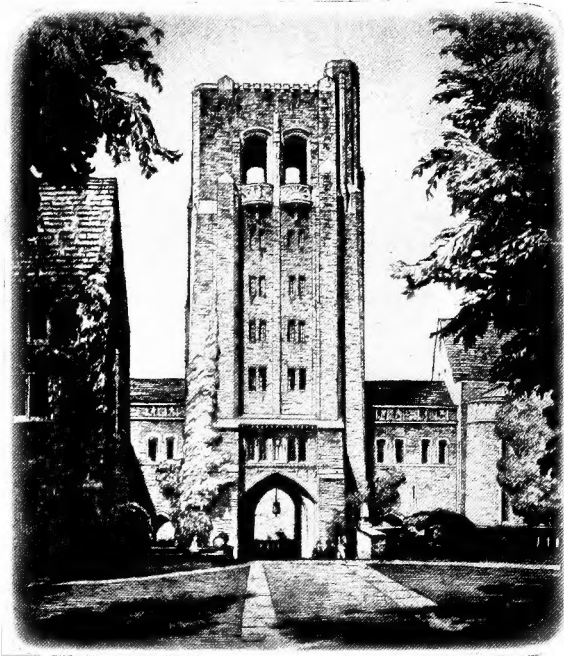


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PREFACE

This work embodies the experience of the author in actual, uninterrupted practice in the courts for a period of twenty years. It is designed to give a clear and concise outline of the criminal law. No efforts have been spared in attempting to collect, classify and arrange all the rules and principles of this branch of the law in such manner that the practitioner may be able to find what is needed in the preparation and trial of a criminal cause. The author has presented very fully the law as found in the official and recognized law reports of this country and England, and in the works of text-writers of authority.

In addition to collecting and classifying the rules as above stated, especially those involving questions of fact, the reader will observe that numerous cases are cited as examples illustrating the rules. It is, indeed, often difficult to determine whether the facts proven or admitted in a case constitute one offense or another, or whether any offense at all,—as, for instance, whether the case be one of larceny or embezzlement, or murder or manslaughter,—and to aid in the solution of such questions no better guide can be given than a few well considered cases.

In citing cases, as a matter of convenience and quick reference, the author has endeavored, so far as possible, to give all the reports in which each case may be found. To illustrate: *S. v. Furney*, 41 Kan. 115, 21 Pac. 213, 8 Am. C. R. 136, 13 Am. St. 262, which means that this case is reported in each of these four reports.

One other feature of this work should be mentioned. In selecting and arranging the subject-matter into chapters for each specific

criminal offense, the author has exercised his best judgment, and has endeavored to note only such matters as are peculiar to the particular crime or offense under consideration. If, for example, the practitioner has under consideration the subject of dying declarations, he naturally turns to the chapter on Homicide, because evidence of dying declarations relates to the law of Homicide only. And if the question be one general in its nature, as the subject of confessions, the lawyer will very naturally turn to the chapter on Evidence, which treats of the general principles of evidence, because evidence of confessions is applicable to any criminal offense. The subjects of Indictments, Defenses and other portions of the work are treated in like manner.

With this brief explanation the author submits this work to the judgment of the legal profession.

Chicago, September 15, 1901.

C. H.

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HUGHES' CRIMINAL LAW

DIVISION ONE CRIMES AND DEFENSES

PART ONE OFFENSES AGAINST THE PERSON

CHAPTER I.

HOMICIDE.

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ARTICLE I. MURDER: DEFINITION AND ELEMENTS.

§ 1. **Definition.**—"Murder is when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or

implied.”¹ “Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either expressed or implied.”² Death must follow within a year and a day as a result of the injury inflicted, to make a case of murder by the common law.³

§ 2. Malice, what constitutes.—Malice within the meaning of the law, is not restricted to anger, revenge, hatred or ill-will, but includes every other intention to kill a human being without just cause or excuse for the act.⁴

§ 3. Sufficient “cooling time.”—If there be a sufficient cooling time for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and is murder.⁵ It has never been held that hatred or ill-will toward the deceased need exist for any considerable length of time in order to constitute malice aforethought.⁶ When a great wrong or injury has been done to or inflicted upon a man, which has excited his passion, all authorities agree that time must be given for the passion of the injured person to become calm, before he can be convicted of murder.⁷

§ 4. “Cooling time” for court.—It is well settled that the question of cooling time is a question of law to be decided by the court, and not a question for the jury. But if such question is left to the jury, and they decide it as the court should, it will be but harmless error.⁸

¹ Bl. Com. 195; 1 Hale P. C. 425; 3 Greenl. Ev., § 130.

² Jackson v. P., 18 Ill. 270.

³ Bl. Com. 197; 1 East P. C. 343; 1 Hawk. P. C. 31, § 9; P. v. Gill, 6 Cal. 637; S. v. Bowen, 16 Kan. 475; Com. v. Roby, 29 Mass. 496; S. v. Mayfield, 66 Mo. 125; 2 Bish Cr. L., § 640; S. v. Huff, 11 Nev. 17; 3 Greenl. Ev., § 143.

⁴ Davis v. S., 51 Neb. 301, 70 N. W. 984; S. v. Weeden, 133 Mo. 70, 34 S. W. 473; McVey v. S., 57 Neb. 471, 77 N. W. 1111; McCoy v. P., 175 Ill. 229, 51 N. E. 777; S. v. Goodenow, 65 Me. 30; Bias v. U. S. (Ind. Ter. 1899), 53 S. W. 471; Taylor v. S., 105 Ga. 746, 31 S. E. 764; Harrell v. S., 39 Tex. Cr. 204, 45 S. W. 581; Logan v. S., 40 Tex. Cr. 85, 53 S. W. 694; Com. v. Goodwin, 122 Mass. 19; S. v.

Wieners, 66 Mo. 13; Stoball v. S., 116 Ala. 454, 23 So. 162.

⁵ 4 Bl. Com. 191. See Gaines v. S. (Tex. Cr. 1899), 53 S. W. 623.

⁶ Kota v. P., 136 Ill. 657, 27 N. E. 53; Peri v. P., 65 Ill. 23; McDaniel v. Com., 77 Va. 281, 4 Am. C. R. 371; Perry v. S., 102 Ga. 365, 30 S. E. 903; Allen v. U. S., 164 U. S. 492, 17 S. Ct. 154; Travers v. U. S., 6 App. D. C. 450; S. v. Straub, 16 Wash. 111, 47 Pac. 227; Jones v. Com., 75 Pa. St. 403, 1 Am. C. R. 263.

⁷ Ferguson v. S., 49 Ind. 33, 1 Am. C. R. 584; P. v. Johnson, 1 Park. C. R. (N. Y.) 291; Com. v. Webster, 5 Cush. (Mass.) 295; 3 Greenl. Ev., § 125; 1 Hale P. C. 453.

⁸ S. v. Moore, 69 N. C. 267, 1 Green C. R. 613; S. v. Ellis, 74 Mo. 207, 219; S. v. Jones, 20 Mo. 58, 64; Payne v. Com., 1 Metc. (Ky.) 370.

§ 5. **Time of deliberation.**—One who takes the life of another by shooting or stabbing him with the deliberate intention of killing him without just cause or provocation, is guilty of murder in the first degree, although the intention to kill was not formed until the precise time of the killing.⁹

§ 6. **Killing while robbing.**—If a homicide be committed in the perpetration of a robbery or other felony, it will, under the statute, be murder in the first degree.¹⁰ If one of two persons, while engaged in committing a robbery together, kills a man, they are both guilty of murder in the first degree, and it makes no difference which one of them did the killing.¹¹

§ 7. **Injuring unborn child.**—If an unborn child be injured by a person willfully beating its mother, and dies from the injury after its birth, such person so beating the mother is guilty of murder.¹²

§ 8. **Killing third person.**—The law is that had the defendant shot at one person with intent to murder him, but killed another, the killing of the latter would be murder under the common law.¹³ A man will be held guilty of murder or manslaughter who, in the attempt to kill one person, by mistake kills a third person, although there is no intent or design to kill such third person.¹⁴

§ 9. **Shooting recklessly.**—If a person intentionally and recklessly shoot into a dwelling-house and kill a person therein, such killing is murder in the first degree.¹⁵

⁹ S. v. Faino, 1 Marv. (Del.) 492, 41 Atl. 134; Miller v. S., 106 Wis. 156, 81 N. W. 1020; Marzen v. P., 173 Ill. 43, 50 N. E. 249; S. v. Kindred, 148 Mo. 270, 49 S. W. 845; Kilgore v. S., 124 Ala. 24, 27 So. 4; Perugi v. S., 104 Wis. 230, 80 N. W. 593; S. v. Morgan (Utah), 61 Pac. 527.

¹⁰ S. v. Foster, 136 Mo. 653, 38 S. W. 721; S. v. Schmidt, 136 Mo. 644, 38 S. W. 719; Henry v. S., 51 Neb. 149, 70 N. W. 924; Morgan v. S., 51 Neb. 672, 71 N. W. 788; Dabney v. S., 113 Ala. 38, 21 So. 211. See Com. v. Chance, 174 Mass. 245, 54 N. E. 551; S. v. Cross, 72 Conn. 722, 46 Atl. 148.

¹¹ Roesel v. S., 62 N. J. L. 216, 41

Atl. 408. See McMahon v. P., 189 Ill. 222.

¹² Clarke v. S., 117 Ala. 1, 23 So. 671.

¹³ Dunaway v. P., 110 Ill. 336; Vandermark v. P., 47 Ill. 122; Walker v. S., 8 Ind. 290; Callahan v. S., 21 Ohio St. 306; 3 Greenl. Ev., § 145.

¹⁴ Butler v. P., 125 Ill. 644, 18 N. E. 338; Clarke v. S., 78 Ala. 474, 6 Am. C. R. 529, 8 Cr. L. Mag. 19; S. v. Vines, 34 La. 1079, 4 Am. C. R. 299; S. v. Gilman, 69 Me. 163, 3 Am. C. R. 17; Brown v. S., 147 Ind. 28, 46 N. E. 34; S. v. McGonigle, 14 Wash. 594, 45 Pac. 20; S. v. Evans, 1 Marv. (Del.) 477, 41 Atl. 136.

¹⁵ Russell v. S., 38 Tex. Cr. 590, 44 S. W. 159.

§ 10. Slight provocation.—The killing of a person may be murder in the first degree though done in a sudden passion, if upon slight provocation: as, if the deceased was merely kicking at the defendant to make him go away, and the defendant killed him.¹⁶

§ 11. Unlawful act done deliberately.—When an act, unlawful in itself, is done with deliberation, and with intention of mischief or great bodily harm, or of mischief indiscriminately, fall where it may, and death ensue, against or beside the original intention of the party, it will be murder.¹⁷ If a man be doing anything unlawful, and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse; for, being guilty of one offense, he is criminally guilty of whatever consequences may follow.¹⁸

§ 12. Killing innocent person.—Though a man be violently assaulted and has no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder: for he ought rather to die himself than escape by the murder of an innocent.¹⁹

§ 13. Killing a trespasser.—The killing of a person intentionally with a deadly weapon, who is committing only a mere trespass upon property, is generally murder, and not manslaughter.²⁰

§ 14. Killing person for food.—Two men and a boy were cast away in a storm on the high seas, and were compelled to put to sea in an open boat. The boat was drifting on the ocean, and was probably more than a thousand miles from land, with no prospect of being rescued, and they were starving. In order to escape death from hunger, the two men killed the boy for the purpose of eating his flesh, believing,

¹⁶ Com. v. Eckerd, 174 Pa. St. 137, 34 Atl. 305.

¹⁷ Mayes v. P., 106 Ill. 313; S. v. Edwards, 71 Mo. 312; Russell v. S., 38 Tex. Cr. 590, 44 S. W. 159; Washington v. S., 60 Ala. 10; 1 McClain Cr. L., § 325; 3 Greenl. Ev., § 147.

¹⁸ 4 Bl. Com. 27.

¹⁹ 4 Bl. Com. 30; Arp v. S., 97 Ala. 5, 12 So. 301, 9 Am. C. R. 521. Compare Lankster v. S. (Tex. Cr.), 56 S. W. 65.

²⁰ Crawford v. S., 90 Ga. 701, 17 S. E. 628, 9 Am. C. R. 591; Carroll v. S., 23 Ala. 28, 58 Am. D. 282. See also S. v. Cantieny, 34 Minn. 1, 24 N. W. 458, 6 Am. C. R. 421; S. v. Warren, 1 Marv. (Del.) 487, 41 Atl. 190; Fertig v. S., 100 Wis. 301, 75 N. W. 960; Noles v. S., 26 Ala. 31; 1 Hale P. C. 457. *Contra*, S. v. Taylor, 143 Mo. 150, 44 S. W. 785.

in good faith, that it afforded the only chance of preserving their lives: Held to be murder.²¹

§ 15. Wound neglected—Death resulting.—If one inflicts upon another a dangerous wound, calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offense of manslaughter or murder, as the case may be; and he is none the less responsible, although it may appear that the deceased might have recovered, if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death.²² The rule deducible from the authorities seems to be that, where the wound is apparently mortal, and a surgical operation is performed in a proper manner, under circumstances which render it necessary, in the opinion of competent surgeons, and such operation is itself the immediate cause of death, the person who inflicted the wound will be responsible; but if death results from grossly erroneous surgical or medical treatment, the person causing the original wound will not be responsible.²³ If the wound is not dangerous in itself, and death results from improper treatment or from disease subsequently contracted, not superinduced by or resulting from the wound, then the accused is not guilty.²⁴

§ 16. Swearing falsely.—Bearing false witness against another with the express intention to take away his life, so that the innocent person be condemned and executed, is murder.²⁵

§ 17. Consequence in forcing a person to do act.—"Forcing a man to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act."²⁶

²¹ *Queen v. Dudley*, L. R. 14 Q. B. D. 273, 5 Am. C. R. 559; 4 Bl. Com. 30; 1 Hale P. C. 57; 1 McClain Cr. L., § 137.

²² *S. v. Bantley*, 44 Conn. 540; *S. v. Landgraf*, 95 Mo. 97, 8 S. W. 237; *Bush v. Com.*, 78 Ky. 271; *P. v. Cook*, 39 Mich. 236; *Daughdrill v. S.*, 113 Ala. 7, 21 So. 378; *Com. v. Eisenhower*, 181 Pa. St. 470, 37 Atl. 521; *S. v. Edgerton*, 100 Iowa 63, 69 N. W. 280; *Clark v. Com.*, 90 Va. 360, 18 S. E. 440; 3 Greenl. Ev., § 139. See *Kee v. S.*, 28 Ark. 155, 2 Am. C.

R. 263 (gangrene); *Com. v. Hackett*, 2 Allen (Mass.) 136; *McAlister v. S.*, 17 Ala. 439; 1 Hale P. C. 423.

²³ *Coffman v. Com.*, 10 Bush (Ky.) 495, 1 Am. C. R. 296; *Parsons v. S.*, 21 Ala. 300; 1 McClain Cr. L., § 292.

²⁴ *Bush v. Com.*, 78 Ky. 271; 1 Hale P. C. 428; *Parsons v. S.*, 21 Ala. 302; 3 Greenl. Ev., § 139.

²⁵ 1 Bl. Com. 196; *Kerr Homicide*, § 42.

²⁶ 3 Greenl. Ev., § 142; *Adams v. P.*, 109 Ill. 449, 4 Am. C. R. 351; 1 McClain Cr. L., § 284.

ARTICLE II. DEGREES OF MURDER.

§ 18. Degrees of murder.—The distinction between the degrees of murder can not be better shown and illustrated than by reference to the statutes of some of the states, and for that purpose the following are given:

§ 19. Massachusetts statute—Murder.—“Murder committed with deliberately premeditated malice aforethought, or in the commission of, or attempt to commit a crime punishable with death or imprisonment for life, or committed with extreme atrocity or cruelty, is murder in the first degree. Murder not appearing to be in the first degree is murder in the second degree. The degree of murder shall be found by the jury. Whoever is guilty of murder in the first degree shall suffer the punishment of death. Whoever is guilty of murder in the second degree shall be punished by imprisonment in the state prison for life. Nothing herein shall be construed to require any modification of the existing forms of indictment.”^{26a}

§ 20. Indiana statutes—First degree.—“Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison or causing the same to be done, kills any human being, is guilty of murder in the first degree, and upon conviction thereof shall suffer death or imprisonment in the state prison during life, in the discretion of the jury.”²⁷ “Whoever fights a duel with another in this state and in so doing inflicts a wound upon his antagonist or any other person, whereof the person thus injured shall die, is guilty of murder in the first degree, and, upon conviction thereof, shall suffer death or imprisonment in the state prison during life, in the discretion of the jury.”^{27a} “Whoever, by previous appointment, made within, fights a duel without, this state, and in so doing inflicts a mortal wound upon any person, whereof the person thus injured shall die within this state, is guilty of murder in the first degree, and, upon conviction thereof, shall suffer death or be imprisoned in the state prison during life, in the discretion of the jury.”^{27b} “Whoever purposely and maliciously, but without premeditation, kills any human

^{26a} Mass. Pub. Stat. 1882, ch. 202, §§ 1-6. shaw v. S., 147 Ind. 334, 47 N. E. 157.

²⁷ Burns' R. S., § 1977; Robinson v. S., 138 Ind. 499, 38 N. E. 45; Hin-

^{27a} Burns' R. S., § 1978.

^{27b} Burns' R. S., § 1979.

being, is guilty of murder in the second degree, and, upon conviction thereof, shall be imprisoned in the state prison during life."²⁸

§ 21. **Iowa statutes—Murder.**—"Whoever kills any human being with malice aforethought, either express or implied, is guilty of murder."²⁹ "All murder which is perpetrated by means of poison, or lying in wait, or any other kind of willful, deliberate and premeditated killing, or which is committed in the perpetration or attempt to perpetrate any arson, rape, robbery, mayhem or burglary, is murder in the first degree." "Whoever commits murder otherwise than as set forth in the preceding section, is guilty of murder in the second degree."^{29a}

§ 22. **Missouri statute—Murder.**—"Every murder which shall be committed by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, and every homicide which shall be committed in the perpetration, or attempt to perpetrate any arson, rape, robbery, burglary, or mayhem, shall be deemed murder in the first degree."³⁰ "All other kinds of murder at common law not herein declared to be manslaughter or justifiable or excusable homicide, shall be deemed murder in the second degree."³¹

§ 23. **Deliberation, in first degree.**—Although the evidence may prove an intentional homicide without any reasonable provocation, it is but murder in the second degree, unless it further appears that the killing was done with deliberation.³²

§ 24. **Intentional killing—Second degree.**—To constitute murder in the second degree, it must appear that the homicide was committed intentionally.³³

²⁸ Burns' R. S., § 1980; *Lillard v. S.*, 151 Ind. 322, 50 N. E. 383.

²⁹ *S. v. Healey*, 105 Iowa 162, 74 N. W. 916; *S. v. Van Tassell*, 103 Iowa 6, 72 N. W. 497.

^{29a} Iowa Code 1897, tit. 24, ch. 2, §§ 4727-4729.

³⁰ Mo. Rev. Stat. 1899, § 1815; *S. v. Cochran*, 147 Mo. 504, 49 S. W. 558; *S. v. Sexton*, 147 Mo. 89, 48 S. W. 452; *S. v. Albright*, 144 Mo. 638, 46 S. W. 620; *S. v. Hyland*, 144 Mo. 302, 46 S. W. 195.

³¹ Mo. Rev. Stat. 1899, ch. 15, § 1816; *S. v. Revely*, 145 Mo. 660, 47 S. W. 787; *S. v. Taylor*, 143 Mo. 150, 44 S. W. 785.

³² *S. v. Silk*, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959; *S. v. Faino*, 1 Marv. (Del.) 492, 41 Atl. 134; *Titus v. S.*, 117 Ala. 16, 23 So. 77; *S. v. Hill*, 69 Mo. 451.

³³ *S. v. Young*, 55 Kan. 349, 40 Pac. 659; *S. v. O'Hara*, 92 Mo. 59, 4 S. W. 422; *S. v. Shock*, 68 Mo. 552.

§ 25. Deliberation essential in first degree.—To constitute murder in the first degree, it is necessary that circumstances of willfulness and deliberation shall be proven. But if circumstances of malice and premeditation are not proved, the law presumes the killing to be murder in the second degree.⁸⁴

§ 26. Premeditated malice not presumed.—When a homicide has been proven, that fact alone authorizes the presumption of malice, and, unexplained, would warrant a verdict for murder in the second degree. But express and premeditated malice can never be presumed; it is evidenced by former grudges, previous threats, lying in wait, or other evidence.⁸⁵

ARTICLE III. MANSLAUGHTER.

§ 27. Definition.—"Manslaughter is the unlawful killing of another without malice, express or implied, which may be either voluntary, upon a sudden heat, or involuntary, but in the commission of some unlawful act."⁸⁶ To constitute manslaughter, the act causing death must be of such character as to show a wanton or reckless disregard of the rights and safety of others.⁸⁷

§ 28. Assault and battery causing death.—If a person participate in a homicide, intending only to commit an assault and battery, he is guilty of manslaughter only.⁸⁸

§ 29. Pointing a loaded gun without examination.—If a person points a gun without examining whether it is loaded or not, and it happens to be loaded and goes off, and death results, he is guilty of negligence and manslaughter.⁸⁹

⁸⁴ S. v. Cain, 20 W. Va. 709; S. v. Underwood, 57 Mo. 40, 1 Am. C. R. 259; Jones v. Com., 75 Pa. St. 403, 1 Am. C. R. 262.

⁸⁵ Hamby v. S., 36 Tex. 523, 1 Green C. R. 652; Herman v. S., 75 Miss. 340, 22 So. 873; Dowdy v. S., 96 Ga. 653, 23 S. E. 827.

⁸⁶ 4 Bl. Com. 191; Martin v. S., 119 Ala. 1, 25 So. 255; Maher v. P., 10 Mich. 212. See 3 Greenl. Ev., § 120; 2 Thompson Trials, § 2183; S. v. Matthews, 148 Mo. 185, 49 S. W. 1085.

⁸⁷ S. v. Dorsey, 118 Ind. 167, 20 N. E. 777, 8 Am. C. R. 520.

⁸⁸ P. v. Munn, 65 Cal. 211, 3 Pac. 650, 6 Am. C. R. 433; Brown v. S., 28 Ga. 200; Com. v. McAfee, 108 Mass. 461; Reg. v. Caton, 12 Cox C. C. 624; Wellar v. P., 30 Mich. 16; Smith v. S., 33 Me. 55; Irvine v. S., 104 Tenn. 132, 56 S. W. 845; 3 Greenl. Ev., § 122.

⁸⁹ Reg. v. Jones, 12 Cox C. C. 628, 2 Green C. R. 34. See Reddick v. S. (Tex. Cr.), 47 S. W. 993; Meyers v. S. (Miss.), 23 So. 428. See

§ 30. **Willful omission of duty—Death resulting.**—Death ensuing in consequence of the willful omission of a duty will be murder; death ensuing in consequence of the negligent omission of a duty will be manslaughter. If death is the direct consequence of the malicious omission to perform a duty, as of a mother to nourish her infant child, this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter.⁴⁰

§ 31. **Gross negligence resulting in death.**—The defendant publicly practiced as a physician, and, being called to attend a sick woman, with her consent caused her to be kept in flannels saturated with kerosene for three days or more, by reason of which she died. From the evidence it appeared that the kerosene was applied by the defendant as the result of foolhardy presumption or gross negligence; that is sufficient to sustain a conviction of manslaughter.⁴¹

§ 32. **Accessories to manslaughter.**—In cases of manslaughter other than *infortunium* or *se-defendendo*, there seems to be no reason why there may not be accessories.⁴² Where prisoners are charged in the indictment as accessories after the fact to murder, they may be found guilty on such indictment of having been accessory to manslaughter, the offense of manslaughter being included in that of murder.⁴³

ARTICLE IV. MATTERS OF DEFENSE.

§ 33. **Murder—Not manslaughter.**—It is no defense to an indictment for manslaughter that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was, therefore, murder.⁴⁴

Robertson v. S., 2 Lea (Tenn.) 239, 3 Am. C. R. 208. See also S. v. Justus, 11 Or. 178, 8 Pac. 337, 6 Am. C. R. 511; Com. v. Pierce, 138 Mass. 165, 5 Am. C. R. 400; Com. v. Matthews, 89 Ky. 291, 12 S. W. 333; 8 Am. & Eng. Encyc. L. (2d ed.) 285; 4 Bl. Com. 192, 197; 1 Hale P. C. 472, 477.

⁴⁰ Lewis v. S., 72 Ga. 164, 5 Am. C. R. 382; Com. v. Macloon, 101 Mass. 1; Reg. v. Conde, 10 Cox C. C. 547; S. v. Smith, 65 Me. 257; U. S. v. Meagher, 37 Fed. 875.

⁴¹ Com. v. Pierce, 138 Mass. 165, 5 Am. C. R. 398, 404; Rex v. Long,

4 C. & P. 423. See Rex v. Spiller, 5 C. & P. 333.

⁴² S. v. Hermann, 117 Mo. 629, 23 S. W. 1071, 9 Am. C. R. 317; Hagan v. S., 10 Ohio St. 459; Goff v. Prime, 26 Ind. 196; Stipp v. S., 11 Ind. 62; S. v. Coleman, 5 Port. (Ala.) 32; 1 Hale P. C. 437; Queen v. Richards, L. R. 2 Q. B. D. 311, 3 Am. C. R. 452. See 4 Bl. Com. 191.

⁴³ Queen v. Richards, L. R. 2 Q. B. D. 311, 3 Am. C. R. 452.

⁴⁴ Garvey's Case, 7 Colo. 384, 3 Pac. 903, 4 Am. C. R. 261; Barnett v. P., 54 Ill. 325; Rhodes v. Com., 48 Pa. St. 396; Adams v. S., 29 Ohio St.

§ 34. **Provocation great.**—"If a man takes another in the act of adultery with his wife, and kills him directly on the spot, it is but manslaughter. It is, however, the lowest degree of it, and, therefore, in such case, the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation."⁴⁵

§ 35. **Officer killing not justified.**—It is considered better to allow one guilty of a misdemeanor to escape altogether than to take his life. So an officer having in custody a prisoner who had been convicted of assault and battery and ordered committed in default of payment of the fine assessed, will be guilty of murder or manslaughter if he kill such prisoner to prevent his escape.⁴⁶

§ 36. **Officer killing.**—Where a police officer uses more force than is reasonably necessary in arresting a person who is resisting the arrest, or if the officer after being thrown into the heat of passion by such person striking him, intentionally shoots his prisoner without malice, causing death, such killing is manslaughter in the fourth degree, as defined by statute.⁴⁷

§ 37. **Principal convicted of manslaughter.**—Two persons were indicted on a charge of homicide, one as principal for murder and the other as accessory before the fact. The principal was tried alone and convicted of manslaughter. The other, on his trial, pleaded in bar that he could not be an accessory before the fact to manslaughter. This plea was held bad, for the reason that the state was not precluded from showing that the principal was in fact guilty of murder, though convicted only of manslaughter.⁴⁸

§ 38. **Provocation by words only.**—Provocation by words only, however opprobrious, will not so mitigate intentional killing as to reduce the homicide to manslaughter.⁴⁹ Passion aroused by mere words,

415; *Lane v. Com.*, 59 Pa. St. 371; *Com. v. McPike*, 3 Cush. (Mass.) 181; 2 *Thompson Trials*, § 2184.

⁴⁵ 4 Bl. Com. 191; *Price v. S.*, 18 Tex. App. 474, 5 Am. C. R. 387; *Jones v. P.*, 23 Colo. 276, 47 Pac. 275; *Shufflin v. P.*, 62 N. Y. 229; 3 *Greenl. Ev.*, § 122; *Morrison v. S.*, 39 Tex. Cr. 519, 47 S. W. 369. *Contra*, *Cyrus v. S.*, 102 Ga. 616, 29 S. E. 917.

⁴⁶ *Reneau v. S.*, 2 Lea (Tenn.) 720, 2 Am. C. R. 624; *S. v. Dietz*, 59 Kan. 576, 53 Pac. 870; 2 *Bish. Cr. L.*, § 648.

⁴⁷ *S. v. Rose*, 142 Mo. 418, 44 S. W. 329.

⁴⁸ *S. v. Burbage*, 51 S. C. 284, 28 S. E. 937. See "Principal and Accessory."

⁴⁹ *Steffy v. P.*, 130 Ill. 101, 22 N. E. 861; *Jackson v. P.*, 18 Ill. 269; *Crosby v. P.*, 137 Ill. 325, 27 N. E. 49;

however insulting, can not reduce homicide below the offense of murder in the second degree.⁵⁰ No slight provocation or previous indignity is sufficient to reduce a deliberate killing from murder to manslaughter; as, where a wife proves unfaithful to her husband and he deliberately kills her for her unfaithfulness, he is guilty of murder.⁵¹

§ 39. Overt act essential.—Mere threats to kill, unaccompanied by any act to carry them into execution, will not warrant the defendant in making any attack, and will afford no excuse for homicide. The danger must appear to be imminent.⁵²

§ 40. Threats of third person.—The accused offered to prove that another and different person than himself had made threats to kill the deceased, just before the commission of the crime with which he was charged, and that immediately after the offense such other person left the country, and had not since been heard from: Held incompetent.⁵³

§ 41. Dangerous character of deceased.—The defense proposed to show that the deceased was a desperate and dangerous man. This the court refused, and would only permit his reputation for peace and quiet to be submitted to the jury. This ruling of the court was error, it appearing that the defendant was not the aggressor.⁵⁴ "When the defendant is the assailant, or commences the affray, he will not be entitled to show in defense the vicious or wicked disposition of the

Teague v. S., 120 Ala. 309, 25 So. 209; *S. v. Faino*, 1 Marv. (Del.) 492, 41 Atl. 134; *S. v. Warren*, 1 Marv. (Del.) 487, 41 Atl. 190; *S. v. McNeill*, 92 N. C. 812; *P. v. Biggins*, 65 Cal. 564, 4 Pac. 570; *S. v. Martin*, 124 Mo. 514, 28 S. W. 12; *McCoy v. P.*, 175 Ill. 231, 51 N. E. 777; *Bonardo v. P.*, 182 Ill. 418, 55 N. E. 519.

⁵⁰ *Smith v. S.*, 103 Ala. 4, 15 So. 843, 9 Am. C. R. 322; *Ex parte Sloane*, 95 Ala. 22, 11 So. 14; *U. S. v. Carr*, 1 Woods 480; *U. S. v. Witterberger*, 3 Wash. C. C. 515; *Evans v. S.*, 44 Miss. 762; *Taylor v. S.*, 48 Ala. 180; *S. v. McCollum*, 119 Mo. 469, 24 S. W. 1021; *Price v. P.*, 131 Ill. 223, 23 N. E. 639, 3 Greenl. Ev., § 124; *McCoy v. P.*, 175 Ill. 231, 51 N.

E. 777. But see *S. v. Trusty*, 1 Pen. (Del.) 319, 40 Atl. 766.

⁵¹ *S. v. Burns*, 148 Mo. 167, 49 S. W. 1005; *Sanchez v. P.*, 22 N. Y. 147; *S. v. Cochran*, 147 Mo. 504, 49 S. W. 558; *S. v. Avery*, 64 N. C. 608; *S. v. Walker*, 50 La. 420, 23 So. 967; *Gregory v. S.* (Tex. Cr.), 48 S. W. 577; *Channell v. S.*, 109 Ga. 150, 34 S. E. 353.

⁵² *Wilson v. P.*, 94 Ill. 301, 324; *S. v. Keene*, 50 Mo. 357; *Myers v. S.*, 33 Tex. 535; *Evans v. S.*, 44 Miss. 762; 2 *Thompson Trials*, § 2161; *Barnards v. S.*, 88 Tenn. 183, 12 S. W. 431.

⁵³ *Crookham v. S.*, 5 W. Va. 510, 2 Green C. R. 673.

⁵⁴ *S. v. Bryant*, 55 Mo. 75, 2 Green C. R. 612.

person whom he has slain." But he may show such disposition in self-defense.⁵⁵ Evidence of the dangerous character of the deceased is competent only under a plea of self-defense, and must be confined to the general reputation of the deceased, and can not be shown by specific acts.⁵⁶ The defendant offered evidence that the general character of the deceased was that of a violent, turbulent, revengeful, bloodthirsty, dangerous man, and reckless of human life. This was competent evidence, and the court erred in excluding it.⁵⁷

§ 42. Deceased going armed.—The defendant set up self-defense, and offered to prove that the deceased had carried pistols: Held incompetent: the fact that at some time he had a pistol would be immaterial; and even if the deceased had been in the habit of going armed, it would be immaterial, if the defendant had no knowledge of that habit.⁵⁸ In a case where the evidence tended to show that the deceased upon no other provocation than mere words placed his hand behind him and then advanced toward the defendant, it was competent to show under the plea of self-defense that the deceased was in the habit of carrying a pistol, and that this fact was known to the defendant, and it could make no difference whether the deceased had a pistol on this occasion or not.⁵⁹

§ 43. Deceased a conspirator.—It is competent to show that the deceased and others formed a conspiracy to whip the defendant and others, the defendant having learned the fact of such conspiracy.⁶⁰

§ 44. Evidence in mitigation as to degree.—The defendant, at his trial on a charge of murder, offered and sought to introduce evidence that, on the day before the homicide was committed, the deceased, armed with a knife, was searching for the defendant, with the avowed intention of killing him; that the deceased called at the house of the defendant, declaring that he would kill the defendant on sight: Held error to reject this evidence: it was competent in mitigation of punishment where the penalty is required to be fixed by the jury, for a

⁵⁵ Cannon v. P., 141 Ill. 281, 30 N. E. 1027.

⁵⁶ S. v. Faino, 1 Marv. (Del.) 492, 41 Atl. 134; S. v. Fontenot, 50 La. 537, 23 So. 634; Powell v. S., 101 Ga. 9, 29 S. E. 309; Travers v. U. S., 6 App. D. C. 450.

⁵⁷ Fields v. S., 47 Ala. 603, 1 Green

C. R. 637; S. v. Bryant, 55 Mo. 75, 2 Green C. R. 612; Smith v. S., 75 Miss. 542, 23 So. 260.

⁵⁸ McDonnall v. P., 168 Ill. 95, 48 N. E. 86.

⁵⁹ Daniel v. S., 103 Ga. 202, 29 S. E. 767.

⁶⁰ Williams v. P., 54 Ill. 425.

term of years or life imprisonment, or the death penalty for the crime of murder—even though such evidence was not sufficient to reduce the crime to manslaughter.⁶¹

§ 45. Relative strength competent.—The defense was that the defendant used a pistol to repel an assault which was not only violent in fact, but was made by a powerful man of dangerous temper, who had made threats against him. The defendant offered witnesses for examination who were personally familiar with both parties and capable of forming opinions of the relative strength, temper and other personal qualities not capable of any description except by opinion: Held error to reject this offered evidence.⁶² And in such case the defendant may show the relative strength of the deceased and himself by reputation, and not by specific acts.⁶³

§ 46. Defendant must fly.—Every citizen may traverse the streets or stand in all places where he has a right to be, and when not at fault is not bound to fly when assailed by anybody; in some of the states, however, in cases of homicide, the ancient doctrine is adhered to that one must fly if he can rather than kill his assailant.⁶⁴

§ 47. Danger imminent, justifies killing.—Whenever a man is in imminent danger of receiving great bodily harm, or it is being inflicted upon him by another, whether it endangers his life or not, he has the right to defend himself to prevent such great bodily harm, even though he kills his assailant in defending himself.⁶⁵

§ 48. Danger apparent—Reasonable.—Before a person is warranted in taking the life of his assailant in self-defense, the danger, or apparent danger, must be such as would justify an ordinarily prudent man, under like circumstances, in taking the life of an assail-

⁶¹ Nowacryk v. P., 139 Ill. 336, 342, 28 N. E. 961; Fletcher v. P., 117 Ill. 184, 7 N. E. 80; 1 McClain Cr. L., § 363.

⁶² Brownell v. P., 38 Mich. 735; King v. S., 90 Ala. 612, 8 So. 856; S. v. Graham, 61 Iowa 608, 16 N. W. 743; S. v. Brown, 63 Mo. 439.

⁶³ S. v. Cushing, 17 Wash. 544, 50 Pac. 512.

⁶⁴ Com. v. Drum, 58 Pa. St. 9; Brown v. Com., 86 Va. 466, 10 S. E. 745; S. v. Crane, 95 N. C. 619; S. v.

Jones, 89 Iowa 182, 56 N. W. 427; Holmes v. S., 100 Ala. 80, 14 So. 864; Stoball v. S., 116 Ala. 454, 23 So. 162. *Contra*, see "Defenses." See Page v. S., 141 Ind. 236, 40 N. E. 745.

⁶⁵ Minton v. Com., 79 Ky. 461; Fields v. State, 134 Ind. 46, 32 N. E. 780; Pond v. P., 8 Mich. 150; McClain Cr. L., § 302. See P. v. Robertson, 67 Cal. 646, 8 Pac. 600, 6 Am. C. R. 521.

ant to save his own life, or prevent great bodily harm.⁶⁶ It is highly important that the jury should be apprised of all the circumstances, real or apparent, surrounding the defendant at the time of the homicide, in determining the necessity of resorting to force in defense of his life or person.⁶⁷

§ 49. Defending against several.—Where a defendant killed one of several persons who were pursuing or assaulting him armed with weapons, he will not be restricted, on a plea of self-defense, to the one he actually killed; for he may show that he had the right to kill any of them in self-defense.⁶⁸

§ 50. Defending judge.—An officer selected to protect a judge of the United States Supreme Court may, when such justice is threatened with danger, take the life of an assailant, if the circumstances are such as to warrant the belief that such killing is necessary to save the life of such justice, and he acts in good faith.⁶⁹

§ 51. Establishing defense—"Satisfactorily."—A statute providing that "the killing being proved, the burden of proving circumstances of mitigation or that justify or excuse the homicide, will devolve upon the accused to show justification," does not require him to "satisfactorily" establish his defense.⁷⁰

§ 52. Killing not probable consequence of act.—There can be no conviction of homicide on evidence that the accused knocked the deceased down with his fist during a discussion concerning the possession of a horse, and the horse jumped on him or kicked and thus killed him, the killing not being the probable consequence of his act.⁷¹ If two men concert together to fight two other men with their fists, and one strikes an unlucky blow causing death, both would be guilty of

⁶⁶ *S. v. Warren*, 1 Marv. (Del.) 487, 41 Atl. 190.

⁶⁷ *Cannon v. P.*, 141 Ill. 280, 30 N. E. 1027; *Oliver v. S.*, 17 Ala. 587; *Monroe v. S.*, 5 Ga. 85; *Pritchett v. S.*, 22 Ala. 39; *S. v. Smith*, 12 Rich. (S. C.) 430; *Morrison v. S.* (Fla.), 28 So. 97; *Bondurant v. S.* (Ala.), 27 So. 775; *Whar. Cr. Ev.*, § 69. See "Defenses" generally.

⁶⁸ *S. v. Adler*, 146 Mo. 18, 47 S. W. 794.

⁶⁹ *In re Neagle*, 135 U. S. 1, 10 S. Ct. 658.

⁷⁰ *Appleton v. P.*, 171 Ill. 477, 49 N. E. 708; *Smith v. P.*, 142 Ill. 122, 31 N. E. 599; *Alexander v. P.*, 96 Ill. 101; *Halloway v. P.*, 181 Ill. 548, 54 N. E. 1030; *Ingram v. S.*, 62 Miss. 142, 5 Am. C. R. 485. See *Kent v. P.*, 8 Colo. 563, 9 Pac. 852, 5 Am. C. R. 409; *Ortwein v. Com.*, 76 Pa. St. 414, 1 Am. C. R. 299.

⁷¹ *P. v. Rockwell*, 39 Mich. 503, 3 Am. C. R. 224.

manslaughter. But if one used a knife, or other deadly weapon, without the knowledge or consent of the other, he only who struck the blow with the weapon would be responsible for the death resulting from the blow given by it.⁷²

§ 53. **Accidental death.**—If a man intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal act.⁷³ A person who was unjustifiably assaulted by another, pushed his assailant away from him, using no more force than was reasonably necessary. The assailant, on being thus pushed away, fell on a lighted lamp, from which her clothing caught fire, burning her so severely that she died: Held to be accidental death.⁷⁴

§ 54. **Negligence without intent.**—Mere negligence with no intent to do harm is not necessarily criminal: as, where a person carelessly uses a dangerous weapon in ignorance or with a laudable purpose, under the belief that no harm is possible, the criminal intent being wanting.⁷⁵

§ 55. **Third person striking.**—A person who was in no manner connected with the act of inflicting a mortal wound, gave the deceased a blow after the wound had been given by another. If the blow did not contribute to causing the death of the deceased, he was not guilty of the homicide, although he may have intended to assist the person who inflicted the mortal wound.⁷⁶

§ 56. **Rioter not liable for accidental killing.**—A rioter can not be held guilty of murder or manslaughter by reason of the accidental killing of an innocent person, by those who are engaged in suppressing the riot.⁷⁷

§ 57. **Evidence of suicide.**—The accused called witnesses to prove that the deceased, six years prior to her death, was of a melancholy disposition, and was predisposed to and threatened to commit suicide;

⁷² Reg. v. Caton, 12 Cox C. C. 624, Cr. L. § 351. *Contra*, S. v. Hardie, 47 Iowa 647, 2 Am. C. R. 327.

⁷³ 4 Bl. Com. 27, 181.

⁷⁴ S. v. Trusty, 1 Pen. (Del.) 319, 45 S. W. 1009.

⁷⁵ Robertson v. S., 2 Lea (Tenn.) 338; Com. v. Campbell, 7 Allen 541; 1 Bish. Cr. L. (8th ed.), § 637. See 4 Bl. Com. 181-2.

⁷⁶ 40 Atl. 766.

⁷⁷ Robertson v. S., 2 Lea (Tenn.) 239, 3 Am. C. R. 208. See 1 McClain

but this testimony was rejected as being too remote. This was error; the lapse of time should go merely to the weight—and not to the competency—of the testimony.⁷⁸

§ 58. Insanity—Mental condition.—The testimony as to the condition of the mind of the accused at times previous and subsequent to the killing, is admissible solely upon the ground that it tends to show the mental condition at the time of the homicide.⁷⁹

§ 59. Abortion statute.—A statute providing that “every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child and shall thereby destroy it, shall be guilty of manslaughter,” has no application to the woman taking the substance or using the instrument herself with intent to destroy her child.⁸⁰

§ 60. Child must be born.—The child might have breathed before it was born, but its having breathed is not sufficient life to make the killing of the child murder. There must have been an independent circulation or the child can not be considered as alive for this purpose.⁸¹

ARTICLE V. INDICTMENT.

§ 61. Premeditated malice.—Under a statute defining murder in the first degree to be the “willful, deliberate and premeditated killing” of a human being, an indictment by proper averments charging that the defendant “of his deliberate, premeditated malice aforethought” killed and murdered the deceased, sufficiently states the homicide was deliberate and premeditated.⁸² Though the indictment fails to allege that the killing was done “feloniously and with premeditated malice,” yet if, with proper averments, it charges the assaults or acts causing the death to have been done feloniously and with premeditated malice, it is sufficient.⁸³

⁷⁸ *Blackburn v. S.*, 23 Ohio St. 165; *Com. v. Trefethen*, 157 Mass. 185, 31 N. E. 961. *Contra*, *Siebert v. P.*, 143 Ill. 584, 32 N. E. 431; *S. v. Marsh*, 70 Vt. 288, 40 Atl. 836.

⁷⁹ *S. v. Lewis*, 20 Nev. 333, 22 Pac. 241, 8 Am. C. R. 585. See “Defenses.”

⁸⁰ *S. v. Prude*, 76 Miss. 543, 24 So. 871.

⁸¹ *S. v. Winthrop*, 43 Iowa 519, 2 Am. C. R. 277; *Sheppard v. S.*, 17 Tex. App. 74; *Rex v. Enoch*, 5 C. & P. 539.

⁸² *S. v. Metcalf*, 17 Mont. 417, 43 Pac. 182; *S. v. Noel*, 61 Kan. 857, 58 Pac. 990.

⁸³ *Drake v. S.*, 145 Ind. 210, 41 N.

§ 62. "Malice aforethought" essential.—In indictments where it is necessary to use the word "feloniously" to designate the offense as a felony, the omission of the words "with malice aforethought" will not be supplied by the employment of the word "feloniously."⁸⁴ An indictment charging murder by proper averments, stating that the defendant "willfully, feloniously and with malice aforethought, did strike and beat" the deceased, giving him a mortal wound, "and did then and there cast and throw him into the sea and drown him," sufficiently charges that he willfully, feloniously and with malice aforethought threw him into the sea, without repeating those words.⁸⁵

§ 63. Manslaughter included.—In an indictment for a homicide, charging murder, but defective as to that grade of crime, the words "murder" and "with malice aforethought" may be rejected as surplusage and the prisoner put upon his trial for manslaughter.⁸⁶ An indictment for murder in the first degree includes manslaughter and all the lower degrees of murder.^{86a}

§ 64. Indictment for murder.—An indictment charging in the language of the statute that the defendant at a time and place mentioned, "willfully, feloniously and of his malice aforethought did kill and murder" the deceased, sufficiently charges murder.⁸⁷

§ 65. Weapon in which hand.—The indictment need not allege in which hand nor how the defendant held or used the weapon with which he killed the deceased.⁸⁸

§ 66. "Deliberately" in first degree.—The word "deliberately" is essential in the statutory description of murder in the first degree, and it or its equivalent must be alleged in the indictment, although the words "willfully" and "premeditatedly" are used.⁸⁹

E. 799. *Contra*, Holt v. Ter., 4 Okla. 76, 43 Pac. 1083.

⁸⁴ S. v. Fairlamb, 121 Mo. 137, 25 S. W. 895; S. v. Wimberly, 3 McCord 190; Kaelin v. Com., 84 Ky. 354, 1 S. W. 594; Witt v. S., 6 Coldw. 5; S. v. Watson, 41 La. 598, 8 Am. C. R. 543, 7 So. 125.

⁸⁵ St. Clair v. U. S., 154 U. S. 134, 14 S. Ct. 1002; S. v. Dooley, 89 Iowa 584, 57 N. W. 414.

⁸⁶ Garvey's Case, 7 Colo. 384, 3 Pac. 903, 4 Am. C. R. 260; Dias v. S., 7

Blackf. (Ind.) 20; Reed v. S., 8 Ind. 200; 3 Greenl. Ev., § 119.

^{86a} Morrison v. S. (Fla.), 28 So. 97.

⁸⁷ Flynn v. S., 97 Wis. 44, 72 N. W. 373; S. v. Robertson, 50 La. 455, 23 So. 510; S. v. Cronin, 20 Wash. 512, 56 Pac. 26; P. v. McCarron, 121 Mich. 1, 79 N. W. 944.

⁸⁸ Com. v. Robertson, 162 Mass. 90, 38 N. E. 25.

⁸⁹ Cannon v. S., 60 Ark. 564, 31 S. W. 150, 32 S. W. 128. See S. v.

§ 67. **Indictment sufficient—First degree.**—Where an indictment, after stating the time and place with proper averments, charged that the defendant “did then and there unlawfully, feloniously, purposely and with premeditated malice unlawfully kill and murder” a person named, “by then and there feloniously, purposely and with premeditated malice, shooting at and against the said” person, sufficiently charges murder in the first degree under the statute.⁹⁰

§ 68. **Indictment sufficient—First degree.**—Under a statute which provides that “all murder which is perpetrated by means of poison, is murder in the first degree,” an indictment charging that the defendant “did willfully, feloniously, premeditatedly, deliberately, unlawfully and of his malice aforethought, kill” the deceased, sufficiently charges the commission of the crime.⁹¹ The indictment follows the form prescribed by the legislature for indictments for murder in charging the act to have been done with “malice aforethought,” and such charge is tantamount to an averment that the act was “willful, deliberate and premeditated.”⁹²

§ 69. **Indictment sufficient.**—The indictment alleged that the defendant “did unlawfully, willfully, feloniously and with his malice aforethought, and after deliberation and premeditation, kill and murder one J— by shooting him, the said J—, with a certain gun, which he, the said (defendant, naming him), then and there had and held in his hands, the said gun, being then and there loaded with gunpowder and leaden bullets, against the peace,” etc.: Held sufficient.⁹³

§ 70. **Homicide on seas.**—In charging murder as having been committed on the high seas, the indictment is not required to state the locality where committed. Alleging that the crime was committed in an American vessel upon the high seas within the jurisdiction of the court and of the United States and not within the jurisdiction of any particular state, is sufficient.⁹⁴

Donnelly, 130 Mo. 642, 32 S. W. 1124.

⁹⁰ Lane v. S., 151 Ind. 511, 51 N. E. 1056. See also S. v. Kindred, 148 Mo. 270, 49 S. W. 845; S. v. Burns, 148 Mo. 167, 49 S. W. 1005; S. v. Cochran, 147 Mo. 504, 49 S. W. 558. See Turner v. S., 61 Ark. 359, 33 S. W. 104.

⁹¹ S. v. Van Tassel, 103 Iowa 6, 72 N. W. 497; Hamlin v. S., 39 Tex. Cr. 579, 47 S. W. 656.

⁹² Nevada v. Hing, 16 Nev. 307, 4 Am. C. R. 376.

⁹³ La Rue v. S., 64 Ark. 144, 41 S. W. 53. See Borrego v. Ter., 8 N. M. 446, 46 Pac. 349. See Rosenberger v. S., 154 Ind. 425, 56 N. E. 914 (poisoning); S. v. Bradford, 156 Mo. 91, 56 S. W. 898; Green v. S., 154 Ind. 655, 57 N. E. 657.

⁹⁴ Andersen v. U. S., 170 U. S. 481, 18 S. Ct. 689.

§ 71. "Human being" immaterial.—Murder is defined to be "the unlawful killing of a human being in the peace of the people, with malice aforethought, either expressed or implied." The indictment is not bad in failing to allege that the deceased was a human being, or in the peace of the people or state.⁹⁵

§ 72. Averment of assault.—The indictment is not fatal in omitting to charge the defendants, in formal and express terms, with the commission of an assault and battery on the body of the deceased.⁹⁶

§ 73. "Lead balls" immaterial.—An indictment charging murder in the usual form by shooting with a pistol, but failing to allege "that with the leaden balls so shot out of said pistol," the mortal wound was inflicted, was held sufficient.⁹⁷

§ 74. Description of wound.—The want of a minute specification and character of the wounds, charged in the indictment to have been inflicted, is technical, and, if available at all, should be urged on a motion to quash.⁹⁸ It is not necessary to describe the wound in the indictment, nor is it necessary to state on what part of the body the wound was inflicted.⁹⁹

§ 75. Time, place and cause of death.—The indictment alleging by proper averments that the defendant inflicted upon the body of the deceased a "mortal wound, of which mortal wound" the deceased "did languish, and, languishing, did then and there instantly die," sufficiently states the time and place of giving the wound and cause of death.¹⁰⁰

§ 76. Negligence of druggist.—An indictment charging negligence of a druggist in filling a prescription for a child, is fatally defective

⁹⁵ *Palmer v. P.*, 138 Ill. 362, 28 N. E. 130; *Kirkham v. P.*, 170 Ill. 11, 48 N. E. 465; *S. v. Stanley*, 33 Iowa 526; *Merrick v. S.*, 63 Ind. 327; *Dumas v. S.*, 63 Ga. 600; *Com. v. Murphy*, 11 Cush. (Mass.) 472; 1 McClain Cr. L., § 374.

⁹⁶ *Dennis v. S.*, 103 Ind. 142, 2 N. E. 349, 5 Am. C. R. 472; *Cordell v. S.*, 22 Ind. 1; *Wood v. S.*, 92 Ind. 269.

⁹⁷ *S. v. Silk*, 145 Mo. 240, 44 S. W. 764, 46 S. W. 959; *McVey v. S.*, 57 Neb. 471, 77 N. W. 1111; *Stutsman v. Ter.*, 7 Okla. 490, 54 Pac. 707.

⁹⁸ *Stone v. P.*, 2 Scam. (Ill.) 326; *West v. S.*, 48 Ind. 483; *Com. v. Chapman*, 65 Mass. 422; *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25; 1 McClain Cr. L., § 380.

⁹⁹ *S. v. Bronstine*, 147 Mo. 520, 49 S. W. 512; *Com. v. Robertson*, 162 Mass. 90, 38 N. E. 25; *Walker v. S.*, 34 Fla. 167, 16 So. 80; *Robertson v. S. (Fla.)*, 28 So. 424, 427.

¹⁰⁰ *Ball v. U. S.*, 163 U. S. 662, 16 S. Ct. 1192. See *Smith v. S. (Fla.)*, 27 So. 868.

in failing to allege that the defendant delivered the powders to any one to be administered to the child and in failing to state how the mother of the child procured the powders.¹

§ 77. Killing third person.—The indictment must allege that the malicious assault was made on the person slain, although the defendant did not intend to kill him, but intended to kill a different person.²

§ 78. Duplicity—Several instruments.—The indictment in alleging that the accused struck the deceased on the head with a piece of iron, and also then and there struck him with a sledge, and also with a shovel, is not bad for duplicity.³

§ 79. Three using one weapon.—The indictment in alleging that three defendants killed and murdered the deceased by striking and stabbing him upon the belly with a knife, is proper pleading, the same as if one person be charged with thus using the knife.⁴

§ 80. Aiding, abetting—Sufficient.—An indictment alleging that several defendants murdered the deceased by one of them shooting him while the others were then and there aiding and abetting, but which one of the defendants actually "did the shooting and killing, or which aided and abetted, is to the grand jury unknown," is sufficient.⁵ An indictment charging two persons jointly with the crime of murder in one count, and one of them in another count as accessory after the fact to the murder charged to have been committed by the other, is sufficient and not objectionable for repugnancy or misjoinder.⁶

§ 81. Weapon used.—An indictment, though sufficient in other respects in charging murder by shooting, will be defective if it fails to name the weapon used in the homicide, or allege that it was to the grand jurors unknown.⁷

¹ *S. v. Smith*, 66 Mo. 97. See *Com. v. Chapman*, 11 Cush. (Mass.) 422; *Coates v. P.*, 72 Ill. 303.

² *S. v. Clark*, 147 Mo. 20, 47 S. W. 886; *S. v. Barr*, 11 Wash. 481, 39 S. W. 187.

³ *Jackson v. S.*, 39 Ohio St. 38; *S. v. McDonald*, 67 Mo. 13; 1 Bish. Cr. Proc., § 432.

⁴ *Com. v. Roberts*, 108 Mass. 300; *Evans v. S.*, 58 Ark. 47, 22 S. W. 1026; *Com. v. Chapman*, 11 Cush. (Mass.) 422; *Coates v. P.*, 72 Ill. 303.

⁵ *Tudor v. Com.*, 19 Ky. L. 1039, 43 S. W. 187.

⁶ *S. v. Burbage*, 51 S. C. 284, 28 S. E. 937.

⁷ *Jackson v. S.*, 34 Tex. Cr. 38, 28 S. W. 815; *Harris v. S.*, 37 Tex. Cr. 441, 36 S. W. 88.

ARTICLE VI. EVIDENCE; VARIANCE.

Subdivision 1.—Burden of Proof.

§ 82. **Killing being proved—Burden.**—As a general rule it may be stated that all homicide is malicious and, of course, amounts to murder, unless when justified, excused or alleviated. All these circumstances of justification, excuse or alleviation must be shown by the prisoner.⁸ When the people have proved the killing, and no evidence has been given tending to prove justification, they have made out a prima facie case of the guilt of the defendant beyond a reasonable doubt.⁹ Murder in the first degree will not be presumed from the mere fact that the defendant killed the deceased, though unaccompanied by any circumstances of justification, excuse or mitigation; but murder in the second degree will be presumed from the fact of killing.¹⁰

§ 83. **Statute on killing being proved.**—The statute which provides that “the killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide,” should be construed in connection with the other sections of the statute which define the constituent elements of crime generally, and the elements of murder specially. Proof of the mere abstract fact that the accused killed the deceased will not sustain a verdict.¹¹

⁸ O'Mara v. Com., 75 Pa. St. 430; S. v. Tommy, 19 Wash. 270, 53 Pac. 157; S. v. Mason, 54 S. C. 240, 32 S. E. 357; S. v. Byrd, 121 N. C. 684, 28 S. E. 353; 1 McClain Cr. L., § 333; 4 Bl. Com. 201; Davis v. S., 51 Neb. 301, 70 N. W. 984; Linehan v. S., 113 Ala. 70, 21 So. 497; P. v. Marshall, 112 Cal. 422, 44 Pac. 718; Ter. v. Lucero, 8 N. M. 543, 46 Pac. 18; 3 Greenl. Ev. 144.

⁹ P. v. Rodrigo, 69 Cal. 601, 11 Pac. 481, 8 Am. C. R. 53; S. v. Patterson, 45 Vt. 308, 1 Green C. R. 492; Upstone v. P., 109 Ill. 175; S. v.

Brown, 41 Minn. 319, 43 N. W. 69; O'Mara v. Com., 75 Pa. St. 424; Davis v. S., 25 Ohio St. 369; Clements v. S., 50 Ala. 117; S. v. Hicks, 125 N. C. 636, 34 S. E. 247; Kastner v. S., 58 Neb. 767, 79 N. W. 713.

¹⁰ S. v. Miller, 9 Houst. (Del.) 564, 32 Atl. 137; S. v. Payne, 10 Wash. 545, 39 Pac. 157; S. v. Evans, 124 Mo. 397, 28 S. W. 8; Robertson v. Com. (Va.), 20 S. E. 362.

¹¹ Kent v. P., 8 Colo. 563, 5 Am. C. R. 409, 416, 9 Pac. 852; Maher v. P., 10 Mich. 217. See S. v. Patterson, 45 Vt. 308, 1 Green C. R. 492.

§ 84. **Burden—Killing proved.**—The court erred in giving the following instruction: "When the homicide is proved by the state to be the act of the defendant, the law presumes malice; and unless the evidence offered to prove the homicide should relieve the defendant or mitigate the crime, he should be found guilty of murder as charged." If there is any evidence, whether introduced by the state or the defendant, rebutting or tending to rebut the presumption of malice, the defendant is entitled to the benefit of it.¹²

§ 85. **Burden, self-defense.**—Where the defendant pleads self-defense, the burden is on him to prove that plea by a preponderance of the evidence.¹³

§ 86. **Insanity—Burden of proof.**—In regard to the burden of proof in cases where insanity is set up as a defense, there are three separate, distinct and well-defined theories: (1) The defendant must prove his insanity beyond a reasonable doubt. (2) The presumption of sanity prevails until it is overcome by preponderance of evidence showing the defendant's insanity to the satisfaction of the jury. (3) If any evidence is introduced tending to prove that the defendant is insane, the state is bound to prove and establish his sanity, like all other elements of the crime, beyond a reasonable doubt.¹⁴

§ 87. **Burden, as to wound.**—If a person receives a wound willfully inflicted by another which might cause death, and death actually follows, the burden is on him who inflicted it to show that it did not cause the death.¹⁵

Subdivision 2.—Dying Declarations.

§ 88. **Dying declarations—Defined.**—Dying declarations, as is well settled, are neither more nor less than statements of material facts, concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which on the mind is regarded as equivalent to the sanction of an oath. They are substitutes for sworn testimony.¹⁶ Dying declarations are

¹² Perry v. S., 102 Ga. 365, 30 S. E. 903.

¹³ S. v. Ballou, 20 R. I. 607, 40 Atl. 861; Lewis v. S., 120 Ala. 339, 25 So. 43. See "Defenses" for self-defense generally.

¹⁴ S. v. Lewis, 20 Nev. 333, 22 Pac.

241, 8 Am. C. R. 592. See "Defenses—Insanity."

¹⁵ Edwards v. S., 39 Fla. 753, 23 So. 537. See S. v. Strong, 153 Mo. 543, 55 S. W. 78.

¹⁶ P. v. Olmstead, 30 Mich. 431, 1 Am. C. R. 304; Hurd v. P., 25 Mich. 405; P. v. Knapp, 26 Mich. 112.

such as are made relating to the facts of an injury of which the party afterward dies, under the fixed belief and moral conviction that immediate death is inevitable—and without hope of recovery.¹⁷

§ 89. **Dying declarations—Not hearsay.**—Dying declarations are exceptions to the rule excluding hearsay evidence because of the solemnity of the circumstances under which they are made, upon the belief of impending death and when every hope of recovery is gone.¹⁸

§ 90. **Dying statements competent for defendant.**—Dying declarations are competent on behalf of the defendant, as well as the prosecution, when admissible under the rule making such declarations competent.¹⁹

§ 91. **Dying statement constitutional.**—Evidence of dying declarations when admissible under the rule, does not violate the constitutional provision “that the accused shall be confronted by the witnesses against him.”²⁰

¹⁷ *Westbrook v. P.*, 126 Ill. 89, 18 N. E. 304; *Simons v. P.*, 150 Ill. 73, 36 N. E. 1019; *North v. P.*, 139 Ill. 103, 28 N. E. 966; *Digby v. P.*, 113 Ill. 123; *S. v. Furney*, 41 Kan. 115, 21 Pac. 213, 8 Am. C. R. 133; *S. v. Baldwin*, 79 Iowa 714, 45 N. W. 297; *S. v. Johnson*, 26 S. C. 152, 7 Am. C. R. 366; *S. v. Schmidt*, 73 Iowa 469, 35 N. W. 590; *Norris v. P.*, 101 Ill. 408; *Pace v. Com.*, 89 Ky. 204, 12 S. W. 271; *S. v. Medlicott*, 9 Kan. 257, 1 Green C. R. 233; *P. v. Olmstead*, 30 Mich. 435; *Murphy v. P.*, 37 Ill. 447; *Bates v. Com.*, 14 Ky. L. 177, 19 S. W. 928; *Barnett v. P.*, 54 Ill. 325; *McLean v. S. (Miss.)*, 12 So. 905; *Tracy v. P.*, 97 Ill. 101; *S. v. Daniel*, 31 La. 91, 95; 1 Greenl. Ev., § 156; *Underhill Cr. Ev.*, § 103, citing *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560; *Collins v. S.*, 46 Neb. 37, 64 N. W. 432; *Com. v. Mika*, 171 Pa. St. 273, 33 Atl. 65; *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92; *Cole v. S.*, 105 Ala. 76, 16 So. 762; *S. v. Faile*, 41 S. C. 551, 43 S. C. 52, 19 S. E. 690, 20 S. E. 798; *White v. S.*, 111 Ala. 92, 21 So. 330; *Whitaker v. S.*, 79 Ga. 87, 91, 3 S. E. 403; *Jones v. S. (Tex. Cr.)*, 38 S. W. 992; *Archibald v. S.*, 122 Ind. 122, 23 N. E. 758; *P. v. Kraft*, 91 Hun (N. Y.) 474, 36 N. Y.

Supp. 1034; *S. v. Wilson*, 121 Mo. 434, 442, 26 S. W. 357; *Vaughan v. Com.*, 86 Ky. 431, 435, 6 S. W. 153.

¹⁸ *Digby v. P.*, 113 Ill. 125, 55 Am. R. 402; *S. v. Schmidt*, 73 Iowa 469, 35 N. W. 590; *P. v. Beverly*, 108 Mich. 509, 66 N. W. 379; *Com. v. Casey*, 11 Cush. (Mass.) 421, 59 Am. D. 150; *Kennedy v. S.*, 85 Ala. 327, 5 So. 300; *S. v. Saunders*, 14 Or. 300, 12 Pac. 441; *S. v. Reed*, 137 Mo. 125, 38 S. W. 574; *Graves v. P.*, 18 Colo. 170, 32 Pac. 63; *Starr v. Com.*, 97 Ky. 193, 30 S. W. 397; *S. v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *Pace v. Com.*, 89 Ky. 204, 11 Ky. L. 407, 12 S. W. 271.

¹⁹ *Shell v. S.*, 88 Ala. 14, 7 So. 40; *P. v. Knapp*, 26 Mich. 112; *Brock v. Com.*, 92 Ky. 183, 17 S. W. 337; *P. v. Hall*, 94 Cal. 595, 30 Pac. 7; *P. v. McLaughlin*, 44 Cal. 435; *Brown v. Com.*, 73 Pa. St. 327, 13 Am. R. 740; *Moore v. S.*, 12 Ala. 764; *S. v. Saunders*, 14 Or. 300, 12 Pac. 441; 1 Bish. Cr. Proc., § 1207; *Underhill Cr. Ev.*, § 110.

²⁰ *Brown v. Com.*, 73 Pa. St. 321, 13 Am. R. 740, 2 Green C. R. 517; *Com. v. Carey*, 12 Cush. 246; *Woodside v. S.*, 2 How. (Miss.) 655; *Anthony v. S.*, Meigs (Tenn.) 277; *S. v. Nash*, 7 Iowa 347. See also

§ 92. Death from abortion.—Where death results from criminal abortion, the person performing the abortion may be prosecuted for murder. In such case, dying declarations are competent.²¹

§ 93. Written and oral statements.—If the dying declarations were repeated at different times and one should be reduced to writing covering different grounds and referring to different matters from those contained in the verbal statements, then both may be admitted in evidence.²² If the dying statements are reduced to writing and signed by the declarant, the writing is the best evidence of the statement made at that time, and must be produced or its absence accounted for; but the fact that the declaration has been reduced to writing will not preclude evidence of unwritten declarations made on other occasions.²³ If the only evidence of what the deceased stated was reduced to writing and signed by him at the time it was made, then the writing, if existing, should be produced; and neither a copy nor parol evidence of such declarations can be admitted to supply the omission; and if the writing and the oral statements were the same, then the absence of the writing should be accounted for before evidence of the oral statements can be produced.²⁴

§ 94. Not signed or read—Memorandum.—Where the statement of the declarant has been reduced to writing, but neither signed nor read over to him, it becomes a mere memorandum, and is not compe-

Barnett v. P., 54 Ill. 330; *S. v. Waldron*, 16 R. I. 191, 14 Atl. 847; *Lambeth v. S.*, 23 Miss. 323; *Campbell v. S.*, 11 Ga. 374; *Burrell v. S.*, 18 Tex. 713; *Com. v. Richards*, 18 Pick. (Mass.) 437, 29 Am. D. 608; *S. v. Vansant*, 80 Mo. 76; *Green v. S.*, 66 Ala. 40, 41 Am. R. 744; *S. v. Oliver*, 2 Houst. (Del.) 585; *S. v. Saunders*, 14 Or. 300, 12 Pac. 441; *Miller v. S.*, 25 Wis. 384; *S. v. Baldwin*, 15 Wash. 15, 45 Pac. 650; *S. v. Kindle*, 47 Ohio St. 358, 24 N. E. 485; *Walston v. Com.*, 16 B. Mon. (Ky.) 15; *Hill v. Com.*, 2 Gratt. (Va.) 607; *Underhill Cr. Ev.*, § 111.

²¹ *S. v. Baldwin*, 79 Iowa 715, 45 N. W. 297; *Simons v. P.*, 150 Ill. 66, 36 N. E. 1019; *Peoples v. Com.*, 87 Ky. 488, 9 S. W. 509, 810; *S. v. Dickinson*, 41 Wis. 299; *Montgomery v. S.*, 80 Ind. 338, 41 Am. R. 815, 3 Cr.

L. Mag 523; *Gillett Indirect & Col. Ev.*, § 192.

²² *S. v. Tweedy*, 11 Iowa 359; *P. v. Simpson*, 48 Mich. 474, 12 N. W. 662; *S. v. Walton*, 92 Iowa 455, 61 N. W. 179.

²³ *Dunn v. P.*, 172 Ill. 587, 50 N. E. 137; *Boulden v. S.*, 102 Ala. 78, 15 So. 341; *S. v. Walton*, 92 Iowa 455, 61 N. W. 179; *P. v. Simpson*, 48 Mich. 474, 12 N. W. 662; *Epperson v. S.*, 5 Lea (Tenn.) 291; *S. v. Carrington*, 15 Utah 480, 50 Pac. 526; *Collier v. S.*, 20 Ark. 36; *Whar. Cr. Ev.* (8th ed.), § 295; 1 Bish. Cr. Pro., § 1213.

²⁴ *S. v. Tweedy*, 11 Iowa 359; *Beets v. S.*, Meigs (Tenn.) 106; *Rex v. Gay*, 7 C. & P. 230; *Collier v. S.*, 20 Ark. 36; *Merrill v. S.*, 58 Miss. 65. See *S. v. Patterson*, 45 Vt. 308, 12 Am. R. 200; *Underhill Cr. Ev.*, § 112.

tent evidence: it serves only to refresh the memory of the person who wrote it.²⁵

§ 95. Form, words or signs.—A dying declaration may be made orally as well as in writing or by signs or words; and it may be made under oath or not under oath, and any form is sufficient if otherwise competent.²⁶

§ 96. Substance of dying statement.—Where the witnesses are unable to repeat the exact words of the deceased in making his dying statement, the substance of what he said may be given in evidence.²⁷

§ 97. Dying declarations restricted.—All the text-books and a host of judicial decisions assert that the rule admitting dying declarations in evidence is confined to the cases of homicide.²⁸ Dying declarations must be restricted to the act of killing and the circumstances immediately attending the act, and forming part of the *res gestae*.²⁹ But

²⁵ *Anderson v. S.*, 79 Ala. 5; *Allison v. Com.*, 99 Pa. St. 17; *Binns v. S.*, 46 Ind. 311; *S. v. Somnier*, 33 La. 237; *S. v. Wilson*, 24 Kan. 189, 36 Am. R. 237; *Com. v. Haney*, 127 Mass. 455.

²⁶ *Mockabee v. Com.*, 78 Ky. 382; *S. v. Somnier*, 33 La. 239; *Underhill Cr. Ev.*, § 113; *Daughdrill v. S.*, 113 Ala. 7, 21 So. 378; *Com. v. Casey*, 11 Cush. (Mass.) 417, 59 Am. D. 150; *Gillett Indirect & Col. Ev.*, § 201.

²⁷ *P. v. Chase*, 79 Hun (N. Y.) 296, 29 N. Y. Supp. 376; *Ward v. S.*, 8 Blackf. (Ind.) 101; *Montgomery v. S.*, 11 Ohio 424; *Brown v. S.*, 32 Miss. 442; *S. v. Baldwin*, 15 Wash. 15, 45 Pac. 650; *Krebs v. S.*, 8 Tex. App. 1; *Underhill Cr. Ev.*, § 110, citing *Mattox v. U. S.*, 146 U. S. 140, 13 S. Ct. 50; *P. v. Chin Mook Sow*, 51 Cal. 597.

²⁸ *Brown v. Com.*, 73 Pa. St. 327; *Reg. v. Hind*, 8 Cox. C. C. 300; *P. v. Davis*, 56 N. Y. 95; *S. v. Harper*, 35 Ohio St. 78; *Reynolds v. S.*, 69 Ala. 502, 4 Am. C. R. 152; *S. v. Dickinson*, 41 Wis. 299; *Railing v. Com.*, 110 Pa. St. 100, 6 Am. C. R. 12, 1 Atl. 314; *S. v. Furney*, 41 Kan. 115, 13 Am. St. 262, 21 Pac. 213; *S. v. O'Shea*, 60 Kan. 772, 57 Pac. 970;

Thayer v. Lombard, 165 Mass. 174, 42 N. E. 563; *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Simons v. P.*, 150 Ill. 66, 36 N. E. 1019; *Mora v. P.*, 19 Colo. 255, 35 Pac. 179; *Starr v. Com.*, 97 Ky. 193, 30 S. W. 397; *S. v. Jefferson*, 77 Mo. 136; *Poteete v. S.*, 9 Baxt. (Tenn.) 270, 40 Am. R. 90; *Gillett Indirect & Col. Ev.*, § 192.

²⁹ *Starr v. Com.*, 97 Ky. 193, 30 S. W. 397; *S. v. Shelton*, 47 N. C. 364, 64 Am. D. 587; *Leiber v. Com.*, 9 Bush (Ky.) 11, 1 Am. C. R. 310; *Mose v. S.*, 35 Ala. 421; *Nelson v. S.*, 7 Humph. (Tenn.) 542; *S. v. Johnson*, 26 S. C. 152, 1 S. E. 510, 7 Am. C. R. 366; *Payne v. S.*, 61 Miss. 161, 4 Am. C. R. 155; *Wroe v. S.*, 20 Ohio St. 460; *S. v. Bohan*, 15 Kan. 407, 2 Am. C. R. 280; 1 Greenl. Ev., § 156; *Dixon v. S.*, 13 Fla. 636, 1 Green C. R. 688; 1 McClain Cr. L., §§ 425, 426, 427; *Collins v. Com.*, 12 Bush (Ky.) 271, 2 Am. C. R. 282; *Sullivan v. S.*, 102 Ala. 135, 15 So. 264, 48 Am. St. 22; *Johnson v. S.*, 94 Ala. 35, 10 So. 667; *Blackburn v. S.*, 98 Ala. 65, 13 So. 274; *Scott v. P.*, 63 Ill. 508; *Ex parte Fatheree*, 34 Tex. Cr. 594, 31 S. W. 403; *S. v. Garrand*, 5 Or. 216; *S. v. Reed*, 137 Mo. 125, 38 S. W. 574;

under the rule thus restricting dying declarations, may be shown evidence as to the person who committed the assault on the deceased.³⁰

§ 98. Belief of immediate death in extremity.—Dying declarations are made in extremity, when the party is at the point of death and when every hope of this world is gone—when every motive to falsehood is silenced and the mind is induced by the most powerful considerations to speak the truth.³¹ The sincere and settled belief of impending dissolution, the absence of all hope, however slight, can alone give to the declaration that sanction which is attributed to the testimony of the living by the solemn oath judicially administered. It is not necessary that the declarant shall aver that he believes death to be certain and impending.³² If at the time the deceased made the dying statement he did so under the fixed belief of immediate death and without any hope of recovery, such statement is admissible as a dying declaration, although he may afterward entertain hope of recovery.³³

§ 99. Immediate death not essential.—It is not necessary that the declarant should be on the point of immediate death to make his

S. v. Evans, 124 Mo. 397, 28 S. W. 8; *Savage v. S.*, 18 Fla. 909; *S. v. Perigo*, 80 Iowa 37, 45 N. W. 399; *S. v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *Puryear v. Com.*, 83 Va. 51, 1 S. E. 512; *Denton v. S.*, 1 Swan (Tenn.) 279; *Bryant v. S.*, 80 Ga. 272, 4 S. E. 853; *S. v. Black*, 42 La. 861, 8 So. 594; *P. v. Davis*, 56 N. Y. 103.

³⁰ *Com. v. Roddy*, 184 Pa. St. 274, 39 Atl. 211; *S. v. Kessler*, 15 Utah 142, 49 Pac. 293; *Mattox v. U. S.*, 146 U. S. 140, 13 S. Ct. 50.

³¹ *Westbrook v. P.*, 126 Ill. 89, 18 N. E. 304; *Digby v. P.*, 113 Ill. 125; *S. v. Cantieny*, 34 Minn. 1, 24 N. W. 458, 6 Am. C. R. 427; *North v. P.*, 139 Ill. 82, 28 N. E. 966; *Edmondson v. S.*, 41 Tex. 496; *Brown v. Com.*, 73 Pa. St. 321, 2 Green C. R. 516; *S. v. Mellicott*, 9 Kan. 257, 1 Green C. R. 227; *Evans v. S.*, 58 Ark. 47, 22 S. W. 1026; 1 Greenl. Ev. (Redf. ed.), § 156.

³² *Bell v. S.*, 72 Miss. 507, 17 So. 232, 10 Am. C. R. 280; *P. v. Simpson*, 48 Mich. 474, 12 N. W. 662;

Donnelly v. S., 26 N. J. L. 463; *Com. v. Matthews*, 89 Ky. 287, 12 S. W. 333; *Ward v. S.*, 78 Ala. 441; 1 Greenl. Ev. 158; *Tip v. S.*, 14 Lea (Tenn.) 502.

³³ *S. v. Reed*, 53 Kan. 773, 37 Pac. 174; *S. v. Shaffer*, 23 Or. 560, 32 Pac. 545; *S. v. Mills*, 91 N. C. 595; *Swisher v. Com.*, 26 Gratt. (Va.) 963, 21 Am. R. 330. See *Hall v. Com.*, 89 Va. 171, 15 S. E. 517; *Ex parte Meyers*, 33 Tex. Cr. 204, 26 S. W. 196; *Johnson v. S.*, 102 Ala. 1, 16 So. 99; *Polk v. S.*, 35 Tex. Cr. 495, 34 S. W. 633; *P. v. Crews*, 103 Cal. 174, 36 Pac. 367; *Reg. v. Steele*, 12 Cox C. C. 168. See also *Brande v. S.* (Tex. Cr. App.), 45 S. W. 17; *Taylor v. S.*, 38 Tex. Cr. 552, 43 S. W. 1019; *Com. v. Brewer*, 164 Mass. 577, 42 N. E. 92; *S. v. Evans*, 124 Mo. 397, 28 S. W. 8; *S. v. Walton*, 92 Iowa 455, 61 N. W. 179; *S. v. Trivas*, 32 La. 1086, 36 Am. R. 293; *Joslin v. S.*, 75 Miss. 838, 23 So. 515; *Doolin v. Com.*, 16 Ky. L. 189, 27 S. W. 1; *Mattox v. U. S.*, 146 U. S. 151, 13 S. Ct. 50.

dying statement competent evidence, if otherwise competent.⁸⁴ The fact that the declarant may live several days or even weeks after making a dying statement, will not render it incompetent.⁸⁵

§ 100. **Slightest hope of recovery.**—Where the declarant had the slightest hope of recovery, his declarations are not admissible, although he may have died within an hour afterward.⁸⁶

§ 101. **Dying statement competent.**—"My husband said, when he came in, 'Don't take on; the shot will kill me. I'll not get well.' * * * The morning after the next day, being the day he died, he said to me he could not get well; he said that all along, from the first to the last talk we had about it; he could scarcely speak above a whisper. He told me when and how he wanted to be buried the same evening after he was shot. He never expressed any hope of recovery, but said all the time he could not get well. Don't think he asked for a physician at all. On Saturday morning, the day he died, he told me how the trouble occurred." Deceased said: "Mother, I never can get well; I am killed." Held competent.⁸⁷

§ 102. **Dying statement too uncertain.**—If it turn out that the dying declarations are too indefinite or irrelevant, the same may be excluded on motion, and the jury instructed to disregard the same.⁸⁸

⁸⁴ S. v. Nocton, 121 Mo. 538, 26 S. W. 551; S. v. Daniel, 31 La. 92; Young v. S., 95 Ala. 4, 10 So. 913; Hall v. Com., 89 Va. 171, 15 S. E. 517; S. v. Schmidt, 73 Iowa 469, 35 N. W. 590; Lipscomb v. S., 75 Miss. 559, 23 So. 210, 230; Wagoner v. Ter. (Ariz.), 51 Pac. 145; Lowry v. S., 12 Lea (Tenn.) 145; P. v. Simpson. 48 Mich. 474, 12 N. W. 662; Mattox v. U. S., 146 U. S. 140, 13 S. Ct. 50.

⁸⁵ P. v. Weaver, 108 Mich. 649, 66 N. W. 567; Evans v. S., 58 Ark. 47, 22 S. W. 1026; S. v. Reed, 53 Kan. 767, 37 Pac. 174; Radford v. S., 33 Tex. Cr. 520, 27 S. W. 143; S. v. Craine, 120 N. C. 601, 27 S. E. 72; P. v. Chase, 79 Hun (N. Y.) 296, 29 N. Y. Supp. 376; Boulden v. S., 102 Ala. 78, 15 So. 341; Com. v. Haney, 127 Mass. 455; White v. S., 111 Ala. 92, 21 So. 330; Moore v. S., 96 Tenn. 209, 33 S. W. 1046; Daughdrill v. S., 113 Ala. 7, 21 So. 378; Underhill Cr. Ev., § 105.

⁸⁶ P. v. Hodgdon, 55 Cal. 72, 36 Am. R. 30; Whitaker v. S., 79 Ga. 87, 3

S. E. 403; Com. v. Roberts, 108 Mass. 296; Peak v. S., 50 N. J. L. 179, 12 Atl. 701; Underhill Cr. Ev., § 103, citing Jackson v. Com., 19 Gratt. (Va.) 656; S. v. Medlicott, 9 Kan. 257, 282, 285; P. v. Hodgdon, 55 Cal. 72, 76; Bell v. S., 72 Miss. 507, 17 So. 232, 10 Am. C. R. 277; Com. v. Bishop, 165 Mass. 148, 42 N. E. 560; S. v. Simon, 50 Mo. 370; P. v. Evans, 40 Hun (N. Y.) 492; Morgan v. S., 31 Ind. 199.

⁸⁷ Watson v. S., 63 Ind. 548, 3 Am. C. R. 227. See Johnson v. S., 47 Ala. 9, 1 Green C. R. 595; S. v. Furney, 41 Kan. 115, 21 Pac. 213. See also S. v. Russell, 13 Mont. 164, 32 Pac. 854; S. v. Evans, 124 Mo. 397, 407, 28 S. W. 8; Lester v. S., 37 Fla. 382, 20 So. 232; P. v. Bemmerly, 87 Cal. 118, 25 Pac. 266; S. v. Black, 42 La. 861, 864, 8 So. 594; S. v. Sadler, 51 La. 1397, 26 So. 390; Hagenow v. P., 188 Ill. 547, 59 N. E. 242; Green v. S., 154 Ind. 655, 57 N. E. 637.

⁸⁸ Whar. Cr. Ev. (8th ed.), § 298; Scott v. P., 63 Ill. 511.

§ 103. Dying statement—Incompetent matter.—The dying declarations contained not only a statement of the killing, but also, as follows: Hacket, the defendant, had often threatened to kill him, the deceased. Held error to admit this.³⁹ If the dying declaration contain incompetent as well as competent statements, the incompetent part may, on motion, be stricken out, leaving the competent and relevant part to be submitted to the jury.⁴⁰ The deceased stated, among other things, that at a former time he had a warrant to arrest the defendant, and had been told that the defendant was seen with a pistol. These statements were incompetent as a dying declaration, not relating to the cause of death.⁴¹ Any statement made by the deceased showing the state of feeling existing between him and the defendant, is incompetent as a dying declaration,—not relating to the circumstances causing death.⁴²

§ 104. Statement of deceased when two killed.—The defendant shot and killed two persons at the same time and under the same circumstances, one of whom died instantly, and the other survived some time and made a dying statement. The accused was tried for the murder of the one who died instantly, and the court admitted in evidence the dying declaration of the other. Held error, as his death was not the subject of the charge.⁴³

§ 105. Dying statement, incomplete.—If it appears that the dying statement is incomplete and that the deceased intended to qualify his statements or connect them with explanations, but was prevented, such dying statement is incompetent as evidence.⁴⁴ But the fact that

³⁹ *Hacket v. P.*, 54 Barb. (N. Y.) 370. See *Collins v. Com.*, 12 Bush (Ky.) 271, 2 Am. C. R. 282.

⁴⁰ *P. v. Farmer*, 77 Cal. 1, 18 Pac. 800; *S. v. Petsch*, 43 S. C. 132, 20 S. E. 993, 999; *Archibald v. S.*, 122 Ind. 122, 23 N. E. 758; *Mattox v. U. S.*, 146 U. S. 140, 13 S. Ct. 50; *S. v. Terrell*, 12 Rich. (S. C.) 321.

⁴¹ *North v. P.*, 139 Ill. 104, 28 N. E. 966; *Simons v. P.*, 150 Ill. 66, 36 N. E. 1019; *Mitchell v. Com.*, 12 Ky. L. 458, 14 S. W. 489; *Railing v. Com.*, 110 Pa. St. 100, 6 Am. C. R. 8, 1 Atl. 314; *P. v. Fong Ah Sing*, 70 Cal. 8, 11 Pac. 323; *Sullivan v. S.*, 102 Ala. 135, 15 So. 264, 48 Am. St. 22; *S. v. Westfall*, 49 Iowa 328. See also *S. v. Vansant*, 80 Mo. 67; *Montgomery v. S.*, 80 Ind. 338, 41 Am. R. 815; *Wey-*

rich v. P., 89 Ill. 90; *P. v. Taylor*, 59 Cal. 640.

⁴² *Reynolds v. S.*, 68 Ala. 502; *Merrill v. S.*, 58 Miss. 65; *S. v. Shelton*, 2 Jones L. (N. C.) 360, 64 Am. D. 587; *Leiber v. Com.*, 9 Bush (Ky.) 13; *Underhill Cr. Ev.*, § 109.

⁴³ *S. v. Bohan*, 15 Kan. 407, 2 Am. C. R. 278; *Poteete v. S.*, 9 Baxt. (Tenn.) 270, 40 Am. R. 90; *S. v. Fitzhugh*, 2 Or. 233; *S. v. Westfall*, 49 Iowa 328. But see *Gillett Indirect & Col. Ev.*, § 192.

⁴⁴ *S. v. Johnson*, 118 Mo. 491, 40 Am. St. 405, 24 S. W. 229; *S. v. Ashworth*, 50 La. 94, 23 So. 270; *Finn v. Com.*, 5 Rand. (Va.) 701, 1 Greenl. Ev., § 159; *Vass v. Com.*, 3 Leigh (Va.) 786, 24 Am. D. 695. See *S. v. Patterson*, 45 Vt. 308; *McLean v. S.*,

dying statements are conflicting or inconsistent does not render them incompetent, but goes only to their credibility.⁴⁵ The facts relating to the making of the dying statements in the following cases are reviewed by the court and the statements held incompetent.⁴⁶

§ 106. Statement of deceased incompetent.—The declarant said: "He is the cause of my death. Oh, those horrible instruments! Laws is the cause of my death; he is my murderer. They abused me terribly." Held error to admit this declaration. It makes no definite charge that the defendant used the instruments mentioned.⁴⁷ The doctor testified: "I told the deceased she would not recover, and she was perfectly aware of her danger. I told her I understood she had taken something. She said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said she hoped I would do all I could for her, for the sake of her family. I told her there was no chance of her recovery." This shows a degree of hope, and is hence incompetent.⁴⁸ The deceased said to the witness, a few days before he was killed, that he (deceased) expected that some of those fellows whose wives he had been running after, would kill him some day. Held not error to exclude this testimony.⁴⁹

§ 107. Opinion as to belief of death.—The doctor gave it as his opinion that the deceased believed he was about to die, giving no facts upon which to predicate his conclusion. Such opinion was incompetent.⁵⁰

§ 108. Opinions incompetent.—Any statements amounting to expressions of opinion which the deceased would not have been permitted to state as a witness on the trial, are not competent as a dying declaration.⁵¹ The deceased, in his dying statement, among other

16 Ala. 672; Com. v. Haney, 127 Mass. 455.

⁴⁵ Richards v. S., 82 Wis. 172, 51 N. W. 652; Moore v. S., 12 Ala. 764, 46 Am. D. 276.

⁴⁶ Tracy v. P., 97 Ill. 103; S. v. Medlicott, 9 Kan. 257, 1 Green C. R. 232; Bell v. S., 72 Miss. 507, 17 So. 232, 10 Am. C. R. 277.

⁴⁷ S. v. Baldwin, 79 Iowa 714, 45 N. W. 297. See S. v. Center, 35 Vt. 378; S. v. Perigo, 80 Iowa 37, 45 N. W. 399; P. v. Olmstead, 30 Mich. 431; Tracy v. P., 97 Ill. 103; S. v.

Medlicott, 9 Kan. 257, 1 Green C. R. 232; Bell v. S., 72 Miss. 507, 17 So. 232, 10 Am. C. R. 277.

⁴⁸ Rex v. Crockett, 4 C. & P. 544. See Mathedy v. Com., 14 Ky. L. 182, 19 S. W. 977.

⁴⁹ Schoolcraft v. P., 117 Ill. 277, 7 N. E. 649.

⁵⁰ Westbrook v. P., 126 Ill. 89, 18 N. E. 304.

⁵¹ S. v. O'Shea, 60 Kan. 772, 57 Pac. 970; Green v. Com., 13 Ky. L. 897, 18 S. W. 515; McBride v. P., 5 Colo. App. 91, 37 Pac. 953; S. v.

things, said that the defendant killed him for nothing. This amounts merely to the expression of an opinion, and is, therefore, incompetent.⁵²

§ 109. **Incompetent as witness.**—If the person making the dying statement would have been incompetent as a witness on the trial, it follows that his dying declaration is not competent to be introduced in evidence.⁵³

§ 110. **Declarations by incompetent witness.**—Dying declarations of a person who has been mortally wounded, with regard to the circumstances which caused death, are to be received with the same degree of credit as the testimony of the deceased would have been had he been examined on oath.⁵⁴

§ 111. **Statement of deceased—Res gestae.**—The defendant had just passed from the house of the deceased with a chair in his hand, challenging the deceased to come on as Lydia Porter and the witness entered the house. The affray, of whatever nature, had just transpired. Upon the instant of the witness entering, the deceased jumped from his chair where he was sitting before the fire with his hands across his knees, and, among other things, said: "Now we'll see whether I am to be knocked down with a chair in my own house." Held competent as part of the *res gestae*, a verbal act expressive of the hopes and fears of deceased.⁵⁵ Some time after the shooting, during the same night, the deceased said, in the presence of the accused: "Have I no friends here?" "Gentlemen, I am dying. I did no wrong." Held competent as part of the *res gestae*.⁵⁶

Mace, 118 N. C. 1244, 24 S. E. 798; Kearney v. S., 101 Ga. 803, 29 S. E. 127; Berry v. S., 63 Ark. 382, 38 S. W. 1038; S. v. Perigo, 80 Iowa 37, 45 N. W. 399; Mathedy v. Com., 14 Ky. L. 182, 19 S. W. 977; P. v. Wasson, 65 Cal. 538, 4 Pac. 555. See Shenberger v. S., 154 Ind. 630, 57 N. E. 519; Underhill Cr. Ev., § 108.
⁵² Collins v. Com., 12 Bush (Ky.) 271; Com. v. Matthews, 89 Ky. 287, 12 S. W. 333; S. v. Foot You, 24 Or. 61, 33 Pac. 537; Wagoner v. Ter. (Ariz.), 51 Pac. 145; Hall v. S., 132 Ind. 317, 322, 31 N. E. 536. See Powers v. S., 74 Miss. 777, 21 So. 657; Gillett Indirect & Col. Ev., § 199; S. v. Perigo, 80 Iowa 37, 45

N. W. 399. *Contra*, S. v. Lee, 58 S. C. 335, 36 S. E. 706; Payne v. S., 61 Miss. 161; Sullivan v. S., 102 Ala. 135, 15 So. 264, 48 Am. St. 22; S. v. Black, 42 La. 861, 8 So. 594.

⁵³ P. v. Sanford, 43 Cal. 29; Rex v. Pike, 3 C. & P. 598 (child); S. v. Elliott, 45 Iowa 486; S. v. Ah Lee, 8 Or. 214.

⁵⁴ Dixon v. S., 13 Fla. 636, 1 Green C. R. 688; Oliver v. S., 17 Ala. 587; Green v. S., 13 Mo. 382; S. v. Ferguson, 2 Hill (S. C.) 619.

⁵⁵ S. v. Porter, 34 Iowa 131, 1 Green C. R. 246.

⁵⁶ Healy v. P., 163 Ill. 381, 45 N. E. 230. See "*Res Gestæ*" under "Evidence."

§ 112. **Statements not *res gestae*.**—Statements of the deceased, not part of the *res gestae*, are not competent for the defense—being only hearsay. But can such statements be shown by the defendant if made under the rule making the same competent against the accused?⁵⁷ Declarations of the deceased, not being dying statements nor part of the *res gestae*, and made out of the presence of the accused, are not competent.⁵⁸ But if the declarations of the deceased relate to some fact about which there is no dispute, the admission of them is harmless.^{58a} Declarations of the deceased made at different times within a year before his death, and prior to his last illness, that he intended to take his own life, not being part of the *res gestae*, are mere hearsay and incompetent. It is not competent to prove that the deceased declared she should perform the operation of abortion on herself with a lead pencil, if it was not otherwise done.⁵⁹

§ 113. **Statements of deceased—Hearsay.**—Statements of the deceased which are not dying declarations, relating what the accused had said or done to her a day or two before, that is, that defendant persuaded her to take the medicine; that he, the doctor, was to blame,—is mere hearsay and most damaging.⁶⁰ Declarations of the deceased which are not part of the *res gestae* are mere hearsay and incompetent.⁶¹ For example: Q. "What did the deceased say to you after he (the defendant) had been out ten minutes?" A. "She told me that he warned her if he couldn't come and see her that night, he would kill her." The defendant appeared fifteen minutes after this declaration and killed the deceased. Held mere hearsay and reversible error.⁶²

§ 114. **Preliminary evidence on competency.**—Preliminary evidence on the competency of dying declarations is addressed to the court, and the jury should, for that purpose, be excluded from hear-

⁵⁷ Moeck v. P., 100 Ill. 245; Adams v. P., 47 Ill. 376; P. v. Aiken, 66 Mich. 460, 33 N. W. 821, 7 Am. C. R. 356.

⁵⁸ Weyrich v. P., 89 Ill. 95; Howard v. P., 185 Ill. 560, 57 N. E. 441.

^{58a} Gedy v. P., 170 Ill. 288, 48 N. E. 987.

⁵⁹ Siebert v. P., 143 Ill. 584, 32 N. E. 431; Com. v. Felch, 132 Mass. 22; S. v. Wood, 53 N. H. 484; Blackburn v. S., 23 Ohio St. 146; S. v. Dart, 29

Conn. 153; Kennedy v. P., 39 N. Y. 253.

⁶⁰ P. v. Aiken, 66 Mich. 460, 33 N. W. 821, 7 Am. C. R. 356.

⁶¹ Montag v. P., 141 Ill. 82, 30 N. E. 337; Weyrich v. P., 89 Ill. 96; S. v. Pomeroy, 25 Kan. 349; Crookham v. S., 5 W. Va. 510, 2 Green C. R. 614; Cheek v. S., 35 Ind. 492; 1 Greenl. Ev., § 156.

⁶² Montag v. P., 141 Ill. 82, 30 N. E. 337.

ing the same; but if the court admits the dying declarations, the preliminary evidence must then be given to the jury.⁶³

§ 115. **Determining mental condition.**—In determining the mental condition of the deceased at the time of making his dying statement, the court will take into consideration not only his language, conduct and condition, but all other facts and circumstances competent to be considered.⁶⁴ Where the theory of the defense was that the deceased was not in a rational state of mind, at the time of making the dying statement, by reason of taking chloroform, it was error to refuse to allow the medical witness to answer this question: "Under ordinary circumstances, how much chloroform is necessary to put a person under its influence by inhalation?"⁶⁵

§ 116. **Testing competency of dying statements.**—Dying declarations should not be permitted to go to the jury unless the proof satisfies the court beyond a reasonable doubt that they were made in extremity; but if the court admits the declarations in evidence, the jury must determine whether the deceased was *in extremis*, and whether he believed that death was impending and had lost all hope of recovery at the time of making the statement.⁶⁶

§ 117. **Testing competency.**—The court, in passing upon the competency of dying declarations, as to belief of impending death, will take into consideration everything said and done by the deceased as well as by third persons in his presence.⁶⁷

⁶³ North v. P., 139 Ill. 102, 28 N. E. 966; Starkey v. P., 17 Ill. 20; S. v. Elliott, 45 Iowa 486, 2 Am. C. R. 323; Jones v. S., 71 Ind. 66; Doles v. S., 97 Ind. 555; Varnedoe v. S., 75 Ga. 181; Hill v. Com., 2 Gratt. (Va.) 594; Bell v. S., 72 Miss. 507, 17 So. 232, 10 Am. C. R. 277; Montgomery v. S., 11 Ohio 425; S. v. Furney, 41 Kan. 115, 21 Pac. 213. *Contra*, as to excluding the jury: S. v. Shaffer, 23 Or. 555, 32 Pac. 545; P. v. Smith, 104 N. Y. 493, 58 Am. R. 537, 10 N. E. 873; Johnson v. S., 47 Ala. 10; Price v. S., 72 Ga. 441; Doles v. S., 97 Ind. 555.

⁶⁴ S. v. Murdy, 81 Iowa 611, 47 N. W. 867; Westbrook v. P., 126 Ill. 82, 18 N. E. 304; Bell v. S., 72 Miss. 507,

17 So. 232, 10 Am. C. R. 277; P. v. Abbott (Cal.), 4 Pac. 769; S. v. Young, 104 Iowa 730, 74 N. W. 693; P. v. Bemmerly, 87 Cal. 117, 25 Pac. 266; Norfleet v. Com., 17 Ky. L. 1137, 33 S. W. 938; P. v. Chase, 79 Hun (N. Y.) 296, 29 N. Y. Supp. 376; S. v. Wilson, 24 Kan. 189, 36 Am. R. 257; P. v. Simpson, 48 Mich. 476, 12 N. W. 662; Puryear v. Com., 83 Va. 54, 1 S. E. 512.

⁶⁵ Tracy v. P., 97 Ill. 107.

⁶⁶ Westbrook v. P., 126 Ill. 89, 18 N. E. 304; Starkey v. P., 17 Ill. 20; S. v. Arnold, 13 Ired. (N. C.) 184; Underhill Cr. Ev., § 110.

⁶⁷ Digby v. P., 113 Ill. 125; 1 Bish. Cr. Pro., § 1212. Any statement made to the deceased by a physician

§ 118. **Dying statement—Weighed by jury.**—The jury shall judge the weight and credibility of dying declarations, and not the court.⁶⁸ Considering the nature of dying declarations, the jury, in determining their weight, should act with great caution and deliberation, and the court should be exceedingly careful not to invade the province of the jury by its instructions.⁶⁹

§ 119. **Testing competency of dying statement.**—The defendant offered to prove to the court, by competent testimony, that at the time of making the declaration offered by the prosecution as the dying declaration, the deceased did not believe that he was about to die, but expected to recover from the wound, and the defendant asked the court to be permitted at this stage of the proceeding to introduce his evidence touching the matters made in his offer for the purpose of testing the competency of the declarations of the deceased. The court refused the offer. Held error.⁷⁰

§ 120. **Impeaching dying statements.**—Dying declarations may be impeached or discredited in like manner that the testimony of the deceased could have been impeached or discredited, had he appeared on the witness-stand as a witness; and the credibility of such declarations is to be determined by the same tests and rules as are applied in determining the weight of any other testimony.⁷¹ It is competent to show on cross-examination of a witness that the deceased, in making his dying statement, was in a reckless, irreverent state of mind; that he was hostile toward the accused, and that he used profane language.⁷²

or others attending him expressing an opinion that he could not recover, is competent: *S. v. Young*, 104 Iowa 730, 74 N. W. 693; *Polly v. Com.*, 15 Ky. L. 502, 24 S. W. 7; *P. v. Weaver*, 108 Mich. 649, 66 N. W. 567; *Lemons v. S.*, 97 Tenn. 560, 37 S. W. 552.

⁶⁸ *Justice v. S.*, 99 Ala. 181, 13 So. 658; *Jordan v. S.*, 82 Ala. 1, 2 So. 460; *Vass v. Com.*, 3 Leigh (Va.) 786; *Baxter v. S.*, 15 Lea (Tenn.) 666; *Lambeth v. S.*, 23 Miss. 322; *Com. v. Casey*, 11 Cush. (Mass.) 417, 59 Am. D. 150; *Campbell v. S.*, 38 Ark. 509; *S. v. Shaffer*, 23 Or. 555, 32 Pac. 545; *S. v. McCanon*, 51 Mo. 160; *Walker v. S.*, 42 Tex. 360; *White v. S.*, 111 Ala. 92, 21 So. 330; *McQueen v. S.*, 94 Ala. 50, 10 So. 433; *S. v. Pearce*, 56 Minn. 226,

57 N. W. 652, 1065. See *S. v. Schmidt*, 73 Iowa 469, 35 N. W. 590; *Dixon v. S.*, 13 Fla. 636.

⁶⁹ *P. v. Kraft*, 148 N. Y. 631, 43 N. E. 80; *S. v. Vansant*, 80 Mo. 67; *Boyle v. S.*, 105 Ind. 469, 55 Am. R. 218, 5 N. E. 203; *S. v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *White v. S.*, 111 Ala. 92, 21 So. 330; *Shell v. S.*, 88 Ala. 17, 7 So. 40; *S. v. Gay*, 18 Mont. 57, 44 Pac. 411; *Peck v. S.*, 50 N. J. L. 179, 12 Atl. 701.

⁷⁰ *S. v. Elliott*, 45 Iowa 486, 2 Am. C. R. 323.

⁷¹ *Lester v. S.*, 37 Fla. 382, 20 So. 232; *P. v. Knapp*, 26 Mich. 112; *Carver v. U. S.*, 164 U. S. 694, 17 S. Ct. 228; *Redd v. S.*, 99 Ga. 210, 25 S. E. 268.

⁷² *Tracy v. P.*, 97 Ill. 107.

§ 121. **Impeaching by contradictions.**—It is well settled that dying declarations may be impeached by proof of contradictory statements on material points, though such contradictory statements were not made *in extremis*.⁷³ Contradictory statements made in the declaration itself or in different declarations which are admissible as dying declarations may be considered as affecting their credibility.⁷⁴

§ 122. **Sustaining after impeachment.**—If the defendant introduces impeaching evidence to impeach dying declarations, the prosecution may then introduce evidence to sustain the same.⁷⁵

§ 123. **Impeaching dying statements.**—The dying statement tended to prove that the deceased took a quantity of calomel for the purpose of procuring an abortion, and that such abortion occurred as a result, on July 19th; that the defendant gave her the calomel and directed her to take it for that purpose. For the purpose of impeaching the dying declaration, the defendant offered to prove that on the next day, July 20th, in a conversation with her, in the presence of others, she referred to another person as having helped her out of her trouble, referring to the abortion; that she said to the defendant among other things: "When I was in trouble, you were not willing to help me out." Held error to refuse this testimony.⁷⁶

§ 124. **Jury taking written statement, improper.**—In addition to the written dying declarations of the deceased, declarations made on four other occasions were reproduced by witnesses for the state. The written statement contained portions which were held incompetent by the court, and the jury were directed to disregard such portions. The defendant introduced witnesses whose testimony was in direct conflict with material portions of the dying declarations. Permitting the jury to take with them the written declarations to the jury-room when considering of their verdict, was held an abuse of the discretion

⁷³ Dunn v. P., 172 Ill. 591, 50 N. E. 137; Shell v. S., 88 Ala. 14, 7 So. 40; Morelock v. S., 90 Tenn. 528, 18 S. W. 258; Carver v. U. S., 164 U. S. 694; Battle v. S., 74 Ga. 101; S. v. Lodge, 9 Houst. (Del.) 542, 33 Atl. 312; P. v. Lawrence, 21 Cal. 368; Felder v. S., 23 Tex. App. 477, 59 Am. R. 777, 5 S. W. 145; Nelms v. S., 13 S. & M. (Miss.) 500, 53 Am. D.

94. *Contra*, Wroe v. S., 20 Ohio St. 460.

⁷⁴ Leigh v. P., 113 Ill. 372; McPherson v. S., 9 Yerg. (Tenn.) 279; Moore v. S., 12 Ala. 764, 46 Am. D. 276.

⁷⁵ S. v. Craine, 120 N. C. 601, 27 S. E. 72; S. v. Blackburn, 80 N. C. 474.

⁷⁶ Dunn v. P., 172 Ill. 592, 50 N. E. 137.

of the court, considering the incompetent portions. The jury may or may not have disregarded the marked incompetent portions.⁷⁷

Subdivision 3.—Statements of Defendant.

§ 125. **Declarations of defendant.**—Declarations made by the defendant prior to the homicide that he intended to sell out and leave the community for fear he might have trouble with the deceased, are not competent as a defense.⁷⁸

§ 126. **Declaration of conspirator.**—The declarations of one of the conspirators in reference to the deceased, made before the homicide, is competent against the others.⁷⁹ Where persons enter into a conspiracy to kill another and accomplish the deed, all are alike guilty, and it is not material which one of the conspirators may have given the fatal blow.⁸⁰

§ 127. **Confessions competent.**—A confession of one charged with murder, freely and voluntarily given, without inducements or threats, is admissible against him.⁸¹

§ 128. **Statements at inquest.**—It is well settled that parol evidence is admissible to prove what the accused voluntarily disclosed before the coroner's jury, if it is shown that his examination there was not reduced to writing.⁸² The accused having voluntarily made a statement before the coroner, such statement, if otherwise competent, may be read in evidence on the trial, even if the accused declined to sign it after it had been made and written out.⁸³

§ 129. **Previous assault, when incompetent.**—Evidence that about a year before the homicide the defendant assaulted the deceased, is incompetent where it further appears that in the meantime the de-

⁷⁷ Dunn v. P., 172 Ill. 588, 50 N. E. 137.

⁷⁸ Red v. S., 39 Tex. Cr. 414, 46 S. W. 408; Harrell v. S., 39 Tex. Cr. 204, 45 S. W. 581.

⁷⁹ McDaniel v. S., 103 Ga. 268, 30 S. E. 29.

⁸⁰ Thomas v. S., 124 Ala. 48, 27 So. 315. See Dover v. S., 109 Ga. 485, 34 S. E. 1030. See Nite v. S. (Tex. Cr. App. 1899), 54 S. W. 763; "Evidence;" "Conspiracy."

⁸¹ P. v. Goldenson, 76 Cal. 328, 19

Pac. 161; S. v. Glahn, 97 Mo. 679, 11 S. W. 260; Dodson v. S., 86 Ala. 60, 5 So. 485; 1 Greenl. Ev., § 220.

⁸² Lyons v. P., 137 Ill. 618, 27 N. E. 677; S. v. Parish, Busb. L. (N. C.) 239; Rex v. Reed, M. & M. 403.

⁸³ Epps v. S., 102 Ind. 539, 1 N. E. 491, 5 Am. C. R. 523; 1 Greenl. Ev., § 228; 1 Rus. Crimes (5th ed.), § 110; P. v. Martinez, 66 Cal. 278, 5 Pac. 261; Newton v. S., 21 Fla. 53; P. v. Mondon, 4 N. Y. Cr. 112.

fendant frequently visited the deceased and continued such visits up to the time of her death.⁸⁴

Subdivision 4.—Threats; Malice; Motive.

§ 130. **Threats of defendant.**—Threats made by the accused shortly before the homicide, of his purpose to kill some one, are competent as tending to prove malice, without reference to any particular person.⁸⁵ It is proper for the jury to take into consideration all the circumstances under which the threats were made by the accused, in determining whether or not they were the expression of a deliberate purpose or design to kill.⁸⁶ Threats made by the defendant shortly before the homicide, against the deceased, are competent as tending to show the animus with which the killing was done, and that the defendant entertained an unfriendly feeling against the deceased.⁸⁷ A threatening letter, written by the defendant to the prosecuting witness, declaring, among other things, that there are not men enough on earth to stop him having his just dues, is competent in a case of assault with intent to kill, as tending to show hostile feelings of the defendant against the prosecuting witness.⁸⁸

§ 131. **Threats of deceased competent.**—Threats made by the deceased are admissible in cases of doubt, to prove that the deceased made the attack.⁸⁹ Threats made by the deceased against the defendant, are admissible to prove that the deceased was seeking the life of the defendant, though such threats were not known by the defendant until after the killing.⁹⁰ Threats made by the deceased, when

⁸⁴ *Herman v. S.*, 75 Miss. 340, 22 So. 873.

⁸⁵ *Williams v. Com.*, 21 Ky. L. 612, 52 S. W. 843; *Brooks v. Com.*, 100 Ky. 194, 18 Ky. L. 702, 37 S. W. 1043; *Trusty v. Com.*, 19 Ky. L. 706, 41 S. W. 766; *P. v. Craig*, 111 Cal. 460, 44 Pac. 186; *Allen v. S.*, 111 Ala. 80, 20 So. 490; *S. v. Cochran*, 147 Mo. 504, 49 S. W. 558; *Harris v. S.*, 109 Ga. 280, 34 S. E. 583. *Contra*, *Holley v. S.*, 39 Tex. Cr. 301, 46 S. W. 39; *Godwin v. S.*, 38 Tex. Cr. 466, 43 S. W. 336; *Gaines v. S.* (Tex. Cr. App. 1899), 53 S. W. 623.

⁸⁶ *Bolzer v. P.*, 129 Ill. 120, 21 N. E. 818.

⁸⁷ *McCoy v. P.*, 175 Ill. 233, 51 N. E. 777; *Milton v. S.*, 40 Fla. 251, 24

So. 60; *P. v. Chaves*, 122 Cal. 134, 54 Pac. 596; *Rawlins v. S.*, 40 Fla. 155, 24 So. 65; *Waldron v. S.*, 41 Fla. 265, 26 So. 701.

⁸⁸ *S. v. Lawrence*, 70 Vt. 524, 41 Atl. 1027.

⁸⁹ *Whar. Cr. Ev.* (8th ed.), § 757; *Allison v. U. S.*, 160 U. S. 203, 16 S. Ct. 252, 10 Am. C. R. 443; *Roberts v. S.*, 68 Ala. 156.

⁹⁰ *Campbell v. P.*, 16 Ill. 18; *Wiggins v. P.*, 93 U. S. 465, 4 Am. C. R. 494; *P. v. Scoggins*, 37 Cal. 676; *Holler v. S.*, 37 Ind. 57; *S. v. Turpin*, 77 N. C. 473; *S. v. Harrod*, 102 Mo. 590, 15 S. W. 373; *Young v. Com.*, 19 Ky. L. 929, 42 S. W. 1141.

known to the accused, are competent as tending to show that in making the assault on the deceased, he acted under a just fear of danger to his life; but such threats are incompetent if not made known to the accused.⁹¹

§ 132. Threats of deceased, not competent.—Previous threats made by the deceased against the accused may be rejected as not competent, in case of self-defense, where the accused offers no evidence tending to prove self-defense.⁹²

§ 133. Reputation of deceased in rebuttal.—The defendant having introduced evidence tending to show self-defense, that he did the killing while the deceased was making a dangerous assault on him, the prosecution then had the right to show that the reputation of the deceased for peaceableness was good.⁹³

§ 134. Evidence, when several killed.—On a charge of manslaughter where the killing was caused by the explosion of a steam boiler through alleged negligence of the defendant, it is proper to show the full extent of injury to all persons, but not their sufferings and treatment in hospitals.⁹⁴

§ 135. Friendship between the persons.—Acts of friendship and association between the defendant and the deceased subsequent to the time of the threats made by the deceased, are competent against the defendant under a plea of self-defense.⁹⁵

§ 136. Malice implied from weapon used.—The law implies malice from the killing with a deadly weapon, and thus imposes upon the accused the burden of showing a want of malice. This is the rule in this country and England.⁹⁶ But the use of a deadly weapon does

⁹¹ Powell v. S., 19 Ala. 581; Lingo v. S., 29 Ga. 470; S. v. Cushing, 17 Wash. 544, 50 Pac. 512.

⁹² S. v. Reed, 137 Mo. 125, 38 S. W. 574. See also S. v. Helm, 92 Iowa 540, 61 N. W. 246; S. v. McGonigle, 14 Wash. 594, 45 Pac. 20; Lester v. S., 37 Fla. 382, 20 So. 232; P. v. Kennedy, 10 N. Y. Cr. 394, 22 N. Y. Supp. 267; Cardwell v. Com., 20 Ky. L. 496, 46 S. W. 705; S. v. Byrd, 121 N. C. 684, 28 S. E. 353;

S. v. Wiggins, 50 La. 330, 23 So. 334; S. v. Hickey, 50 La. 600, 23 So. 504.

⁹³ Thrawley v. S., 153 Ind. 375, 55 N. E. 95. See Sims v. S., 38 Tex. Cr. 637, 44 S. W. 522.

⁹⁴ P. v. Thompson, 122 Mich. 411, 81 N. W. 344.

⁹⁵ Naugher v. S., 116 Ala. 463, 23 So. 26.

⁹⁶ Bankhead v. S., 124 Ala. 14, 26 So. 979; S. v. McDonnell, 32 Vt. 491,

not raise a presumption of premeditation and design to take life, though such use does raise a presumption of malice.⁹⁷ Malice may be inferred where an act unlawful in itself is done deliberately with intention of mischief or great bodily harm to those on whom it may chance to light and death is occasioned by it.⁹⁸

§ 137. Malice, when not implied.—If the means employed be not dangerous to life, or, in other words, if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. The distinguishing characteristic respecting the two crimes of murder and manslaughter is malice.⁹⁹

§ 138. Evidence of motive.—It is competent to show in evidence the unchastity of the wife, if such unchastity be her motive for killing her husband; that is, if she desired his death to give her more freedom to indulge in her lust.¹⁰⁰

§ 139. Previous relations—Quarrels.—On the trial of a husband for the murder of his wife, the character of the relations existing between them, such as quarrels, angry discussions, personal violence, cruel treatment and the like conduct, may be shown in evidence against him.¹

538; *McQueen v. S.*, 103 Ala. 12, 15 So. 824; *S. v. Decklotts*, 19 Iowa 447; *Kent v. P.*, 8 Colo. 563, 9 Pac. 852, 5 Am. R. 419; *Miller v. S.*, 107 Ala. 40, 19 So. 37; *S. v. Davis*, 9 Houst. (Del.) 407, 33 Atl. 55; *S. v. Foreman*, 1 Marv. (Del.) 517, 41 Atl. 140; *S. v. Earnest*, 56 Kan. 31, 42 Pac. 359; *Clarke v. S.*, 117 Ala. 1, 23 So. 671; *Holderman v. Ter.* (Ariz.), 260 Pac. 876; *Bondurant v. S.* (Ala.), 27 So. 775; 4 Bl. Com. 200; 3 Greenl. Ev., § 144. *Contra*, *S. v. Cross*, 42 W. Va. 253, 24 S. E. 996. See *Underhill Cr. Ev.*, § 320.

⁹⁷ *North Carolina v. Gosnell*, 74 Fed. 734.

⁹⁸ *Adams v. P.*, 109 Ill. 450; *Mayes v. P.*, 106 Ill. 313; *Davison v. P.*, 90 Ill. 229; *Kent v. P.*, 8 Colo. 563, 9 Pac. 852, 5 Am. C. R. 420; *Fitch v. S.*, 37 Tex. Cr. 500, 36 S. W. 584; *S. v. Coleman*, 6 Rich. (S. C.) 185, 3 Am. C. R. 180; *Head v. S.*, 44 Miss.

735; *Spies v. P.*, 122 Ill. 1, 174, 12 N. E. 865, 17 N. E. 898; *S. v. Kimball*, 50 Me. 409; *Van Houten v. S.*, 46 N. J. L. 16; *Hutchison v. Com.*, 82 Pa. St. 472; 3 Greenl. Ev., § 144; *S. v. Kortgaard*, 62 Minn. 7, 64 N. W. 51.

⁹⁹ *P. v. Munn*, 65 Cal. 211, 3 Pac. 650, 6 Am. C. R. 433; *Wellar v. P.*, 30 Mich. 16, 1 Am. C. R. 280; *S. v. McNab*, 20 N. H. 160; *S. v. Smith*, 32 Me. 369; *Darry v. P.*, 10 N. Y. 120.

¹⁰⁰ *Weyrich v. P.*, 89 Ill. 98; *P. v. Scott*, 153 N. Y. 40, 46 N. E. 1028; *S. v. Duestrow*, 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Webb v. S.*, 73 Miss. 456, 19 So. 238; *S. v. Chase*, 68 Vt. 405, 35 Atl. 336; *Fraser v. S.*, 55 Ga. 325, 1 Am. C. R. 315; *P. v. Parmelee*, 112 Mich. 291, 70 N. W. 577; *Underhill Cr. Ev.*, §§ 90, 323; *Brunson v. S.*, 124 Ala. 37, 27 So. 410.

¹ *S. v. Seymour*, 94 Iowa 699, 63 N. W. 661; *S. v. Cole*, 63 Iowa 695, 17 N.

§ 140. **Motive not indispensable.**—It is not necessary to establish a motive to warrant a conviction on a charge of homicide, if the case is otherwise clearly proven.²

§ 141. **Threats of defendant—Motive.**—Where it appeared that the defendant, a cattle man, was threatening sheep men generally, with deadly weapons, that he had threatened the deceased, a sheep herder, it was held competent to show that shortly before the homicide he had threatened and made attacks on other sheep herders on the range, as tending to prove motive for the homicide.³

§ 142. **Previous relations—Adulterous.**—Any fact or circumstance which tends to show motive or want of motive for killing a person, is competent evidence on a charge of homicide; as, if the defendant and deceased had lived in adultery with the same woman in whose presence the deceased was killed, such fact tends to prove motive for the homicide.⁴

§ 143. **Defendant's cruelty competent.**—Evidence of statements made by a husband reflecting on the character of his wife while living with her, and his treatment showing his desire to get rid of her, may be shown in evidence against him on the charge of murdering her, as tending to prove motive.⁵

§ 144. **Hostile feelings.**—That the defendant on several occasions prior to the homicide, expressed feelings of hostility and dislike toward the deceased, may be shown in evidence, though the language used did not amount to threats against the deceased.⁶

W. 183; Phillips v. S., 62 Ark. 119, 34 S. W. 539; Painter v. P., 147 Ill. 444, 35 N. E. 64; S. v. Bradley, 67 Vt. 465, 32 Atl. 238; P. v. Colvin, 118 Cal. 349, 50 Pac. 539; P. v. Buchanan, 145 N. Y. 1, 39 N. E. 846; Boyle v. S., 61 Wis. 440, 21 N. W. 289; Si- berry v. S., 149 Ind. 684, 39 N. E. 936; Thiede v. Utah Ter., 159 U. S. 510, 16 S. Ct. 62; P. v. Decker, 157 N. Y. 186, 51 N. E. 1018; Underhill Cr. Ev., § 333; Spears v. S. (Tex. Cr.), 56 S. W. 347.

² Johnson v. U. S., 157 U. S. 320, 15 S. Ct. 614; Com. v. Hudson, 97 Mass. 565; S. v. David, 131 Mo. 380, 33 S. W. 28; P. v. Johnson, 139 N. Y. 358, 34 N. E. 920; Hornsby v. S., 94 Ala. 55, 10 So. 522.

³ S. v. Davis (Idaho), 53 Pac. 678.

⁴ S. v. Reed, 50 La. 990, 24 So. 131; S. v. Larkin, 11 Nev. 314; McCue v. Com., 78 Pa. St. 185; Underhill Cr. Ev., § 323. See Com. v. Fry (Pa. 1901), 48 Atl. 257.

⁵ P. v. Buchanan, 145 N. Y. 1, 39 N. E. 846; P. v. Benham, 160 N. Y. 402, 55 N. E. 11, 14 N. Y. Cr. 434, 63 N. Y. Supp. 923. See S. v. Callaway, 154 Mo. 91, 55 S. W. 444.

⁶ P. v. Barthleman, 120 Cal. 7, 52 Pac. 112.

§ 145. **Preparation for flight.**—Preparation for flight after the homicide by attempting to hire a conveyance to take the defendant away from the neighborhood is competent.⁷

Subdivision 5.—Opinions; Other Offenses.

§ 146. **Post-mortem examination.**—The mere fact that a post-mortem examination is made some time after the death (as one month) is not in itself any reason why the result of such examination should be excluded, unless the interval is so long and the condition of the body is such that the jury could not reasonably find whether its condition was attributable to the ante-mortem or post-mortem causes.⁸

§ 147. **Opinion of police, damaging.**—The evidence being entirely circumstantial and the life of the accused involved, it was error to permit a police officer to state that on the night of the homicide: "I saw Michael McHugh and learned that he knew about Devine (the defendant) and Williams, and we of the police formed the theory that they were the men that had done the shooting."⁹

§ 148. **What witness thought.**—A witness will not be permitted to tell what he *thought* on seeing one of two persons who were quarreling over a game, put his hand to his hip pocket.¹⁰

§ 149. **Evidence of other poisonings.**—Where a prisoner was charged with the murder of her child by poison, and the defense was that its death resulted from an accidental taking of such poison, evidence that two other children of hers and a lodger in her house had died previous to the present charge under like circumstances by poison, was held to be admissible.¹¹

§ 150. **Evidence of other offense.**—A person may be guilty as one of the burglars in stealing goods, but not guilty of a homicide committed by the others while concealing the goods the same night in the same community, the offenses being distinct.¹²

⁷ Teague v. S., 120 Ala. 309, 25 So. 209; P. v. Flannelly, 128 Cal. 83, 60 Pac. 670; S. v. Morgan (Utah), 61 Pac. 527. See "Evidence."

⁸ Williams v. S., 64 Md. 384, 1 Atl. 887, 5 Am. C. R. 513.

⁹ Devine v. P., 100 Ill. 293.

¹⁰ Walker v. P., 133 Ill. 114, 24 N. E. 424.

¹¹ Reg. v. Roden, 12 Cox C. C. 630, 2 Green C. R. 34; Reg. v. Cotton, 12 Cox C. C. 400, 1 Green C. R. 102; Zoldoske v. S., 82 Wis. 580, 52 N. W. 778. But see Shaffner v. Com., 72 Pa. St. 60, 2 Green C. R. 508; Underhill Cr. Ev., § 319.

¹² Lamb v. P., 96 Ill. 82. See "Conspiracy."

§ 151. **Evidence of other felony.**—The defendant, after killing the deceased, in the house of the latter, in about half an hour committed the crime of rape on deceased's wife at the barn, they not having separated from the time of the killing to the time of the rape. Held distinct offenses, and to admit evidence of the rape was error.¹³

§ 152. **Eye-witnesses should be called.**—In cases of homicide and in others where analogous reasons exist, those witnesses who were present at the transaction, or who can give direct evidence on any material branch of it, should always be called (by the prosecution), unless possibly where too numerous; that is, where there is no doubt or dispute as to the presence of the witnesses.¹⁴

§ 153. **Non-expert, about blood.**—Any ordinary or non-expert witness may testify that stains which he saw on clothing or other articles, looked like blood, and a chemical test of such stains is not essential to render his evidence competent.¹⁵

§ 154. **Official character of deceased.**—The official character of the person killed may be proved, though not alleged in the indictment, as showing the legal relations and duties of the person killing and person killed, but not as aggravating or modifying the crime.¹⁶

Subdivision 6.—Variance: Instructions.

§ 155. **Variance—As to time.**—Under an indictment containing an averment that the mortal wound killed the deceased instantly,

¹³ *Farris v. P.*, 129 Ill. 529, 21 N. E. 821. See "Evidence," "Conspiracy;" *S. v. Shuford*, 69 N. C. 486, 1 Green C. R. 247.

¹⁴ *Wellar v. P.*, 30 Mich. 16, 1 Am. C. R. 282; *P. v. Kindra*, 102 Mich. 148, 60 N. W. 458; *Bonker v. P.*, 37 Mich. 4, 2 Am. C. R. 82; *Donaldson v. Com.*, 95 Pa. St. 21; *Thompson v. S.*, 30 Tex. App. 325, 17 S. W. 448. *Contra*, *Onofri v. Com.* (Pa.), 11 Atl. 463; *Selph v. S.*, 22 Fla. 539. See "Witnesses."

¹⁵ *S. v. Welch*, 36 W. Va. 690, 15 S. E. 419; *P. v. Smith*, 106 Cal. 73, 39 Pac. 40; *P. v. Smith*, 112 Cal. 333, 44 Pac. 663; *S. v. Bradley*, 67 Vt. 465, 32 Atl. 238; *P. v. Deacons*, 109 N. Y. 374, 16 N. E. 676; *Dillard v. S.*, 58 Miss. 368.

¹⁶ *North v. P.*, 139 Ill. 101, 28 N.

E. 966; *Lynn v. P.*, 170 Ill. 535, 48 N. E. 964; *Boyd v. S.*, 17 Ga. 194; *Wright v. S.*, 18 Ga. 383. The facts shown in the following cases were held sufficient to sustain conviction of murder: *Com. v. Morrison*, 193 Pa. St. 613, 44 Atl. 913; *S. v. Calaway*, 154 Mo. 91, 55 S. W. 444; *Com. v. Krause*, 193 Pa. St. 306, 44 Atl. 454; *Bridgewater v. S.*, 153 Ind. 560, 55 N. E. 737; *McKinney v. S.* (Tex. Cr. App. 1900), 55 S. W. 341; *S. v. Fisher*, 23 Mont. 540, 59 Pac. 919; *Waggoner v. S.* (Tex. Cr. App. 1900), 55 S. W. 491; *Garrett v. S.* (Tex. Cr. App. 1900), 55 S. W. 501; *Alvarez v. S.*, 41 Fla. 532, 27 So. 40; *Jennings v. P.* (Ill.), 59 N. E. 515; *P. v. Clarke*, 130 Cal. 642, 63 Pac. 139 (second degree); *P. v. Ferraro*, 161 N. Y. 365, 55 N. E. 931, 14 N.

proof that he did not die for some time after the wound was inflicted is competent, and there is no variance.¹⁷

§ 156. No variance—Shooting or drowning.—The defendant was charged in the same count in an indictment with committing a murder by shooting and drowning the deceased. The indictment was supported by evidence that the defendant shot the deceased and immediately threw him into the sea, leaving it doubtful whether he was killed by the shooting or by drowning.¹⁸

§ 157. Variance—"Means unknown."—If the indictment alleges that the defendant committed murder with an instrument, to the grand jury unknown, and it should appear on the trial that by reasonable diligence they could have found out the character of the instrument, this would not constitute a fatal variance; but if it should appear on the trial that they did know what instrument was used in causing death, this would constitute a fatal variance.¹⁹

§ 158. Verdict as to degree.—The information, which conforms to the statute and is in the usual form, merely charges murder without charging in what way it was committed or in what degree. Under the statute the jury must find the degree of the offense, and it can not be treated as murder in the first degree unless expressly so found.²⁰

§ 159. Verdict of manslaughter acquits of murder.—A conviction of manslaughter on a charge of murder is an acquittal of the murder charge. Manslaughter is included in an indictment for murder.²¹

Y. Cr. 266; S. v. Pepo, 23 Mont. 473, 59 Pac. 721; S. v. Headrick, 149 Mo. 396, 51 S. W. 99; S. v. Hicks, 125 N. C. 636, 34 S. E. 247; Speights v. S. (Tex. Cr. Ap. 1899), 54 S. W. 595; P. v. Wise, 163 N. Y. 440, 57 N. E. 740; S. v. Miller, 156 Mo. 76, 56 S. W. 907. The facts shown in the following cases were held sufficient to sustain conviction of manslaughter: Williams v. S. (Tex. Cr. Ap. 1899), 54 S. W. 759; S. v. Smith, 78 Minn. 362, 81 N. W. 17; Keesler v. S., 154 Ind. 242, 56 N. E. 232; Bonardo v. P., 132 Ill. 411, 55 N. E. 519; P. v. Harris, 125 Cal. 94, 57 Pac. 780; P. v. Anderson (Cal. 1901), 63 Pac.

668. Evidence not sufficient: Crosby v. P. (Ill.), 59 N. E. 546.

¹⁷ Reddick v. S. (Tex. Cr. Ap.), 47 S. W. 993; Debney v. S., 45 Neb. 856, 64 N. W. 446.

¹⁸ Andersen v. U. S., 170 U. S. 481, 18 S. Ct. 689.

¹⁹ Terry v. S., 120 Ala. 286, 25 So. 176. See "Variance."

²⁰ P. v. Hall, 48 Mich. 482, 12 N. W. 665, 4 Am. C. R. 358; Graves v. S., 45 N. J. L. 203, 4 Am. C. R. 388.

²¹ Brennan v. P., 15 Ill. 518; P. v. Gilmore, 4 Cal. 376; Hurt v. S., 25 Miss. 378; Barnett v. P., 54 Ill. 325; S. v. Tweedy, 11 Iowa 350; Jones v. S., 13 Tex. 184; Johnson v. S., 29

§ 160. **Instruction in words of statute.**—The statute of Illinois is as follows: "The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide." Held that an instruction in the language of this statute is not improper.²² The statute of the same state relating to self-defense is as follows: "If a person kill another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given." An instruction in the language of this section, if not modified by some other instruction, is erroneous.²³ But if the above section relating to self-defense be given as an instruction in connection with the section of the criminal code defining justifiable homicide, it will not be erroneous; which latter section reads as follows: "Justifiable homicide is the killing of a human being in necessary self-defense, or in the defense of habitation, property or person, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as murder, rape, robbery, burglary and the like, upon either person or property, or against any person or persons, who manifestly intend or endeavor, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person and that the party killing really acted under the influence of those fears, and not in a spirit of revenge."²⁴

Ark. 31; P. v. Knapp, 26 Mich. 112, 1 Green C. R. 253; 1 McClain Cr. L., § 390. *Contra*, Bohanan v. S., 18 Neb. 57, 24 N. W. 390, 6 Am. C. R. 488; S. v. Behimer, 20 Ohio St. 572; Com. v. Arnold, 83 Ky. 1, 7 Am. C. R. 210.

²² Duncan v. P., 134 Ill. 118, 24 N. E. 765.

²³ Enright v. P., 155 Ill. 35, 39 N. E. 561; McCoy v. P., 175 Ill. 230, 51 N. E. 777; Gainey v. P., 97 Ill. 277.

²⁴ Kinney v. P., 108 Ill. 524; Appleton v. P., 171 Ill. 479, 49 N. E. 708. See Enright v. P., 155 Ill. 32, 39 N. E. 561; Healy v. P., 163 Ill. 383, 45 N. E. 230.

§ 161. **Instruction erroneous.**—A summary instruction, though in proper form and embodying all the essential facts constituting murder, but which concludes by directing the jury that if they believe such facts have been proven beyond a reasonable doubt, they should find the defendant guilty of murder, is erroneous as tending to force a conviction for murder instead of manslaughter where the jury may, in their judgment, return a verdict of manslaughter.²⁵

§ 162. **Instruction as to verdict.**—An instruction to the jury that their "verdict should be either guilty of murder in the first degree or not guilty," is erroneous, there being no claim or pretense that the murder, if committed, was perpetrated by means of poison or lying in wait. If there had, perhaps the instruction given might have been proper.²⁶ But where there is no evidence of a lower degree or included crime, the court may instruct the jury to convict of the crime charged or acquit.^{26a}

§ 163. **Venue—Place of death.**—If a fatal blow is given in one state and death occurs in another, the defendant may be tried in the state where death took place.^{26b} But the federal courts hold that such jurisdiction does not exist unless conferred by statute.²⁷ The modern and more rational view is that the crime is committed where the unlawful act is done and that the subsequent death, at another place, can not change the locality of the crime.²⁸

§ 164. **Stay of execution.**—A stay of execution will be granted on satisfying the court that the defendant has become insane or is quick with child since conviction.²⁹

§ 165. **Waiving rights.**—It is an ancient maxim of the law that in capital cases the accused stands upon all his rights and waives nothing.

²⁵ *Steiner v. P.*, 187 Ill. 245, 58 N. E. 383; *Lynn v. P.*, 170 Ill. 527, 48 N. E. 964; *Panton v. P.*, 114 Ill. 505, 2 N. E. 411.

²⁶ *Baker v. P.*, 40 Mich. 411, 3 Am. C. R. 170; *Stevenson v. U. S.*, 162 U. S. 312.

^{26a} 1 McClain Cr. L., § 391, citing *Sparf v. U. S.*, 156 U. S. 51, 15 S. Ct. 273, 10 Am. C. R. 212; *S. v. McKinney*, 111 N. C. 683, 16 S. E. 235. See "Instructions."

^{26b} *Tyler v. P.*, 8 Mich. 326; *Kerr Homicide*, § 43.

²⁷ *U. S. v. McGill*, 4 Dall. 427; *U. S. v. Armstrong*, 2 Curt. 446. See *S. v. Hall*, 114 N. C. 910, 19 S. E. 602.

²⁸ *S. v. Kelly*, 76 Me. 331, 5 Am. C. R. 344; *Com. v. Macloon*, 101 Mass. 1.

²⁹ *Spann v. S.*, 47 Ga. 549, 1 Green C. R. 393; 1 Hale P. C. 368. If the convict becomes insane after conviction, his mental condition prior to his conviction may be inquired into: *Spann v. S.*, 47 Ga. 549.

He could not be prejudiced by failing to object to the incompetent damaging evidence which a juror brought out by asking an unsworn by-stander if the witness testifying told the truth as to his having been at a certain place named by the witness at a time stated.³⁰ In another case, the defendant, an ignorant German, entered his plea of guilty to a charge of murder—having no counsel. He was sentenced to be hanged. At the same term he made application to withdraw the plea of guilty, which was overruled. This ruling was error under the peculiar circumstances of the case, and the defendant did not waive his rights.³¹

³⁰ *Dempsey v. P.*, 47 Ill. 325; *Falk v. P.*, 42 Ill. 335. *Loach v. S.*, 77 Miss. 691, 27 So. 618 (insanity).

³¹ *Gardner v. P.*, 106 Ill. 79; *De*

CHAPTER II.

ASSAULTS.

ART. I.	Definition and Elements,	§§ 166-178
II.	Matters of Defense,	§§ 179-201
III.	Indictment,	§§ 202-218
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ARTICLE I. DEFINITION AND ELEMENTS.

§ 166. **Assault defined.**—An assault is an attempt or offer with force and violence to do a corporal hurt to another.¹ An assault has been defined as any attempt or offer, with force or violence, to do a corporal hurt to another, whether wantonly or with a malicious intention, with such circumstances as denote an intention to do it at the time, coupled with a present ability to carry that intention into execution.² The approved definition of an assault involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect.³

§ 167. **Battery defined.**—The least touching of another person willfully or in anger is a battery,—the unlawful beating of another. The law can not draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it.⁴

¹ 1 Hawk. P. C., c. 63, § 1; 1 East P. C. 406; 3 Bl. Com. 120; 1 Russell Cr. 750. See *S. v. Cody*, 94 Iowa 169, 62 N. W. 702, 10 Am. C. R. 40; *S. v. Malcolm*, 8 Iowa 413.

² *Underhill Cr. Ev.*, § 352, citing *Tarver v. S.*, 43 Ala. 354; *U. S. v. Hand*, 2 Wash. C. C. 435.

³ *Chapman v. S.*, 78 Ala. 463, 6 Am. C. R. 38; 3 Greenl. Ev., § 62; *P. v. Lilley*, 43 Mich. 521, 5 N. W. 982; *S. v. Godfrey*, 17 Or. 300, 20 Pac. 625, 11 Am. St. 830.

⁴ *Kirkland v. S.*, 43 Ind. 146, citing 2 Bish. Cr. Law, § 72; 1 Russell Cr. 751; 3 Cooley's Blackstone 120.

§ 168. **Spitting in face.**—Spitting in a man's face or on his body, or throwing water on him, is a battery. Encouraging a dog to bite another is a battery.⁵

§ 169. **Unlawful beating.**—There is no distinction between the statutory words "unlawful beating" and the word "battery" at common law.⁶

§ 170. **Administering poison.**—The unlawful infliction of an injury by administering poison constitutes an assault.⁷

§ 171. **Putting in fear.**—The defendant put his wife in fear by threats, causing her to jump out of a window, breaking her leg. Held to be grievous bodily harm caused by the defendant.⁸

§ 172. **Exposing infant.**—Leaving an infant child in the street in the night time, exposed and without sufficient clothing, is an assault.⁹

§ 173. **Pointing loaded gun.**—Pointing a loaded gun at another within shooting distance, and striking at another with a stick within striking distance without hitting, are assaults.¹⁰ But it is not an assault to point a loaded gun at another if there is no intention to do bodily harm.¹¹

§ 174. **Firing off gun.**—Firing off a loaded gun in the direction of a person or crowd of persons constitutes an assault.¹² And shoot-

⁵ McClain Cr. L., § 235; S. v. Baker, 65 N. C. 332; Johnson v. S., 17 Tex. 515; S. v. Philley, 67 Ind. 304; S. v. Myers, 19 Iowa 517; Murdock v. S., 65 Ala. 520; Com. v. Hagenlock, 140 Mass. 125, 3 N. E. 36. See P. v. Manchego, 80 Cal. 306, 22 Pac. 223. *Contra*, Alston v. S., 109 Ala. 51, 20 So. 81.

⁶ Hunt v. P., 53 Ill. App. 111.

⁷ Carr v. S., 135 Ind. 1, 9 Am. C. R. 80, 41 Am. St. 408, 34 N. E. 533. *Contra*, Garnet v. S., 1 Tex. App. 605, 28 Am. R. 405.

⁸ S. v. Gorham, 55 N. H. 152; Reg. v. Hilliday, Kerr Hom., § 2, p. 3; Com. v. White, 110 Mass. 407.

⁹ Com. v. Stoddard, 91 Mass. 280.

¹⁰ S. v. Lightsey, 43 S. C. 114, 20

S. E. 975, 10 Am. C. R. 38; S. v. Reavis, 113 N. C. 677, 18 S. E. 388. See Keefe v. S., 19 Ark. 190; S. v. Taylor, 20 Kan. 643; P. v. McMakin, 8 Cal. 547; Com. v. White, 110 Mass. 407; S. v. Epperson, 27 Mo. 255; Tollett v. S. (Tex. Cr. Ap. 1900), 55 S. W. 335.

¹¹ S. v. Sears, 86 Mo. 169; Richels v. S., 33 Tenn. 606.

¹² S. v. Merritt, 62 N. C. 134; S. v. Baker, 20 R. I. 275, 38 Atl. 653; S. v. Myers, 19 Iowa 517; Smith v. Com., 100 Pa. St. 324; S. v. Nash, 86 N. C. 650, 41 Am. R. 472. See Cowley v. S., 78 Tenn. 282; S. v. Triplett, 52 Kan. 678, 35 Pac. 815; P. v. Hannigan, 58 N. Y. Supp. 703 (officer).

ing at another where the gun is loaded only with powder, is an assault.¹³

§ 175. **Fighting with fists.**—If two persons, by agreement and without anger, fight with their fists, they are both guilty of an assault.¹⁴ Striking another in mutual combat, or after the necessity to strike in defense of oneself has passed, constitutes an assault, although the accused may not have been in fault in bringing on the difficulty.¹⁵

§ 176. **Prize-fighting.**—Prize-fighting, boxing matches and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or material ill-will. All persons aiding and abetting are guilty.¹⁶

§ 177. **Society punishment.**—The defendants and prosecutrix were members of a benevolent society known as the "Good Samaritans," which society had certain rules and ceremonies of initiation and expulsion. The ceremony of expulsion consisted in suspending the person from the wall by means of a cord fastened around the waist. Inflicting this punishment against the will of the person constitutes assault and battery.¹⁷

§ 178. **Shooting third person.**—If a person make an assault by shooting at a certain person intending to kill, and he hits another person, he is guilty of assault with intent to kill the person so hit.¹⁸

¹³ *Crumbley v. S.*, 61 Ga. 582.

¹⁴ *S. v. Bryson*, 60 N. C. 478; *Com. v. Collberg*, 119 Mass. 350. *Contra*, *Barholt v. Wright*, 45 Ohio St. 177, 12 N. E. 185; *Com. v. Miller*, 35 Ky. 320.

¹⁵ *Harris v. S.*, 123 Ala. 69, 26 So. 515.

¹⁶ *Com. v. Collberg*, 119 Mass. 351, 1 Am. C. R. 59, citing 2 Greenl. Ev., § 85; *Bell v. Hansley*, 3 Jones (N. C.) 131; *Champer v. S.*, 14 Ohio St. 437; *Reg. v. Coney*, 8 Q. B. D. 535.

¹⁷ *S. v. Williams*, 75 N. C. 134, 1 Am. C. R. 56, citing *Bell v. Hansley*, 3 Jones (N. C.) 131.

¹⁸ *Dunaway v. P.*, 110 Ill. 336; *S. v. Meadows*, 18 W. Va. 658; *Walker v. S.*, 8 Ind. 290; *Callahan v. S.*, 21 Ohio St. 306; *Vandermark v. P.*, 47 Ill. 122. See *S. v. Myers*, 19 Iowa 517; *Hollywood v. P.*, 3 Keyes (N. Y.) 55; *Smith v. Com.*, 100 Pa. St. 324; *Powell v. S.*, 32 Tex. Cr. 230, 22 S. W. 677.

ARTICLE II. MATTERS OF DEFENSE.

§ 179. **Force against force.**—A person who is unlawfully assaulted may defend himself, although he is not in danger of losing his life or of suffering great bodily harm. He may repel force with a reasonable amount of force.¹⁹

§ 180. **Pistol in hand only.**—The accused held a pistol in one hand, but did not shoot or attempt to shoot or strike the witness with it. On conviction for assault with a deadly weapon, the court should have given a new trial.²⁰

§ 181. **Pointing unloaded gun.**—An assault is an attempt to commit a battery; and an attempt is, according to common legal understanding, an intent to do a thing combined with an act which falls short of the thing intended. Pointing an unloaded pistol at a person at the distance of six paces does not constitute an assault.²¹ Presenting an unloaded gun at one who supposes it to be loaded, although within shooting distance if loaded, is not an assault.²² Pointing an unloaded gun at another, some distance off, putting such other person in fear, is not an assault with a dangerous weapon.²³

§ 182. **Picking up stone.**—The defendant, in picking up a stone when about twenty steps from the person with whom he was having an altercation, but making no effort to throw it at him, is not guilty of an assault.²⁴

§ 183. **Taking hold of person.**—Under the statute of Texas "intent to injure" is an essential element of assault and battery. There-

¹⁹ S. v. Goering, 106 Iowa 636, 77 N. W. 327; P. v. Teixeira, 123 Cal. 297, 55 Pac. 988. See P. v. Williams, 118 Mich. 692, 77 N. W. 248.

²⁰ Tarpley v. P., 42 Ill. 342.

²¹ McKay v. S., 44 Tex. 43, 1 Am. C. R. 53; Crow v. S., 41 Tex. 468.

²² Chapman v. S., 78 Ala. 463, 6 Am. C. R. 37, 56 Am. R. 42; P. v. Morehouse, 53 Hun (N. Y.) 638, 6 N. Y. Supp. 763; S. v. Shepard, 10 Iowa 126; S. v. Smith, 21 Tenn. 457; S. v. Archer, 8 Kan. App. 737, 54 Pac. 927. See also 3 Greenl. Ev. 59; Com. v. White, 110 Mass. 407, 2

Green C. R. 270; Clark v. S., 84 Ga. 577, 10 S. E. 1094; S. v. Hubbs, 58 Ind. 415. *Contra*, S. v. Cherry, 11 Ired. 475.

²³ S. v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. 830; Tarver v. S., 43 Ala. 354; Clark v. S., 84 Ga. 577, 10 S. E. 1094; Thomas v. S., 99 Ga. 38, 26 S. E. 748; S. v. Archer, 8 Kan. App. 737, 54 Pac. 927.

²⁴ Brown v. S., 95 Ga. 481, 20 S. E. 495; S. v. Milsaps, 82 N. C. 549. See Cutler v. S., 59 Ind. 300; S. v. McAfee, 107 N. C. 812, 12 S. E. 435; S. v. Marsteller, 84 N. C. 726; S.

fore, the taking hold of a woman's hand and rubbing one's thumb in the palm of it, and asking her if she knew what that meant, is not an assault.²⁵

§ 184. **Deadly weapon defined.**—A dangerous or deadly weapon is a weapon likely to produce death or great bodily harm, considering the manner in which it is used.²⁶

§ 185. **Ax, hoe, knife, knuckles.**—An ax is a deadly weapon, and the court may, as a matter of law, declare it to be such.²⁷ A hoe is *per se* a deadly weapon and so is a "large piece of timber or club."²⁸ A knife is not necessarily a deadly weapon.²⁹ Brass knuckles are not necessarily a deadly weapon, nor is a pistol.³⁰

§ 186. **Striking with pistol.**—Striking a person severe blows on the head with a pistol, not in self-defense and without any excuse, constitutes an assault with intent to inflict bodily injury.³¹

§ 187. **Exploding gunpowder.**—Attempting violence on the person of another by the explosion of a keg of gunpowder is an assault with a deadly weapon, although the person making such attempt was not present when the explosion occurred.³²

§ 188. **Deadly weapon, question of fact.**—It is for the jury to determine in cases of doubt whether the weapon used was dangerous or

v. Martin, 85 N. C. 508, 39 Am. R. 711; Atterberry v. S., 33 Tex. Cr. 88, 25 S. W. 125.

²⁵ McConnell v. S., 25 Tex. App. 329, 8 S. W. 275; Crawford v. S., 21 Tex. App. 454, 1 S. W. 446.

²⁶ Long v. Com., 18 Ky. L. 176, 35 S. W. 919; Garner v. S., 28 Fla. 113, 9 So. 835; S. v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. 830; P. v. Rodrigo, 69 Cal. 601, 11 Pac. 481; McNary v. P., 32 Ill. App. 58; Hamilton v. P., 113 Ill. 34, 55 Am. R. 396; Hunt v. S., 6 Tex. App. 663.

²⁷ S. v. Ostrander, 18 Iowa 456. See Webb v. S., 100 Ala. 47, 14 So. 865; Mask v. S., 36 Miss. 77. *Contra*, Melton v. S., 30 Tex. App. 273, 17 S. W. 257. See Underhill Cr. Ev., § 356.

²⁸ Hamilton v. P., 113 Ill. 34, 55 Am. R. 396; S. v. Phillips, 104 N. C. 786, 10 S. E. 463; S. v. Shields, 110 N. C. 499, 14 S. E. 779. See S. v. Thompson, 30 Mo. 470 (hoe); S. v. Alfred, 44 La. An. 582, 10 So. 887.

²⁹ Parks v. S. (Tex. Ap.), 15 S. W. 174. See Com. v. O'Brien, 119 Mass. 342, 20 Am. R. 325; Pinson v. S., 23 Tex. 579.

³⁰ Ballard v. S. (Tex. App.), 13 S. W. 674; Key v. S., 12 Tex. App. 506; Branch v. S., 35 Tex. Cr. 304, 33 S. W. 356.

³¹ Allen v. P., 82 Ill. 610. See P. v. Miller, 91 Mich. 639, 52 N. W. 65. See Skidmore v. S., 2 Tex. App. 20.

³² P. v. Pape, 66 Cal. 366, 5 Pac. 621.

deadly in its character or not, or where the manner of its use determines its character.³³

§ 189. Assault to commit larceny.—Under the statute defining assault with intent to commit murder, larceny or other felony, the word "larceny" will not be construed to mean grand larceny; and it matters not as to the value of the property,—it will be a felony.³⁴

§ 190. Assault to commit felony.—"An assault with intent to commit a felony is, at common law, only a misdemeanor; hence, as the grade of the offense is the same as that of a simple assault, the averment of a felonious intent can be stricken out and a conviction had for assault."³⁵

§ 191. With intent to murder.—In prosecutions for assault with intent to murder, the specific intent is the gist of the offense, and it must be such an assault that if death ensues, it is murder.³⁶ All the ingredients of murder, except the killing, enter into and are necessary to constitute the crime of assault with intent to commit the crime of murder. At least there must be malice, express or implied; that would make the assailant a murderer, had he taken life in the assault.³⁷

§ 192. Assault with intent to murder.—While it may be said that every willful murder committed by lying in wait is a deliberate and premeditated murder—in the first degree, yet it does not follow that every assault made lying in wait is made for the deliberate and premeditated purpose of committing murder.³⁸ If the homicide—in case death had ensued—would have been but manslaughter, then the

³³ Doering v. S., 49 Ind. 56, 19 Am. R. 669; P. v. Rodrigo, 69 Cal. 601, 11 Pac. 481; P. v. Cavanagh, 62 How. Prac. (N. Y.) 187; Smallwood v. Com., 17 Ky. L. 1134, 33 S. W. 822; P. v. Leyba, 74 Cal. 407, 16 Pac. 200; S. v. Brown, 41 La. An. 345, 6 So. 541; Shadle v. S., 34 Tex. 572; S. v. Davis, 14 Nev. 407; Underhill Cr. Ev., § 356. See Parrott v. Com., 20 Ky. L. 761, 47 S. W. 452.

³⁴ Kelly v. P., 132 Ill. 369, 24 N. E. 56.

³⁵ Kennedy v. P., 122 Ill. 656, 13 N. E. 213, citing 1 Whar. Cr. L. (8th ed.), § 641a; S. v. Scott, 24 Vt. 127; Hunter v. Com., 79 Pa. St. 503; Lewis v. S., 33 Ga. 131; S. v. Johnson, 30 N. J. L. 185.

³⁶ Crosby v. P., 137 Ill. 336, 27 N. E. 49; 2 Whar. Cr. L., § 1281; Dunn v. P., 158 Ill. 589, 42 N. E. 47.

³⁷ Smith v. S., 52 Ga. 88, 1 Am. C. R. 248, citing Meeks v. S., 51 Ga. 429.

³⁸ Floyd v. S., 3 Heisk. (Tenn.) 342, 1 Am. C. R. 757.

defendant could not be guilty of the assault with intent to murder, but only of a simple assault and battery.³⁹

§ 193. Assault by officer, drunken person.—If an officer arrest a person drunk and confine him until sober and then discharge him without taking him before a proper court, he is guilty of assault and battery.⁴⁰ Or if an officer unlawfully detains another by holding him, he is guilty of an assault.⁴¹ And also if an officer, in making an arrest, uses more force than is necessary to effect the arrest, he is guilty of an assault and battery.⁴²

§ 194. Officer arresting drunken person.—Where a police officer arrests a person without a warrant, whom he believes to be intoxicated, and has good and reasonable cause for such belief, he is not guilty of an assault, although such person was not in fact intoxicated.⁴³

§ 195. Mere insulting words.—Mere words, though provoking and insulting, will afford no justification for an assault and battery.⁴⁴ Mere words, however opprobrious, can not be said to constitute the considerable provocation contemplated by the statute.⁴⁵

§ 196. Assisting officer.—A bystander assisting an officer in making an arrest by command of the officer, is not guilty of an assault, al-

³⁹ *Maher v. P.*, 10 Mich. 216; *Elliott v. S.*, 46 Ga. 159; *S. v. Neal*, 37 Me. 468; *Ex parte Brown*, 40 Fed. 81. See *Williams v. S.* (Fla. 1899), 26 So. 184.

⁴⁰ *S. v. Parker*, 75 N. C. 249, 22 Am. R. 669.

⁴¹ *Smith v. S.*, 105 Ala. 136, 17 So. 107.

⁴² *Ramsey v. S.*, 92 Ga. 53, 17 S. E. 613; *Mesmer v. Com.*, 26 Gratt. (Va.) 976; *S. v. Lafferty*, 5 Har. (Del.) 491; *Beaverts v. S.*, 4 Tex. App. 175; *Dilger v. Com.*, 88 Ky. 550, 11 Ky. L. 67, 11 S. W. 651; *Bowling v. Com.*, 7 Ky. L. 821; *Golden v. S.*, 1 S. C. 292; *S. v. Mahon*, 3 Har. (Del.) 568; *S. v. Fuller*, 96 Mo. 165, 9 S. W. 583; *Patterson v. S.*, 91 Ala. 58, 8 So. 756; *Mockabee v. Com.*, 78 Ky. 380.

⁴³ *Com. v. Presby*, 80 Mass. 65; *Com. v. Cheney*, 141 Mass. 102, 6 N. E. 724, 55 Am. R. 448. See *Dela-*

foile v. S., 54 N. J. L. 381, 24 Atl. 557, 16 L. R. A. 500; *P. v. Wolven*, 2 Edm. Cas. (N. Y.) 108. *Contra*, *S. v. Hunter*, 106 N. C. 796, 11 S. E. 366.

⁴⁴ *Welburn v. S.* (Tex. Cr. Ap.), 24 S. W. 651; *S. v. Briggs* (Tex. Cr. Ap.), 21 S. W. 46; *S. v. Griffin*, 87 Mo. 608; *S. v. Workman*, 39 S. C. 151, 17 S. E. 694; *Reid v. S.*, 71 Ga. 865; *P. v. Moore*, 3 Wheel. Cr. Cas. (N. Y.) 82; *S. v. Herrington*, 21 Ark. 195; *Burns v. S.*, 80 Ga. 544, 7 S. E. 88; *Timon v. S.*, 34 Tex. Cr. 363, 30 S. W. 808. See *Moore v. S.*, 102 Ga. 581, 27 S. E. 675.

⁴⁵ *Steffy v. P.*, 130 Ill. 101, 22 N. E. 861; *Warren v. S.*, 33 Tex. 517; *Smith v. S.*, 39 Miss. 523; *S. v. Mooney*, 62 N. C. 434. But see *S. v. Shipman*, 81 N. C. 513; *Cutler v. S.*, 59 Ind. 300; *S. v. Hampton*, 63 N. C. 13.

though it turn out that the officer was a trespasser in making the arrest.⁴⁶

§ 197. Teacher inflicting punishment.—A school teacher inflicting corporal punishment on a pupil for disobeying the lawful rules of his school, is not guilty of an assault if the punishment be humane and reasonable.⁴⁷ A school-master punishing a child six years old by whipping with a switch, making marks on her body, but which disappeared in a few days, causing no permanent injury, is not guilty of assault and battery where such punishment was inflicted in good faith for disobedience of the rules of school.⁴⁸

§ 198. Parents' chastisement.—It is a good defense that the battery was merely the chastisement of a child by its parent, the correcting of an apprentice or scholar by the master, or the punishment of a criminal by the proper officer, or the keepers of alms-houses and asylums for the poor; provided, the chastisement be moderate in manner, the instrument and the quantity of it, or that the criminal be punished in the manner appointed by law.⁴⁹

§ 199. Owner recovering property.—A person who has been unlawfully deprived of the possession of his property, may use all reasonable and necessary force to recapture it without legal process, and not be guilty of an offense.⁵⁰ The owner of property may resist an officer who attempts to seize it as the property of a third person, and may use such force as is necessary to prevent the officer taking it.⁵¹

⁴⁶ *Watson v. S.*, 83 Ala. 60, 3 So. 441; *S. v. Stalcup*, 1 Ired. (N. C.) 30.

⁴⁷ *Dowlen v. S.*, 14 Tex. App. 61; *Anderson v. S.*, 40 Tenn. 455; *Danenhoffer v. S.*, 69 Ind. 295, 35 Am. R. 216; *Atterberry v. S.*, 33 Tex. Cr. 88, 25 S. W. 125; *S. v. Stafford*, 113 N. C. 635, 18 S. E. 256; *Marlsbary v. S.*, 10 Ind. App. 21, 37 N. E. 558; *S. v. Pendergrass*, 19 N. C. 365, 31 Am. D. 416; *Thomason v. S.* (Tex. Cr. Ap.), 43 S. W. 1013.

⁴⁸ *S. v. Pendergrass*, 19 N. C. 365, 31 Am. D. 416; *Vanvactor v. S.*, 113 Ind. 276, 15 N. E. 341. See *Whitley v. S.*, 33 Tex. Cr. 172, 25 S. W. 1072.

⁴⁹ *S. v. Neff*, 58 Ind. 516, 2 Am. R. 177, citing *S. v. Hull*, 34 Conn. 132; *Forde v. Skinner*, 4 C. & P. 494; *Dean v. S.*, 89 Ala. 46, 8 So. 38; *Boyd v. S.*, 88 Ala. 169, 7 So. 268. See *Hinkle v. S.*, 127 Ind. 490, 26 N. E. 777, holding the punishment unreasonable.

⁵⁰ *S. v. Dooley*, 121 Mo. 591, 26 S. W. 558; *Carter v. Sutherland*, 52 Mich. 597, 18 N. W. 375; *Com. v. Lynn*, 123 Mass. 218. See *Kunkle v. S.*, 32 Ind. 220; *Cox v. S.* (Tex. Cr. Ap.), 34 S. W. 754; *S. v. Austin*, 123 N. C. 749, 31 S. E. 731.

⁵¹ *Wentworth v. P.*, 5 Ill. 551; *Smith v. S.*, 105 Ala. 136, 17 So. 107; *S. v. Johnson*, 12 Ala. 840,

§ 200. **Removing trespasser.**—Where a trespasser on the premises of another, when requested to leave, defiantly stands his ground, he may be removed by such physical force only as is necessary to remove him. And if the trespasser is armed with a deadly weapon, physical force may at once be used to remove him without resorting to gentle means.⁵²

§ 201. **Self-defense.**—If a person is assaulted in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or of receiving great bodily harm, he may use such force in repelling the attack as appears to him to be reasonably necessary in defense of his person.⁵³ But if the defendant himself provoked and brought on the difficulty, he can not invoke the doctrine of self-defense on a charge of assault with intent to murder.⁵⁴

ARTICLE III. INDICTMENT.

§ 202. **Statutory words, sufficient.**—An indictment is sufficient if it describes the offense substantially in the language of the statute. It must enumerate and charge all the substantial elements entering into the statutory description of the offense.⁵⁵

§ 203. **Felonious intent essential.**—An indictment for an assault with intent to kill and murder must allege that the assault was made with a "felonious" intent; that the act was done feloniously.⁵⁶ In drawing an indictment for committing an assault with intent to commit a felony, the felony intended should be stated.⁵⁷

46 Am. D. 283. See *S. v. Briggs*, 25 N. C. 357. But see *Faris v. S.*, 3 Ohio St. 159; *S. v. Richardson*, 38 N. H. 208, 75 Am. D. 173; *P. v. Cooper*, 13 Wend. 379.

⁵² *S. v. Taylor*, 82 N. C. 554; *S. v. Burke*, 82 N. C. 551; *S. v. Woodward*, 50 N. H. 527; *Long v. P.*, 102 Ill. 331; *P. v. Foss*, 80 Mich. 559, 45 N. W. 480, 20 Am. St. 532; *S. v. Lazarus*, 1 Mill Const. (S. C.) 34; *S. v. Steele*, 106 N. C. 766, 11 S. E. 478, 19 Am. St. 573; *S. v. Montgomery*, 65 Iowa 483, 22 N. W. 639. See *S. v. Kaiser*, 78 Mo. App. 575; *S. v. Lockwood*, 1 Pen. (Del.) 76, 39 Atl. 589; *S. v. Howell*, 21 Mont. 165, 53 Pac. 314.

⁵³ *Barr v. S.*, 45 Neb. 458, 63 N. W. 856. See *P. v. Pearl*, 76 Mich. 207, 42 N. W. 1109, 15 Am. St. 304;

Turner v. S. (Tex. 1900), 55 S. W. 53; *Campbell v. P.*, 16 Ill. 17. See *Willis v. S.* (Miss.), 27 So. 524; *Montgomery v. Com.* (Va.), 36 S. E. 371.

⁵⁴ *Scoggins v. S.*, 120 Ala. 369, 25 So. 180. See "Defenses."

⁵⁵ *Cranor v. S.*, 39 Ind. 64; *S. v. Seamons*, 1 Greene (Iowa) 418; *S. v. Kinder*, 109 Ind. 226, 9 N. E. 917; *Parker v. S.*, 118 Ind. 328, 20 N. E. 833. See *S. v. Clayton*, 100 Mo. 516, 13 S. W. 819, 18 Am. St. 565; *Ex parte Mitchell*, 70 Cal. 1, 11 Pac. 488; *P. v. Turner*, 65 Cal. 540, 4 Pac. 553.

⁵⁶ *Ervington v. P.*, 181 Ill. 408, 54 N. E. 981.

⁵⁷ *Davis v. S.*, 35 Fla. 614, 17 So. 565; *S. v. Hailstock*, 2 Blackf. (Ind.) 257.

§ 204. **Alleging assault.**—Under a statute which provides that “whosoever shall unlawfully assault or threaten another, or shall unlawfully strike or wound another,” an indictment alleging that the defendant “did willfully and maliciously make an assault” upon a person named, “and did unlawfully strike, beat and wound him,” is sufficient.⁵⁸

§ 205. **Assault and battery included.**—The indictment alleging that the defendant committed “an assault and battery with intent to kill” a person named, charges only an assault and battery; the words “with intent to kill” being mere surplusage.⁵⁹

§ 206. **Describing weapon.**—Where the pleader averred that the assault was made with a certain instrument (naming it), and averred the instrument to be a deadly weapon, it was held sufficient without any other description of the weapon.⁶⁰

§ 207. **Alleging manner or means.**—In assault with intent to murder, the indictment need not allege the manner or means with any particularity. Intent is the gist of the offense.⁶¹

§ 208. **Assault with weapon.**—On a charge of assault with a deadly weapon with intent to do bodily injury, the indictment must allege either that “no considerable provocation appeared,” or that “the circumstances of the assault showed an abandoned and malignant heart,” being essential elements constituting the offense, or both expressions may be alleged in the same count.⁶²

§ 209. **Assault with weapon, included.**—Not all indictments charging assault with intent to commit murder contain within themselves

⁵⁸ *Hodgkins v. S.*, 36 Neb. 160, 54 N. W. 86.

⁵⁹ *Shepherd v. S.*, 54 Ind. 25; *Sweetser v. S.*, 4 Blackf. 528; *Harris v. S.*, 54 Ind. 2; *P. v. Parker*, 69 Hun 130, 23 N. Y. Supp. 704.

⁶⁰ *Allen v. P.*, 82 Ill. 612; *S. v. Seamons*, 1 Greene (Iowa) 418; *S. v. Shields*, 110 N. C. 497, 14 S. E. 779; *P. v. Congleton*, 44 Cal. 92; *Philpot v. Com.*, 86 Ky. 595, 6 S. W. 455; *Wilson v. Com.*, 3 Bush (Ky.) 105. *Contra*, see *S. v. Russell*, 91 N. C. 624.

⁶¹ *Hamilton v. P.*, 113 Ill. 34; *Conolly v. P.*, 3 Scam. (Ill.) 474; *Dunn v. P.*, 158 Ill. 589, 42 N. E. 47; *P. v. Congleton*, 44 Cal. 92; *S. v. Tidwell*, 43 Ark. 71; *S. v. Phelan*, 65 Mo. 547; *Baker v. S.*, 134 Ind. 657, 34 N. E. 441; *Ash v. S.*, 56 Ga. 583; *P. v. Savercool*, 81 Cal. 650, 22 Pac. 856; *Mathis v. S.*, 39 Tex. Cr. 549, 47 S. W. 464.

⁶² *Baker v. P.*, 49 Ill. 308; *S. v. Townsend*, 7 Wash. 462, 35 Pac. 367. See *Smith v. S.* (Neb. 1899), 78 N. W. 1059; *P. v. Fairbanks*, 7 Utah 3,

assaults with deadly weapons with intent to inflict bodily injury. But where the indictment for an assault to commit murder names the deadly weapon, such as an ax or a knife, then the crime of an assault with a deadly weapon is included in the indictment.⁶³ On an indictment for assault with a deadly weapon with intent to kill, a conviction may be had for an assault with a deadly weapon with intent to inflict bodily injury.⁶⁴

§ 210. Assault and battery included.—An assault and battery may be included in a charge of assault with a deadly weapon if a beating be alleged, and a conviction for the assault or assault and battery may be had before a justice of the peace—on complaint for the higher charge.⁶⁵

§ 211. Assault and battery included.—On a charge of assault and battery with intent to commit murder, the accused may be convicted of assault and battery with intent to commit murder in the second degree or voluntary manslaughter, or of assault and battery alone, if warranted by the evidence.⁶⁶ On an indictment for assault with intent to murder, there may be a conviction of an assault simply. But on an indictment for murder, there can not be a conviction of an assault with intent to murder, and vice versa.⁶⁷

§ 212. Assault to commit injury.—Under an indictment with intent to commit murder or mayhem, the defendant can not be convicted of an assault with intent to commit bodily injury.⁶⁸ An assault with intent to commit a great bodily injury is included in an indictment for murder, and a verdict of such an assault has been sustained.⁶⁹

§ 213. Assault and battery, not included.—“Assault and battery” is not included in an “assault with a deadly weapon with intent to

24 Pac. 538. *Contra*, P. v. Nugent, 4 Cal. 341.

⁶³ Beckwith v. P., 26 Ill. 500.

⁶⁴ Beckwith v. P., 26 Ill. 500; Earll v. P., 73 Ill. 330; S. v. Robey, 8 Nev. 312, 1 Green C. R. 675; S. v. Johnson, 3 N. Dak. 150, 54 N. W. 547; P. v. Congleton, 44 Cal. 92.

⁶⁵ Severin v. P., 37 Ill. 414; Ter. v. Dooley, 4 Mont. 295, 1 Pac. 747; Sweeden v. S., 19 Ark. 205. See

Barnett v. S., 22 Ind. App. 599, 54 N. E. 414.

⁶⁶ Behymer v. S., 95 Ind. 143.

⁶⁷ 1 Ros. Cr. Ev. 124, citing Hunter v. Com., 79 Pa. St. 503; Bryant v. S., 41 Ark. 359; Kennedy v. P., 122 Ill. 649, 13 N. E. 213.

⁶⁸ Carpenter v. P., 4 Scam. (Ill.) 197; 1 Ros. Cr. Ev. 125.

⁶⁹ S. v. Parker, 66 Iowa 586, 5 Am. C. R. 341, 24 N. W. 225.

commit bodily injury," they being two distinct offenses.⁷⁰ A riot and an assault and battery are two distinct offenses; the facts which will constitute the latter will not establish the former. Riot does not include assault and battery.⁷¹ No conviction can be had for an offense which includes some ingredient which is not necessarily included in the charge set forth in the indictment.⁷²

§ 214. Intent to commit manslaughter.—On a charge of assault with intent to commit murder, to convict defendant of assault with intent to commit manslaughter is a contradiction of the terms, because there is no deliberation or premeditation in manslaughter, as in murder.⁷³

§ 215. Charging aggravated assault.—The indictment alleging that the defendant "did unlawfully make an aggravated assault and battery on the person of," a person named, is defective in charging an aggravated assault and battery. It should further allege the statutory description of the aggravated assault, such as that a serious bodily injury was inflicted.⁷⁴ Under the statute, an assault "committed by an adult made upon the person of a female" is an aggravated assault. An indictment charging an offense under this statute should allege by proper averments that the assault was committed by an adult made upon the person of a female.⁷⁵

§ 216. Assault to injure.—An indictment alleging that the defendant made an assault upon a person named, with deadly weapons, "with intent then and there unlawfully and feloniously to beat, strike, wound and bruise," and did inflict upon the person named "a great

⁷⁰ *Moore v. P.*, 26 Ill. App. 138.

⁷¹ *Ferguson v. P.*, 90 Ill. 510; *Greenwood v. S.*, 64 Ind. 250, 3 Am. C. R. 156; 2 *McClain Cr. L.*, § 1001.

⁷² *Carpenter v. P.*, 4 Scam. (Ill.) 197; *Beckwith v. P.*, 26 Ill. 500; *Young v. P.*, 6 Ill. App. 434; *S. v. Largent*, 9 Wash. 691, 38 Pac. 751.

⁷³ *Moore v. P.*, 146 Ill. 600, 35 N. E. 166; *P. v. Lilley*, 43 Mich. 521, 5 N. W. 982; *Bedell v. S.*, 50 Miss. 492. See *Wilson v. S.*, 53 Ga. 205. *Contra*, *S. v. McGuire*, 87 Iowa 142, 54 N. W. 202; *S. v. Butman*, 42 N. H. 490; *Smith v. S.*, 83 Ala. 26, 3 So. 551.

⁷⁴ *Marshall v. S.*, 13 Tex. App. 492; *S. v. Pierce*, 26 Tex. 114; *Griffin v. S.*, 12 Tex. App. 423. See *S. v. Hunter*, 44 Tex. 94; *S. v. Cass*, 41 Tex. 552; *Williamson v. S.*, 5 Tex. App. 485; *Key v. S.*, 12 Tex. App. 506; *Flynn v. S.*, 8 Tex. App. 368; *Meier v. S.*, 10 Tex. App. 39.

⁷⁵ *Collins v. S.*, 5 Tex. App. 38; *Kemp v. S.*, 25 Tex. App. 589, 8 S. W. 804; *Blackburn v. S.*, 3 Tex. 153; *Robinson v. S.*, 25 Tex. App. 111, 7 S. W. 521; *Webb v. S.*, 36 Tex. Cr. 41, 35 S. W. 380.

bodily injury," is not sufficient statement of an assault "with the intention to inflict a great bodily injury."⁷⁶

§ 217. Deadly weapon.—All kinds of "daggers, bowie-knives, poniards, butcher-knives, dirk-knives and other weapons with which dangerous cuts or thrusts can be inflicted" are by statute made deadly weapons. An indictment alleging the making of an assault with a certain "deadly weapon, to wit: a knife," is bad, in that it does not describe the knife.⁷⁷

§ 218. Not duplicity.—A man may be indicted for the battery of two or more persons, in the same count, where done by one and the same act.⁷⁸ A trial and conviction for assault and battery is not a bar to riot growing out of the same transaction, or of assault with a deadly weapon.⁷⁹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 219. Proving intent.—In assault with intent to murder, the intent must be proved, but it may be inferred from facts and circumstances in evidence, and weapon used.⁸⁰

§ 220. Evidence of other assaults.—Evidence of another and different assault upon a different person on a different occasion than that charged in the indictment is not competent.⁸¹ But evidence of a previous assault or difficulty with the person assaulted is competent as tending to show malice of the defendant against such person.⁸²

⁷⁶ S. v. Clark, 80 Iowa 517, 45 N. W. 910; S. v. Harrison, 82 Iowa 716, 47 N. W. 777.

⁷⁷ Ter. v. Armijo, 7 N. M. 571, 37 Pac. 1117. See S. v. Porter, 101 N. C. 713, 7 S. E. 902. See S. v. Henn, 39 Minn. 476, 40 N. W. 572.

⁷⁸ Wharton Cr. Pl. & Pr., § 254. See Greenwood v. S., 64 Ind. 250, 3 Am. C. R. 156.

⁷⁹ Freeland v. P., 16 Ill. 380; Severin v. P., 37 Ill. 414, 423.

⁸⁰ Conn v. P., 116 Ill. 458, 6 N. E. 463; Dunaway v. P., 110 Ill. 333; Perry v. P., 14 Ill. 496; Vandermark v. P., 47 Ill. 122; Murphy v. P., 37 Ill. 447; Davison v. P., 90 Ill. 222; S. v. Decklots, 19 Iowa 447;

S. v. Shippey, 10 Minn. 224; Whar. Cr. Ev., § 764. See Friederich v. P., 147 Ill. 315, 35 N. E. 472; S. v. Gillett, 56 Iowa 459, 9 N. W. 362; S. v. Godfrey, 17 Or. 300, 20 Pac. 625, 11 Am. St. 830; Underhill Cr. Ev., § 354, citing S. v. Dickerson, 98 N. C. 703, 3 S. E. 687; P. v. Smith, 106 Mich. 431, 64 N. W. 200; P. v. Conley, 106 Mich. 424, 64 N. W. 325; P. v. Miller, 91 Mich. 639, 52 N. W. 65.

⁸¹ P. v. Gibbs, 93 N. Y. 470, 1 N. Y. Cr. R. 472.

⁸² Ellis v. S., 120 Ala. 333, 25 So. 1; Underhill Cr. Ev., § 357, citing S. v. Henn, 39 Minn. 476, 40 N. W. 572; P. v. Deitz, 86 Mich. 419, 49 N. W. 296.

§ 221. **Extent of injury.**—On a charge of an assault with intent to kill and murder, it is competent to show in evidence the nature and extent of the injury received by the prosecuting witness as tending to prove criminal intent.⁸³

§ 222. **Self-defense, degree of proof.**—On a charge of assault and battery where the defense is self-defense, the defendant is not required to show self-defense beyond a reasonable doubt.⁸⁴

§ 223. **Variance.**—On a charge of assault on two persons at the same time, proof of assault on one of them will support the charge.⁸⁵

§ 224. **Variance—Knife—Razor.**—The indictment in alleging the assault with a razor, is substantially proved if the evidence be that a knife was used; the two instruments make the same kind of wound.⁸⁶

§ 225. **Variance—Weapon—Fists.**—It is clear that if an indictment charges an assault and battery with a weapon, as with a gun,

⁸³ Williams v. Com., 19 Ky. L. 1427, 43 S. W. 455; S. v. Grant, 144 Mo. 56, 45 S. W. 1102.

⁸⁴ S. v. Dunn, 22 Wash. 67, 60 Pac. 49. The evidence in the following cases held sufficient to sustain convictions: Aneals v. P., 134 Ill. 401, 25 N. E. 1022; Dunn v. P., 158 Ill. 589, 42 N. E. 47; Meyer v. P., 156 Ill. 127, 40 N. E. 490; Rippetoe v. P., 172 Ill. 173, 50 N. E. 166 (robbery case); Parrish v. S., 32 Tex. Cr. 583, 25 S. W. 420; Boyd v. S., 88 Ala. 169, 7 So. 268, 16 Am. St. 31; P. v. Bracco, 69 Hun 206, 23 N. Y. Supp. 505; Isbell v. S., 93 Ga. 194, 18 S. E. 651; P. v. Smith, 106 Mich. 431, 64 N. W. 200; Johnson v. S., 7 Tex. App. 210; Thompson v. S. (Tex. Cr. Ap.), 30 S. W. 667; Tracy v. S. (Tex. Cr. Ap.), 24 S. W. 898; P. v. Spriggs, 58 Hun 603, 11 N. Y. Supp. 433; Robertson v. S. (Tex. Cr. Ap.), 29 S. W. 478; Murphey v. S., 43 Neb. 34, 61 N. W. 491; P. v. Townsend, 120 Mich. 661, 79 N. W. 901; Smith v. S., 58 Neb. 531, 78 N. W. 1059; P. v. Hannigan, 58 N. Y. Supp. 703; Malone v. S., 77 Miss. 812, 26 So. 968; P. v. Kalunki (Mich.

1900), 81 N. W. 923; P. v. Hawkins, 127 Cal. 372, 59 Pac. 697. See P. v. Tompkins, 121 Mich. 431, 80 N. W. 126; Jay v. S. (Tex. Cr. Ap. 1900), 55 S. W. 335; Estes v. S. (Tex. Cr. Ap.), 44 S. W. 838. But not sufficient in the following: White v. P., 93 Ill. 473; Garrity v. P., 70 Ill. 83; Maxwell v. S., 3 Heisk. (Tenn.) 420, 1 Green C. R. 696; Vanvactor v. S., 113 Ind. 276, 15 N. E. 341, 3 Am. St. 645; Priest v. S. (Tex. Cr. Ap.), 34 S. W. 611; Franklin v. S., 27 Tex. App. 136, 11 S. W. 35; Roberts v. S., 32 Neb. 251, 49 N. W. 361; Bawcom v. S., 27 Tex. App. 620, 11 S. W. 639; Leonard v. S., 27 Tex. App. 186, 11 S. W. 112; Wilson v. S., 34 Tex. Cr. 64, 29 S. W. 41; Berkeley v. Com., 88 Va. 1017, 14 S. E. 916; Waller v. Com., 84 Va. 492, 5 S. E. 364; Lee v. S., 34 Tex. Cr. 519, 31 S. W. 667; Hawes v. S. (Tex. Cr. Ap.), 44 S. W. 1094.

⁸⁵ Com. v. O'Brien, 107 Mass. 208. But see S. v. McClintock, 8 Iowa 203.

⁸⁶ Hull v. S., 79 Ala. 33; S. v. Smith, 32 Me. 369; Hernandez v. S., 32 Tex. Cr. 271, 22 S. W. 972.

and the evidence shows that the offense was committed without a weapon, as with the hand or fist, there is a fatal variance.⁸⁷

§ 226. **Variance—Club—Pistol.**—Under the statute for assault with a dangerous weapon, the indictment alleged the assault was made with “knives and clubs.” The proof was that the assault was made with a pistol. Held a variance.⁸⁸

§ 227. **Variance—Different person.**—An indictment for shooting at A. with intent to kill him, is not supported by evidence of shooting at B. with intent to kill him. There is a fatal variance.⁸⁹

§ 228. **Verdict.**—The information charged that the defendant, with force and arms, being armed with a dangerous weapon, made an assault with intent to kill and murder. The verdict of the jury was: “We, the jury, find the defendant guilty of an assault to do great bodily harm, but not guilty of an assault with intent to commit the crime of murder.” The verdict amounts to simple assault only, because it omits an essential element of the higher grade of crime, viz: “being armed with a dangerous weapon.”⁹⁰

⁸⁷ Walker v. S., 73 Ala. 18, citing 1 East P. C. 341; Filkins v. P., 69 N. Y. 101, 25 Am. R. 143; 1 Bish. Cr. Proc., §§ 485, 486. When not a variance: Smith v. S., 123 Ala. 64, 26 So. 641.

⁸⁸ S. v. Braxton, 47 La. 158, 16 So.

745; Herald v. S., 37 Tex. Cr. 409, 35 S. W. 670.

⁸⁹ Barcus v. S., 49 Miss. 17, 1 Am. C. R. 249.

⁹⁰ Sullivan v. S., 44 Wis. 595, 3 Am. C. R. 5, citing Carpenter v. P., 4 Scam. (Ill.) 198; P. v. Murat, 45 Cal. 281; Wilson v. P., 24 Mich. 410.

CHAPTER III.

ABDUCTION.

ART. I. Definition and Elements,	§§ 229-237
II. Matters of Defense,	§§ 238-243
III. Indictment,	§§ 244-249
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ARTICLE I. DEFINITION AND ELEMENTS.

§ 229. **Gravamen of the offense.**—The gravamen of the offense is the purpose or intent with which the enticing and abduction is done, and hence the offense, if committed at all, is complete the moment the female is removed beyond the power and control of her parents or of others having lawful charge of her, whether illicit intercourse ever takes place or not.¹

§ 230. **Committed by threats or fraud.**—The crime of abduction may be committed by threats, menaces or fraud, or by putting the woman in fear, as well as by physical force.³

§ 231. **Detaining against her will.**—The statute of Kentucky provides that whoever “detains any woman against her will with intent to have carnal knowledge with her,” shall be punished. The detention of the woman against her will and with a purpose to carnally know her,

¹ Henderson v. P., 124 Ill. 614, 17 N. E. 68; S. v. Gibson, 111 Mo. 92, 19 S. W. 980. See Bunfill v. P., 154 Ill. 647, 39 N. E. 565; P. v. Stott, 4 N. Y. Cr. R. 306; Com. v. Kaniper, 3 Pa. Co. Ct. R. 276; S. v. Richardson, 117 Mo. 586, 23 S. W. 769; S. v. Bobbst, 131 Mo. 328, 32 S. W. 1149; Underhill Cr. Ev., § 339; S. v. Johnson, 115 Mo. 480, 22 S. W. 463, 9 Am. C. R. 17; Berger v. P., 86 N. Y. 369; S. v. Bussey, 58 Kan. 679, 50 Pac. 891.
³ Moody v. P., 20 Ill. 319. See Beyer v. P., 86 N. Y. 369.

constitutes the gravamen of the offense, and it is immaterial whether persuasion or force or other means be used to accomplish the purpose.⁴

§ 232. "Taking away" female.—It must appear that the defendant took the girl away for the purpose of prostitution and concubinage before a conviction can be sustained. If the girl go of her own free will and take lodgings with the defendant, he will not be guilty.⁵

§ 233. Solicitations and inducements.—That the female was induced to leave home and meet the defendant by his solicitations and inducements, comes within the meaning of the term "take away."⁶

§ 234. Taking from parent or guardian.—The statute contemplates that there may be a legal charge of the female in one who is neither parent nor guardian, but who, under the facts of the case, stands in the place of one or the other. And it makes no difference whether he was legally appointed such guardian or not.⁷

§ 235. Prostitution.—"Prostitution, within the meaning of the law of abduction, is the act or practice of prostituting or offering the body to an indiscriminate intercourse with men for hire; common lewdness of a female."⁸ Prostitution means common indiscriminate illicit intercourse—and not with one man only.⁹

§ 236. "Conversation," meaning.—The word "conversation," as used in a statute defining the offense of abduction, means the manner of living, habit or conduct.¹⁰

⁴ Payner v. Com. (Ky.), 19 S. W. 927.

⁵ S. v. Gibson, 111 Mo. 92, 19 S. W. 980. See P. v. Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. R. 326; Malone v. Com., 91 Ky. 307, 15 S. W. 856.

⁶ S. v. Johnson, 115 Mo. 480, 22 S. W. 463, 9 Am. C. R. 15, citing Slocum v. P., 90 Ill. 274; P. v. Marshall, 59 Cal. 386; P. v. Demousset, 71 Cal. 611, 12 Pac. 788; S. v. Jamison, 38 Minn. 21, 35 N. W. 712; S. v. Stone, 106 Mo. 1, 16 S. W. 890. See Malone v. Com., 91 Ky. 307, 15 S. W. 856; S. v. Chisenhall, 106 N. C. 676, 11 S. E. 518; P. v. Seeley, 37 Hun (N. Y.) 190; P. v. Cook, 61 Cal. 478; Underhill Cr. Ev., § 339. Where the taking and detaining "against the will" of the

female, is an element of the offense, see the following cases: Payner v. Com. (Ky.), 19 S. W. 927; Higgins v. Com., 94 Ky. 54, 21 S. W. 231.

⁷ P. v. Carrier, 46 Mich. 442, 9 N. W. 487; S. v. Ruhl, 8 Iowa 447. See S. v. Angel, 42 Kan. 216, 21 Pac. 1075; S. v. Round, 82 Mo. 679.

⁸ Bunfill v. P., 154 Ill. 647, 39 N. E. 565.

⁹ Osborn v. S., 52 Ind. 526, 1 Am. C. R. 25; Miller v. S., 121 Ind. 294, 23 N. E. 94; S. v. Stoyell, 54 Me. 24; S. v. Ruhl, 8 Iowa 447; Com. v. Cook, 12 Met. 93; P. v. Demousset, 71 Cal. 611, 7 Am. C. R. 1, 12 Pac. 788; S. v. Brow, 64 N. H. 577, 15 Atl. 216.

¹⁰ Bradshaw v. P., 153 Ill. 160, 38 N. E. 652.

§ 237. **Kept mistress.**—If a single woman consents and actually commences cohabiting with a man generally, without limit as to duration of time of illicit intercourse, she becomes his concubine, or his "kept mistress."¹¹

ARTICLE II. MATTERS OF DEFENSE.

§ 238. **Belief as to age.**—It is no defense that the defendant believed the female was not within the age of statutory prohibition at the time; that he believed she was over eighteen years old, or that she told him she was over eighteen.¹²

§ 239. **Female consenting.**—The fact that the girl gave her consent to be taken away by the defendant and consented to have sexual intercourse with him, is no defense.¹³

§ 240. **Enticing for intercourse only.**—Enticing away solely for the purpose of having illicit intercourse is not an offense. Intention to reduce the female to the condition of a common prostitute or concubinage must appear.¹⁴

§ 241. **Meeting for intercourse only.**—Meeting a woman within a few rods of her home to have illicit intercourse with her, after which she returns home to her parents, is clearly not within the scope of the statute.¹⁵

¹¹ Henderson v. P., 124 Ill. 616, 17 N. E. 68, 7 Am. St. 391. See S. v. Bobbst, 131 Mo. 328, 32 S. W. 1149; S. v. Bussey, 58 Kan. 679, 50 Pac. 891; South v. S., 97 Tenn. 496, 37 S. W. 210.

¹² Reg. v. Prince, 1 Am. C. R. 1; S. v. Ruhl, 8 Iowa 447; S. v. Johnson, 115 Mo. 480, 22 S. W. 463, 9 Am. C. R. 16, citing Lawrence v. Com., 30 Gratt. 845; S. v. Newton, 44 Iowa 45; Riley v. S. (Miss.), 18 So. 117; Bish. Stat. Crimes, § 490; P. v. Dolan, 96 Cal. 315, 31 Pac. 107. See Mason v. S., 29 Tex. App. 24, 14 S. W. 71; Bradshaw v. P., 153 Ill. 156, 38 N. E. 652. *Contra*, Brown v. S., 72 Md. 468, 20 Atl. 186. See Underhill Cr. Ev., § 342.

¹³ S. v. Stone, 106 Mo. 1, 16 S. W.

890; Tucker v. S., 76 Tenn. 633; Thweatt v. S., 74 Ga. 821; S. v. Bobbst, 131 Mo. 328, 32 S. W. 1149; Scruggs v. S., 90 Tenn. 81, 15 S. W. 1074; Underhill Cr. Ev., § 340. *Contra*, Mason v. S., 29 Tex. App. 24, 14 S. W. 71.

¹⁴ Slocum v. P., 90 Ill. 274; Henderson v. P., 124 Ill. 615, 17 N. E. 68; S. v. Wilkinson, 121 Mo. 485, 26 S. W. 366; Miller v. S., 121 Ind. 294, 23 N. E. 94; Osborn v. S., 52 Ind. 526; S. v. Ruhl, 8 Iowa 447; S. v. Stoyell, 54 Me. 24, 89 Am. D. 716; Com. v. Cook, 53 Mass. 93; Carpenter v. P., 8 Barb. (N. Y.) 603; Haygood v. S., 98 Ala. 61, 13 So. 325; Underhill Cr. Ev., § 343.

¹⁵ Slocum v. P., 90 Ill. 276; S. v. Brow, 64 N. H. 577, 15 Atl. 216; S.

§ 242. **Mere sexual intercourse.**—Mere sexual intercourse between the parties is not of itself sufficient to prove that the accused intended to take the female away.¹⁶

§ 243. **Marriage is defense.**—The defendant having consummated a marriage good by the common law with the girl and made her his wife, he can not be guilty of taking her away from her mother for the purpose of concubinage, although the girl was not old enough to contract marriage under the statute, notwithstanding her parents refused consent.¹⁷

ARTICLE III. INDICTMENT.

§ 244. **Indictment defective.**—An indictment charging abduction “for the purpose of having illicit sexual intercourse” with the female, and not “for the purpose of prostitution,” as defined by statute, is defective and charges no offense.¹⁸

§ 245. **“Willfully or feloniously.”**—An indictment for abduction need not allege that the female was maliciously, willfully or feloniously taken or detained by the defendant under a statute providing that “whoever shall unlawfully take or detain any woman against her will,” etc., shall be confined in the penitentiary.¹⁹

§ 246. **Against her will.**—The indictment failing to allege all the essential elements of the crime as defined by statute, is defective, as omitting to allege the statutory words “against her will” or “detained against her will.”²⁰

v. McCrum, 38 Minn. 154, 36 N. W. 102. See Haygood v. S., 98 Ala. 61, 13 So. 325. *Contra*, see P. v. Bristol, 23 Mich. 118; P. v. Cummons, 56 Mich. 544, 23 N. W. 215.

¹⁶ S. v. Jamison, 38 Minn. 21, 35 N. W. 712. See S. v. Johnson, 115 Mo. 480, 22 S. W. 463. See also Haygood v. S., 98 Ala. 61, 13 So. 325; S. v. Gibson, 111 Mo. 92, 19 S. W. 980.

¹⁷ S. v. Bittick, 103 Mo. 183, 15 S. W. 325. As to inducing a girl fourteen years old to leave her parents, and marrying her without their

consent, see Cochran v. S., 91 Ga. 763, 18 S. E. 16.

¹⁸ Osborn v. S., 52 Ind. 526, 1 Am. C. R. 26; S. v. Stoyell, 54 Me. 24; S. v. Overstreet, 43 Kan. 299, 23 Pac. 572. See Miller v. S., 121 Ind. 294, 23 N. E. 94; S. v. Ruhl, 8 Iowa 447; Com. v. Cook, 12 Metc. (Mass.) 93.

¹⁹ Higgins v. Com., 94 Ky. 54, 21 S. W. 231.

²⁰ Wilder v. Com., 81 Ky. 591; Krambiel v. Com., 8 Ky. L. 605, 2 S. W. 555; Jones v. S., 34 Tenn. 466. See S. v. O'Bannon, 1 Bailey (S. C.) 144.

§ 247. **Duplicity.**—Charging in an information that the female was taken away by the defendant for the purpose of prostitution and concubinage is bad for duplicity. Concubinage is a distinct offense from prostitution.²¹

§ 248. **Joining kidnapping with abduction.**—Counts of kidnapping may be joined with counts of abduction in the same indictment, the offense being of the same nature.²²

§ 249. **Statutory words sufficient.**—Under a statute providing that whoever “takes a female under the age of sixteen years for the purpose of having sexual intercourse” with her, an indictment setting out that the defendant “did unlawfully, willfully and feloniously take” a certain girl, naming her, into a certain house, “for the purpose of sexual intercourse with him, she, the said girl, being then and there an unmarried female under the age of sixteen years, to wit: the age of ten years,” is sufficient.²³

ARTICLE IV. EVIDENCE; WITNESSES.

§ 250. **Chaste life presumed.**—The presumption of law is, the previous life and conversation of the female were chaste, and the *onus* is upon the defendant to show otherwise. The prosecution is not required to offer evidence in the first instance on the subject of chastity.²⁴

§ 251. **“Chaste life and conversation.”**—There is no practical difference in the meaning of the statutory words, “a chaste life and conversation,” and “a chaste life and previous character.”²⁵

²¹ S. v. Goodwin, 33 Kan. 538, 6 Pac. 899, 5 Am. C. R. 4. See S. v. Terrill, 76 Iowa 149, 40 N. W. 128. *Contra*, P. v. Parshall, 6 Park. C. R. (N. Y.) 129.

²² Mason v. S., 29 Tex. App. 24, 14 S. W. 71.

²³ S. v. Keith, 47 Minn. 559, 50 N. W. 691. Indictment held sufficient: Nichols v. S., 127 Ind. 406, 26 N. E. 839; P. v. Fowler, 88 Cal. 136,

25. Pac. 1110; S. v. Overstreet, 43 Kan. 299, 23 Pac. 572.

²⁴ Bradshaw v. P., 153 Ill. 159, 38 N. E. 652; Slocum v. P., 90 Ill. 274; P. v. Brewer, 27 Mich. 138; Andre v. S., 5 Iowa 389; S. v. Higdon, 32 Iowa 264; P. v. McArdle, 5 Park. C. R. (N. Y.) 180. *Contra*, Com. v. Whittaker, 131 Mass. 224; Underhill Cr. Ev., § 341.

²⁵ Bradshaw v. P., 153 Ill. 160, 38 N. E. 652.

§ 252. **Previous illicit relations.**—It is competent to prove previous illicit relations and also the subsequent conduct of the parties as tending to show the intent of the defendant in what he did.²⁶

§ 253. **Reputation of house.**—The general reputation of the house to which the female was taken by the accused, is competent as tending to show his intention.²⁷

§ 254. **Unchastity—Specific acts.**—Evidence of specific acts of unchastity of the woman with other men is incompetent, and is no defense, under the statute, on a charge of detaining a woman with intent to carnally know her.²⁸

§ 255. **Accomplice.**—Where the evidence tended to show that the defendant had an accomplice in abducting a female, it is competent to show that the accomplice suggested that they all sleep together.²⁹

§ 256. **Lewd women—Defense.**—The defendant is entitled to show in evidence that he met the woman whom he is charged with abducting on a public fair ground, where there were lewd women plying their trade, and that he was informed that she was a lewd woman.³⁰

§ 257. **Female unchaste.**—The female must possess actual personal virtue and chaste life and conversation, as distinguished from good reputation, and this must be averred; and evidence of bad reputation of the female may be shown. It is competent to show that she was an inmate of a bawdy house.³¹ Unchastity of the female can not be shown as a defense under the California statute, that element not being mentioned in the statute.³²

²⁶ *P. v. Carrier*, 46 Mich. 442, 9 N. W. 487. See *S. v. Johnson*, 115 Mo. 480, 22 S. W. 463; *S. v. Overstreet*, 43 Kan. 299, 23 Pac. 572; *S. v. Gibson*, 108 Mo. 575, 18 S. W. 1109.

²⁷ *S. v. Chisenhall*, 106 N. C. 676, 11 S. E. 518.

²⁸ *Cargill v. Com.*, 93 Ky. 578, 20 S. W. 782.

²⁹ *P. v. Brown*, 24 N. Y. Supp. 1111, 71 Hun 601.

³⁰ *Beaven v. Com.*, 17 Ky. L. 246, 30 S. W. 968.

³¹ *Slocum v. P.*, 90 Ill. 274; *Lyons v. S.*, 52 Ind. 426, 1 Am. C. R. 28; *Com. v. Whittaker*, 131 Mass. 224,

3 Cr. L. Mag. 748; *Carpenter v. P.*, 8 Barb. (N. Y.) 603; *Scruggs v. S.*, 90 Tenn. 81, 15 S. W. 1074; *Brown v. S.*, 72 Md. 468, 20 Atl. 186; *Jenkins v. S.*, 83 Tenn. 674. *Contra*, *S. v. Johnson*, 115 Mo. 481, 22 S. W. 463, citing *P. v. Demousset*, 71 Cal. 611, 12 Pac. 788; *P. v. Carrier*, 46 Mich. 442, 9 N. W. 487. *Contra*, *S. v. Bobbst*, 131 Mo. 328, 32 S. W. 1149, 10 Am. C. R. 7.

³² *P. v. Demousset*, 71 Cal. 611, 12 Pac. 788, 7 Am. C. R. 1. See also *S. v. Bobbst*, 131 Mo. 328, 32 S. W. 1149; *Underhill Cr. Ev.*, § 341; *Scruggs v. S.*, 90 Tenn. 81, 15 S. W. 1074.

§ 258. **Evidence of unchastity.**—The defendant offered to prove acts of illicit intercourse on the part of the prosecuting witness prior to the alleged abduction; but the court rejected the evidence. Held error. A single act of illicit connection is competent on the question of previous chaste character.³³

§ 259. **Unchastity after abduction.**—On a charge of abducting an unmarried female of previous chaste character, evidence of her unchastity with other men after the abduction is not competent.³⁴

§ 260. **Unchastity of relative.**—Evidence that the girl's mother and sister were lewd women and had given birth to illegitimate children, is not competent.³⁵

§ 261. **Correspondence.**—Letters written between the parties are competent as showing the relation existing between them prior to the alleged abduction.³⁶ Letters written by the defendant, although not received by the female, are competent as showing his motive in paying attention to her.³⁷

§ 262. **Corroborating female's testimony.**—Under a statute forbidding a conviction upon the uncorroborated testimony of the female alleged to have been abducted, her testimony must be corroborated upon every material element necessary to constitute the crime charged.³⁸

§ 263. **Evidence sufficient.**—The facts are given in detail in each of the following cases and held sufficient to sustain a conviction.³⁹

³³ Lyons v. S., 52 Ind. 426, 1 Am. C. R. 28, citing Bish. Stat. Crimes, § 639; Carpenter v. P., 8 Barb. 603; Kenyon v. P., 26 N. Y. 203; S. v. Shean, 32 Iowa 88. See Beaven v. Com., 17 Ky. L. 246, 30 S. W. 968; South v. S., 97 Tenn. 496, 37 S. W. 210.

³⁴ Scruggs v. S., 90 Tenn. 81, 15 S. W. 1074.

³⁵ Scruggs v. S., 90 Tenn. 81, 15 S. W. 1074; Brown v. S., 72 Md. 468, 20 Atl. 186.

³⁶ South v. S., 97 Tenn. 496, 37 S. W. 210.

³⁷ S. v. Overstreet, 43 Kan. 299, 23 Pac. 572.

³⁸ S. v. Keith, 47 Minn. 559, 50 N. W. 691; P. v. Plath, 100 N. Y. 590, 3 N. E. 790, 53 Am. R. 236. See P. v. Brandt, 14 N. Y. St. 419.

³⁹ Schnicker v. P., 88 N. Y. 192; P. v. Cummons, 56 Mich. 544, 23 N. W. 215; P. v. Bristol, 23 Mich. 118; S. v. Overstreet, 43 Kan. 299, 23 Pac. 572; Ex parte Estrado, 88 Cal. 316, 26 Pac. 209; S. v. Chisenhall, 106 N. C. 676, 11 S. E. 518. See also P. v. Wah Lee Mon, 13 N. Y. Supp. 767; Mason v. S., 29 Tex. App. 24, 14 S. W. 71 (not sufficient).

§ 264. **Witness, female competent.**—On the trial of an indictment for forcible abduction and marriage of a woman, she may be a witness for the state, for she is not legally his wife, the contract of marriage with her having been obtained by force, and hence having no binding obligation in law.⁴⁰ If the woman was taken away against her will and afterward married and defiled, and though possibly the marriage or defilement might be by her subsequent consent, yet this is a felony; and the woman thus taken away and married may be sworn and give evidence against the offender, though he is her husband *de facto*.⁴¹

§ 265. **Proving female's age.**—The female alleged to be under the age of consent, is a competent witness to testify to her age, though her knowledge is based solely on information from her parents.⁴²

⁴⁰ S. v. Gordon, 46 N. J. L. 432, 4 Am. C. R. 4, citing 1 Hale P. C. 301; 2 Hawk. P. C., ch. 46, § 78; Wakefield's Case, 2 Lewin C. C. 279; Bish-Stat. Crimes, § 623.

⁴¹ 4 Bl. Com. 209; 1 East P. C. 454; 1 Hale P. C. 301, 661.

⁴² Com. v. Stevenson, 142 Mass. 466, 8 N. E. 341; Cherry v. S., 68 Ala. 29; Mason v. S., 29 Tex. App. 24, 14 S. W. 71; Bain v. S., 61 Ala. 75.

CHAPTER IV.

KIDNAPPING.

ART. I. Definition and Elements,	§§ 266-268
II. Matters of Defense,	§§ 269-274
III. Indictment; Evidence,	§§ 275-278
IV. False Imprisonment,	§§ 279-284

ARTICLE I. DEFINITION AND ELEMENTS.

§ 266. **Definition.**—"The statute defines kidnapping to be the forcible abduction or stealing away of a man, woman or child from his or her own country, and sending or taking him or her into another."¹

§ 267. **Force not essential—Threats.**—While the letter of the statute requires the employment of force to complete this offense, it must be admitted by all that physical force and violence are not necessary to its completion. The crime may be committed by threats and menaces or by fraudulent representations.²

§ 268. **Against will essential.**—Under the statute of Texas defining kidnapping, the detention of the person alleged to be kidnapped, must be against his or her consent, though under the age of fifteen years.³

ARTICLE II. MATTERS OF DEFENSE.

§ 269. **Parent taking child.**—The statute defining the offense of kidnapping any child can have no application to a father who, as a re-

¹Moody v. P., 20 Ill. 318; 4 Bl. Com. 219.

²Castillo v. S., 29 Tex. App. 127, 14 S. W. 1011.

³Moody v. P., 20 Ill. 318; P. v. DeLeon, 109 N. Y. 226, 16 N. E. 46.

sult of a quarrel with his wife, took his child away from the possession of its mother.⁴ Where a child of tender years which had been awarded to the care and custody of its mother in a divorce proceeding, was taken out of the state with its consent, as well as that of its mother, it was held not to be kidnapping, though taken for the purpose of preventing it attending a criminal trial in which it had been subpoenaed as a witness.⁵

§ 270. **Child's consent immaterial.**—A child of tender years will not be regarded as competent to give consent to be taken away, and the offense may be committed though such child gives its consent.⁶

§ 271. **Persuasion is not inveigling.**—To persuade a person to go out of the state on the promise of compensation, when the person making such promise knows that such compensation can not be had, is not to "inveigle" or kidnap such person within the meaning of the statute defining kidnapping.⁷

§ 272. **Marrying minor, defense.**—The statute of Georgia provides that any person who shall "forcibly, maliciously or fraudulently carry away any child under the age of eighteen years" from the parents of such child without their consent, shall be guilty of kidnapping. The taking away of a girl as young as fourteen years from her parents without their consent, for the purpose of marrying her, with her consent, is not kidnapping, where, under the law, one as young as she may lawfully contract marriage without the consent of her parents.⁸

§ 273. **Taking "out of county" essential.**—To constitute the offense under the statute, it must appear that the defendant took or designed to take the person he is charged with kidnapping "out of the state or county"; merely taking the person against his will to some other place in the county is not sufficient.⁹

§ 274. **Person adjudged insane.**—After procuring a person in good faith to be adjudged insane, conveying him publicly to an insane

⁴ Burns v. Com., 129 Pa. St. 138, 18 Atl. 756; Hunt v. Hunt, 94 Ga. 257, 21 S. E. 515. See *In re Marceau*, 15 N. Y. Cr. 92, 65 N. Y. Supp. 717.
⁵ John v. S., 6 Wyo. 203, 44 Pac. 51.

⁶ S. v. Farrar, 41 N. H. 53; Gravett v. S., 74 Ga. 191.

⁷ P. v. Fitzpatrick, 10 N. Y. Supp. 629.

⁸ Cochran v. S., 91 Ga. 763, 18 S. E. 16.

⁹ Ex parte Miller (Cal.), 24 Pac. 743.

asylum without using force, is not kidnapping, though it afterward appears that such person was not insane.¹⁰

ARTICLE III. INDICTMENT; EVIDENCE.

§ 275. Taking child from parents.—Under a statute defining kidnapping of a child as the taking away any child from its “parents or guardian,” an indictment is sufficient which charges with proper averments that the child was taken away without the consent of its parents, without reference to the guardian.¹¹

§ 276. Duplicity—Joining counts.—The offense may be charged in different ways in different counts in the same indictment; as, where the statute defines the offense to be that, “whoever kidnaps or forcibly or fraudulently carries off, or decoys from his place of residence, or imprisons or arrests any person with the intention of having such person carried away from his place of residence,” shall be deemed guilty of kidnapping, the indictment may charge a “forcible carrying away” in one count, and in another count that the person alleged to have been kidnapped was “fraudulently decoyed” from her place of residence.¹² And under the same statute the taking of a girl away from her home for four or five days and having sexual intercourse with her and then, at her request, taking her home again, does not constitute kidnapping in the absence of any fraud having been practiced upon the girl.¹³

§ 277. Exception to be negatived.—Under a statute providing: “Whoever kidnaps or forcibly or fraudulently carries off or decoys from his place of residence, or arrests or imprisons any person with the intention of having such person carried away from his place of residence, unless it be in pursuance of the laws of the state or of the United States, is guilty of kidnapping,” an indictment failing to aver that the person alleged to have been kidnapped was not taken in pursuance of the laws of the state and United States, is fatally defective.^{13a} And if the indictment fails to allege “with the intention of having

¹⁰ *P. v. Camp*, 139 N. Y. 87, 34 N. E. 755, 66 Hun 531, 21 N. Y. Supp. 741.

¹¹ *Pruitt v. S.*, 102 Ga. 688, 29 S. E. 437.

¹² *Boes v. S.*, 125 Ind. 205, 25 N. E. 218.

¹³ *Eberling v. S.*, 136 Ind. 117, 35 N. E. 1023.

^{13a} *S. v. Kimmerling*, 124 Ind. 382, 24 N. E. 722.

such person carried away from his place of residence," it will be fatally defective.¹⁴ The word "residence" in the above statute means any place where the person alleged to be kidnapped has a right to be.¹⁵

§ 278. **Motive in making arrest.**—It is proper to show in evidence that the defendant, a constable, who arrested a woman, instead of taking her before a justice of the peace, took her to a house of ill-fame, as tending to prove motive in making the arrest.¹⁶

ARTICLE IV. FALSE IMPRISONMENT.

§ 279. **False imprisonment defined.**—False imprisonment is the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority.¹⁷

§ 280. **Arrest without cause.**—If a person for his own private purposes, acting in bad faith, and without probable cause, procures the arrest of another with criminal process, he is guilty of false imprisonment.¹⁸

§ 281. **False imprisonment—Unlawful arrest.**—If criminal prosecution be instituted for the purpose of coercing another to pay a debt or the surrender of some right claimed, and not for the interest of public justice, or to vindicate the law, and was falsely commenced, the fact that the prosecutor procured the advice of counsel will not shield him from the consequences of his wrongful act, done, not in good faith, upon such advice, but with the sinister motive of personal gain.¹⁹

§ 282. **False imprisonment—By threats.**—False imprisonment may be committed without actually making an arrest; as by putting a person in fear by threats of personal violence and thereby preventing him from moving beyond the bounds in which he is detained or from

¹⁴ S. v. Sutton, 116 Ind. 527, 19 N. E. 602. See Com. v. Myers, 146 Pa. St. 24, 23 Atl. 164.

¹⁵ Wallace v. S., 147 Ind. 621, 47 N. E. 13.

¹⁶ P. v. Fick, 89 Cal. 144, 26 Pac. 759.

¹⁷ Slomer v. P., 25 Ill. 61; Win-

ship v. P., 51 Ill. 298; Brewster v. P., 183 Ill. 146.

¹⁸ Slomer v. P., 25 Ill. 61; 4 Bl. Com. 218; Com. v. Nickerson, 5 Allen (Mass.) 518; Vanderpool v. S., 34 Ark. 174.

¹⁹ Neufeld v. Rodeminski, 144 Ill. 88, 32 N. E. 913.

going where he wishes without reasonable apprehension of danger to his person.²⁰

§ 283. **Parents imprisoning child.**—The fact that a blind helpless child may be covered with vermin, can afford his parents no excuse for wantonly imprisoning him in a cold, damp cellar without fire in mid-winter. Such cruel treatment of a child by its parents constitutes false imprisonment.²¹

§ 284. **False imprisonment—Indictment.**—An indictment which charges that the defendant, with force and arms, did make an assault upon a person named, then and there unlawfully and injuriously and against the will of such person, and without any legal warrant, authority or reasonable or justifiable cause, did then and there imprison and detain such person for the space of one hour next following the unlawful arrest of such person, sufficiently states the offense of false imprisonment at common law.²²

²⁰ Meyer v. S. (Tex. Cr. Ap.), 49 S. W. 600.

²² Davies v. S., 72 Wis. 54, 38 N. W. 722.

²¹ Fletcher v. P., 52 Ill. 396.

CHAPTER V.

RAPE.

ART. I.	Definition and Elements,	§§ 285-297
II.	Matters of Defense,	§§ 298-306
III.	Indictment,	§§ 307-323
IV.	Evidence, Variance,	§§ 324-360

ARTICLE I. DEFINITION AND ELEMENTS.

§ 285. **Definition—Elements.**—Rape is the carnal knowledge of a woman by force and against her will.¹ Penetration of the female, in the sense of having sexual intercourse, is essential to constitute rape, but the least degree of penetration, however slight, is sufficient; emission is not necessary.² But such penetration may be proved by circumstantial evidence.³

§ 286. **Asleep, connection when.**—If a man gets in bed with a woman while she is asleep and he knows she is asleep, and he has connection with her or attempts to do so while in that state, he is guilty of rape in the one case and the attempt in the other.⁴

¹ 4 Bl. Com. 210; 1 East P. C. 434; Sutton v. P., 145 Ill. 279, 34 N. E. 420; Garrison v. S., 6 Neb. 274; 3 Greenl. Ev., § 209; Underhill Cr. Ev., § 407.

² Barker v. S., 40 Fla. 178, 24 So. 69; P. v. Crowley, 102 N. Y. 234, 6 N. E. 384; Hardtke v. S., 67 Wis. 552, 30 N. W. 723; White v. Com., 96 Ky. 180, 28 S. W. 340; Comstock v. S., 14 Neb. 205, 15 N. W. 355; Bean v. P., 124 Ill. 576, 583, 16 N. E. 656; Brown

v. S., 76 Ga. 623; S. v. Grubb, 55 Kan. 678, 41 Pac. 951; P. v. Courier, 79 Mich. 366, 44 N. W. 571; Davis v. S., 43 Tex. 189; S. v. Hargrave, 65 N. C. 466.

³ S. v. Carnagy, 106 Iowa 483, 76 N. W. 805; Wood v. S., 12 Tex. App. 174; Underhill Cr. Ev., § 416.

⁴ Reg. v. Mayers, 12 Cox C. C. 311, 1 Green C. R. 319, and note; Payne v. S., 40 Tex. Cr. App. 202, 49 S. W. 604.

§ 287. **Drugging woman.**—To stupefy a woman to insensibility by the use of drugs and while she is in that condition have sexual intercourse with her is rape.⁵

§ 288. **Accomplished by fear or fraud.**—If the offense was committed when the woman yielded her consent by fear or duress, or where a physician falsely pretended that the act done was necessary in a case of medical treatment, it is rape.⁶

§ 289. **Connection with idiot.**—If the girl was in such a state of idiocy as to be incapable of expressing either consent or dissent, and the prisoner had connection with her, he is guilty of rape.⁷

§ 290. **Consent immaterial—Female's age.**—Under the statutory definition of rape, "by carnally and unlawfully knowing any female under the age of eighteen years," it is not material whether the female gave her consent or not.⁸ Under the statute of Elizabeth a girl under ten years was conclusively presumed to be incapable of consent, and it was rape to have carnal knowledge of her with or without her consent.⁹ The statute having declared that a female child under the age of ten years is incapable of consenting to the act of carnal connection, consequently, any carnal connection with a child under that age, is necessarily against her consent and forcible.¹⁰

⁵ *Moody v. P.*, 20 Ill. 319; 3 Greenl. Ev., § 211.

⁶ *Hawkins P. C.*, ch. 41; *S. v. Cunningham*, 100 Mo. 382, 12 S. W. 376, 8 Am. C. R. 675; *Moody v. P.*, 20 Ill. 319; *Queen v. Flattery*, 2 Q. B. D. 410, 3 Am. C. R. 454; *Sowers v. Ter.*, 6 Okla. 436, 50 Pac. 257; *Com. v. Burke*, 105 Mass. 377; *Doyle v. S.*, 39 Fla. 155, 22 So. 272; *Pomeroy v. S.*, 94 Ind. 96; *S. v. Nash*, 109 N. C. 824, 13 S. E. 874; *Hooper v. S.*, 106 Ala. 41, 17 So. 679; *Rice v. S.*, 35 Fla. 236, 17 So. 286; *Reg. v. Woodhurst*, 12 Cox C. C. 443, 1 Green C. R. 313; 1 *Bish. Cr. L.* (8th ed.), § 261; *Underhill Cr. Ev.*, § 417.

⁷ *Reg. v. Barratt*, 12 Cox C. C. 498, 1 Green C. R. 314; *S. v. Hann*, 73 Minn. 140, 76 N. W. 33; *S. v. Ruth*, 21 Kan. 583; *Felton v. S.*, 139 Ind. 531, 39 N. E. 228; *S. v. Shields*, 45 Conn. 256; *S. v. Cunningham*, 100 Mo. 382, 12 S. W. 376; *S. v. Enright*, 90 Iowa 520, 58 N. W. 901; *S. v. Ernest*, 150 Mo. 347, 51 S. W. 688

(infant); *Jones v. S.*, 106 Ga. 365, 34 S. E. 174 (infant); *S. v. Williams*, 149 Mo. 496, 51 S. W. 88.

⁸ *S. v. Frazier*, 54 Kan. 719, 39 Pac. 819; *Head v. S.*, 43 Neb. 30, 61 N. W. 494; *P. v. Verdegreen*, 106 Cal. 211, 39 Pac. 607; *P. v. Smith* (Mich. 1899), 81 N. W. 107; *Buchanan v. S.* (Tex. Cr. App. 1899), 52 S. W. 769; *P. v. Roach*, 129 Cal. 33, 61 Pac. 574.

⁹ *Coates v. S.*, 50 Ark. 330, 7 S. W. 304, 7 Am. C. R. 587; *Com. v. Murphy*, 165 Mass. 66, 42 N. E. 504, 10 Am. C. R. 67; *Gosha v. S.*, 56 Ga. 36, 2 Am. C. R. 590; *Oliver v. S.*, 45 N. J. L. 46, 4 Am. C. R. 533; *S. v. Sullivan*, 68 Vt. 540, 35 Atl. 479; *S. v. Dancy*, 83 N. C. 608; *White v. Com.*, 96 Ky. 180, 28 S. W. 340; *S. v. Tilman*, 30 La. 1249; *Crosswell v. P.*, 13 Mich. 427; 3 Greenl. Ev., § 211; 1 *Hale P. C.* 631; *Underhill Cr. Ev.*, § 407.

¹⁰ *S. v. Erickson*, 45 Wis. 86, 3 Am. C. R. 340; *S. v. Smith*, 9 Houst. (Del.) 588, 33 Atl. 441; *S. v. Wray*,

§ 291. **Aiding, assisting.**—The husband compelled his wife to submit to an attempted sexual intercourse with a colored man; that he threatened them both in case of refusal. He held a loaded gun over them in support of such threat. Held that the husband was guilty of an assault with intent to commit rape.¹¹

§ 292. **Assault with intent, included.**—An assault with intent to commit rape is included in a count charging rape, the same as manslaughter is included in a count charging murder.¹² Assault with intent to commit rape as defined by statute includes every ingredient of the crime of rape except actual penetration of the female by the defendant.¹³

§ 293. **Assault, overt act essential.**—An assault with intent to commit rape is not complete unless it appears that the defendant did some overt act equivalent to an assault on the female with such intent.¹⁴

§ 294. **Assault with intent.**—The prosecutrix, a white woman, was going home alone through the woods. She soon discovered that she was pursued by the accused, a negro, who called out three times to her to stop, and she saw him running after her about seventy yards away. She then began to run "as hard as she could." The accused was approaching her until the road emerged from the woods into a lane in sight of her home. The accused then ceased to pursue her and fled

109 Mo. 594, 19 S. W. 86; Crosswell v. P., 13 Mich. 429, 432; P. v. Miller, 96 Mich. 119, 55 N. W. 675; Head v. S., 43 Neb. 30, 61 N. W. 494; P. v. Goulette, 82 Mich. 36, 45 N. W. 1124; Exon v. S. (Tex. Cr. App.), 33 S. W. 336; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504; 3 Greenl. Ev., § 211; Underhill Cr. Ev., § 407.

¹¹ S. v. Dowell, 106 N. C. 722, 11 S. E. 525; S. v. Hairston, 121 N. C. 579, 28 S. E. 492; P. v. Chapman, 62 Mich. 280, 28 N. W. 896; Caruth v. S. (Tex. Cr. App.), 28 S. W. 532; 2 Bish. Cr. L. (8th ed.), § 1135.

¹² Prinderville v. P., 42 Ill. 219; S. v. Mueller, 85 Wis. 203, 55 N. W. 165; Com. v. Cooper, 15 Mass. 187; Polson v. S., 137 Ind. 519, 35 N. E. 907; S. v. Austin, 109 Iowa 118, 80 N. W.

303 (attempt); S. v. Shepard, 7 Conn. 54; S. v. Frazier, 53 Kan. 87, 36 Pac. 58; Pratt v. S., 51 Ark. 167, 10 S. W. 233; P. v. Abbott, 97 Mich. 484, 56 N. W. 862; Com. v. Dean, 109 Mass. 349, 1 Green C. R. 196; S. v. Peters, 56 Iowa 263, 9 N. W. 219; S. v. Bagan, 41 Minn. 285, 43 N. W. 5; P. v. Courier, 79 Mich. 366, 44 N. W. 571. But see S. v. Hearsey, 50 La. 373, 23 So. 372.

¹³ S. v. Smith, 9 Houst. (Del.) 588, 33 Atl. 441.

¹⁴ Gaskin v. S., 105 Ga. 631, 31 S. E. 740; S. v. Sherman, 106 Iowa 684, 77 N. W. 461. See Moon v. S. (Tex. Cr. App.), 45 S. W. 806; Hanes v. S., 155 Ind. 112, 57 N. E. 704; P. v. Vann, 129 Cal. 118, 61 Pac. 776.

into the woods. Held sufficient to constitute an assault with intent to commit rape, though he had not actually seized the woman.¹⁵

§ 295. Attempt—Instruction.—On a charge of assault with intent to commit rape, an instruction directing the jury to convict if they believe him guilty of an “attempt,” as charged in the indictment, is error.¹⁶

§ 296. Indecent liberties with child.—The offense of taking “indecent liberties with the person of a female child” may be committed without taking such liberties of her private parts.¹⁷

§ 297. Statute valid—As to age.—The legislature in the proper exercise of its power may pass a law making it rape to carnally know any female child under the age of eighteen.¹⁸

ARTICLE II. MATTERS OF DEFENSE.

§ 298. Previous intercourse, no defense.—The fact that the defendant may have had sexual intercourse with a female under the age of consent, previous to the act charged in the indictment, is incompetent and no defense.¹⁹

§ 299. Unchastity of female.—The unchastity of the female alleged to have been ravished, is no defense to a charge of rape. The crime may be committed upon an unchaste woman as well as one of chaste character.²⁰

§ 300. Marriage no defense.—It is no defense to a charge of rape that the defendant has since married the female and that she has forgiven him.²¹

¹⁵ *S. v. Neely*, 74 N. C. 425; *Goldin v. S.*, 104 Ga. 549, 30 S. E. 749; *S. v. Rawles*, 65 N. C. 334; *S. v. Davis*, 1 Ired. (N. C.) 125. See *S. v. Carnagy*, 106 Iowa 483, 76 N. W. 805. But see *S. v. Jeffreys*, 117 N. C. 743, 23 S. E. 175.

¹⁶ *Preisker v. P.*, 47 Ill. 383.

¹⁷ *P. v. Hicks*, 98 Mich. 86, 56 N. W. 1102. See *P. v. Sheffield*, 105 Mich. 117, 63 N. W. 65.

¹⁸ *S. v. Phelps*, 22 Wash. 181, 60 Pac. 134.

¹⁹ *P. v. Harris*, 103 Mich. 473, 61 N. W. 871.

²⁰ *P. v. Hartman*, 103 Cal. 242, 37 Pac. 153; *Pratt v. S.*, 19 Ohio St. 277; *McQuirk v. S.*, 84 Ala. 435, 4 So. 775. But see *Underhill Cr. Ev.*, § 418, citing *O'Brien v. S.*, 47 N. J. L. 279; *P. v. Johnson*, 106 Cal. 289, 39 Pac. 622; *S. v. Hollenbeck*, 67 Vt. 34, 30 Atl. 696; *Brown v. S.*, 72 Miss. 997, 17 So. 278; *S. v. Eberline*, 47 Kan. 155, 27 Pac. 839; *S. v. Brown*, 55 Kan. 766, 42 Pac. 363.

²¹ *S. v. Newcomer*, 59 Kan. 668, 54 Pac. 685.

§ 301. **Woman weak-minded.**—Having sexual intercourse with a woman who is so weak-minded that she is incapable of giving consent, is rape under the statute, and the fact that the defendant did not know of the mental condition of the woman is no defense.²²

§ 302. **Belief as to age.**—That the defendant believed or was told the girl was over the age of consent, is no defense.²³

§ 303. **Soliciting no offense.**—Merely trying to persuade the female to yield to his embraces, is not sufficient to sustain the charge against the accused. It must appear that he intended to overcome any resistance of the female by force, and compel her to submit.²⁴ The defendant not having employed any force to overcome the slight resistance offered, but simply fondled with the woman and dallied with her person, and in the absence of threats to do her bodily harm, or other circumstance of duress, held not sufficient to prove an intent to force the female.²⁵ It must appear from the evidence that the accused made an unlawful assault upon the woman, with intent feloniously and forcibly to ravish and carnally know her against her will. Taking hold of the woman merely to persuade her will not constitute the assault. Intent is of the essence of the offense.²⁶

§ 304. **Want of consent essential.**—Want of consent on the part of the female is of the essence of the crime of rape, and must be proved by the prosecution beyond a reasonable doubt before there can be a legal conviction.²⁷ If the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had been theretofore employed, it is not rape.²⁸ Although the defend-

²² *P. v. Griffin*, 117 Cal. 583, 49 Pac. 711; *Caruth v. S.* (Tex. Cr. App.), 25 S. W. 778; *Underhill Cr. Ev.*, § 407.

²³ *S. v. Baskett*, 111 Mo. 271, 19 S. W. 1097; *Edens v. S.* (Tex. Cr. App.), 43 S. W. 89; *S. v. Newton*, 44 Iowa 45; *S. v. Sherman*, 106 Iowa 684, 77 N. W. 461; *P. v. Ratz*, 115 Cal. 132, 46 Pac. 915.

²⁴ *Stevens v. P.*, 158 Ill. 117, 41 N. E. 856; *McNair v. S.*, 53 Ala. 453; *Toulet v. S.*, 100 Ala. 72, 14 So. 403; *Riley v. Com.* (Ky. 1900), 55 S. W. 547; *S. v. Harney*, 101 Mo. 470, 14 S. W. 657; *S. v. Kendall*, 73 Iowa 255, 34 N. W. 843; *Com. v. Merrill*, 14 Gray (Mass.) 415; *Tiller v. S.*, 101 Ga. 782, 29 S. E. 424; *Reynolds v. P.*, 41 How. Pr. (N. Y.) 179.

²⁵ *White v. S.*, 136 Ind. 308, 36 N. E. 274; *S. v. Hagerman*, 47 Iowa 151; *Moore v. S.*, 79 Wis. 546, 48 N. W. 653; *Joice v. S.*, 53 Ga. 50.

²⁶ *Barr v. P.*, 113 Ill. 472; *S. v. McCune*, 16 Utah 170, 51 Pac. 818; *Hunter v. S.*, 29 Fla. 486, 10 So. 730; *Peterson v. S.*, 14 Tex. App. 162; *S. v. Williams*, 121 N. C. 628, 28 S. E. 405.

²⁷ *Sutton v. P.*, 145 Ill. 287, 34 N. E. 420; *Reynolds v. S.*, 27 Neb. 90, 42 N. W. 903; *Whittaker v. S.*, 50 Wis. 518, 7 N. W. 431; *Ter. v. Potter*, 1 Ariz. 421, 25 Pac. 529.

²⁸ *Whittaker v. S.*, 50 Wis. 518, 7 N. W. 431; *Connors v. S.*, 47 Wis.

ant may have used such force as would ordinarily overcome the resistance of the female, yet if she finally consents to his embraces and submits to having sexual intercourse without any physical or mental resistance, there is no offense committed.²⁹

§ 305. **Infant unable—Age.**—Under the common law an infant under the age of fourteen is unable to commit the crime of rape. But if it appears that an infant between the age of seven and fourteen has mind to distinguish good and evil, he may be convicted.³⁰ An infant under fourteen years of age is presumed in law to be unable to commit rape, and, therefore, can not be guilty of that crime. But the presumption is merely *prima facie*, and may be rebutted by proof.³¹

§ 306. **Assault—Female consents.**—On a charge of an assault with intent to commit rape, a conviction can not be had if the female consented, even though she was under the age of consent, where the defendant would have been guilty of rape had he accomplished the act intended.³²

ARTICLE III. INDICTMENT.

§ 307. **Force must be alleged.**—“Rape is the carnal knowledge of a female forcibly and against her will.” Force is an element of the crime, and the act must be alleged to have been done “forcibly.”³³

523, 2 N. W. 1143. See *Sutton v. P.*, 145 Ill. 286, 34 N. E. 420; *Mathews v. S.*, 101 Ga. 547, 29 S. E. 424; *Hollis v. S.*, 27 Fla. 387, 9 So. 67; *Mills v. U. S.*, 164 U. S. 644, 17 S. Ct. 210; *Reynolds v. S.*, 27 Neb. 90, 42 N. W. 903.

²⁹ *Mathews v. S.*, 101 Ga. 547, 29 S. E. 424; *Taylor v. S.*, 110 Ga. 150, 35 S. E. 161.

³⁰ *Heilman v. Com.*, 84 Ky. 457, 1 S. W. 731; *Williams v. S.*, 20 Fla. 777, 5 Am. C. R. 614; *Gordon v. S.*, 93 Ga. 531, 21 S. E. 54; *King v. Groombridge*, 7 C. & P. 582; *McKinny v. S.*, 29 Fla. 565, 10 So. 732; 1 Hale P. C. 629; 4 Bl. Com. 212; *Hiltabiddle v. S.*, 35 Ohio St. 52; *Chism v. S. (Fla.)*, 28 So. 399; 3 Greenl. Ev., § 215; *Underhill Cr. Ev.*, § 408.

³¹ *Bird v. S.*, 110 Ga. 315, 35 S. E. 156; *Gordon v. S.*, 93 Ga. 531, 21 S. E. 54, 9 Am. C. R. 445; *S. v. Jones*,

39 La. 935, 3 So. 57; *Williams v. S.*, 20 Fla. 777, 5 Am. C. R. 614; *Davidson v. Com.*, 20 Ky. L. 540, 47 S. W. 213; *S. v. Coleman*, 54 S. C. 162, 31 S. E. 866; *Foster v. Com.*, 96 Va. 306, 31 S. W. 503; 1 McClain Cr. L., § 449; *Williams v. S.*, 14 Ohio 222 (assault); *P. v. Randolph*, 2 Parker Cr. R. (N. Y.) 213 (assault); *Underhill Cr. Ev.*, § 408.

³² *Hardin v. S.*, 39 Tex. Cr. 406, 46 S. W. 803; *Welch v. S. (Tex. Cr. App.)*, 46 S. W. 812. See *Morgan v. S. (Tex. Cr. App.)*, 50 S. W. 718. *Contra*, *P. v. Lourintz*, 114 Cal. 628, 46 Pac. 613; *S. v. Hunter*, 18 Wash. 670, 52 Pac. 247; *Allen v. S.*, 36 Tex. Cr. 381, 37 S. W. 429; *Callison v. S.*, 37 Tex. Cr. 211, 39 S. W. 300; *S. v. Sullivan*, 68 Vt. 540, 35 Atl. 479; *Croomes v. S.*, 40 Tex. Cr. 672, 51 S. W. 924; *Porter v. P.*, 158 Ill. 372, 41 N. E. 886. See *Hanes v. S.*, 155 Ind. 112, 57 N. E. 704.

³³ *Porter v. P.*, 158 Ill. 372, 41 N.

§ 308. **Force not essential.**—Where the statute provides that persons sixteen years of age or over who shall have carnal knowledge of any female person under the age of fourteen years, either with or without her consent, shall be guilty of rape, force is not essential to be alleged in the indictment.³⁴ The indictment, in alleging that the female was of tender years and under the age of consent, is sufficient without alleging “with force and against her will.”³⁵

§ 309. **“Against will,” when immaterial.**—Under the statutory definition of rape by having carnal knowledge of a female under the age of sixteen years, it is not necessary to allege or prove that the act was committed “against her will,” or by force.³⁶ But if the female alleged to have been ravished is over the age of consent, then the indictment must, with other essential averments, allege that the act was committed “against her will,” this being an essential element of the offense as defined by statute.³⁷

§ 310. **Age of accused—Defense.**—It has never been held that in charging the crime of rape as defined at common law, it was necessary to aver that the accused was at the time of the age of fourteen years or upward.³⁸ Under a statute providing that a person “over sixteen years old who carnally knows a female under fourteen years old, with or without her consent,” shall be guilty of rape, the indictment need not allege that the defendant was over the age of sixteen; for if the defendant is not over the age of sixteen, it is a matter of defense.³⁹

§ 311. **Averting age of female.**—An indictment charging the defendant with having carnal knowledge of a female “under the age of puberty, to wit: of the age of fourteen years,” sufficiently charges

E. 886; *McNair v. S.*, 53 Ala. 453, 2 Am. C. R. 583; *Com. v. McDonald*, 110 Mass. 405; *Hall v. S.*, 40 Neb. 320, 58 N. W. 929.

³⁴ *Porter v. P.*, 158 Ill. 372, 41 N. E. 886.

³⁵ *S. v. Black*, 63 Me. 210; *Farrell v. S.*, 54 N. J. L. 416, 24 Atl. 723; *Com. v. Sullivan*, 6 Gray (Mass.) 477; *S. v. Miller*, 111 Mo. 542, 20 S. W. 243; *Holton v. S.*, 28 Fla. 303, 9 So. 716; *P. v. Rangod*, 112 Cal. 669, 44 Pac. 1071; *Porter v. P.*, 158 Ill. 370, 41 N. E. 886. *Contra*, *Jones v. S.* (Tex. Cr. App.), 46 S. W. 813.

³⁶ *P. v. Shoonmaker*, 117 Mich. 190, 75 N. W. 439; *Myers v. S.*, 54 Neb. 297, 74 N. W. 605; *S. v. Bowser*, 21 Mont. 133, 53 Pac. 179 (force).

³⁷ *S. v. Austin*, 109 Iowa 118, 80 N. W. 303.

³⁸ *P. v. Ah Yek*, 29 Cal. 575; *Sutton v. P.*, 145 Ill. 285, 34 N. E. 420; *Cornelius v. S.*, 13 Tex. App. 349; *Com. v. Sugland*, 4 Gray (Mass.) 7.

³⁹ *S. v. Sullivan*, 68 Vt. 540, 35 Atl. 479; *P. v. Wessel*, 98 Cal. 352, 33 Pac. 216; *Davis v. S.*, 42 Tex. 226; *S. v. Ward*, 35 Minn. 182, 28 N. W. 192.

the offense of having carnal knowledge of a female under the age of sixteen years.⁴⁰

§ 312. **Marriage immaterial.**—Under a statute which provides that “whoever shall ravish a woman, married or maid or other, where she did not consent, either before or after, and likewise where a man ravisheth a woman with force, although she consents after, he shall be deemed guilty of rape,” it is not necessary to allege in the indictment whether the woman was married or to state her age.⁴¹

§ 313. **Not wife of defendant.**—An indictment for abusing and having carnal knowledge of a female child need not allege that the child is not the wife of the defendant even though it appears from the indictment that she bears the same name as that of the defendant.⁴² Nor need the indictment allege that the woman assaulted was not the wife of the defendant.⁴³ But under a statute defining rape to be “the carnal knowledge of a female under the age of fifteen years, other than the wife of the person,” an indictment which fails to negative the fact that the female was the wife of the defendant, is fatally defective.⁴⁴ But if the female is over the age of fifteen, the indictment need not allege that she was not the wife of the defendant.⁴⁵

§ 314. **“Ravish” not essential.**—The word “ravish” is not essential in charging the offense of rape where it is not used in the statutory description of the crime.⁴⁶

§ 315. **“Feloniously” immaterial.**—It is not necessary under the statute to allege in the indictment in charging the crime of rape on a girl under the age of fourteen years that the defendant committed the act “feloniously” or “unlawfully,” these words not being mentioned in the statutory definition.⁴⁷

⁴⁰ *Inman v. S.*, 65 Ark. 508, 47 S. W. 558; *King v. S.*, 120 Ala. 329, 25 So. 178; *S. v. Erickson* (Minn.), 83 N. W. 512.

⁴¹ *S. v. Haddon*, 49 S. C. 308, 27 S. E. 194.

⁴² *S. v. Halbert*, 14 Wash. 306, 44 Pac. 538.

⁴³ *S. v. White*, 44 Kan. 514, 25 Pac. 33; *Com. v. Scannel*, 11 Cush. (Mass.) 547.

⁴⁴ *Rice v. S.*, 37 Tex. Cr. 36, 38 S.

W. 801; *Dudley v. S.*, 37 Tex. Cr. 543, 40 S. W. 269; *Young v. Ter.*, 8 Okla. 525, 58 Pac. 724. See *P. v. Flaherty*, 29 N. Y. Supp. 641, 79 Hun 48; *Parker v. Ter.*, 9 Okla. 109, 59 Pac. 9.

⁴⁵ *Caidenas v. S.* (Tex. Cr. App.), 40 S. W. 980.

⁴⁶ *Wilkey v. Com.*, 20 Ky. L. 578, 47 S. W. 219; *Tway v. S.*, 7 Wyo. 74, 50 Pac. 188. See *S. v. Phelps*, 22 Wash. 181, 60 Pac. 134.

⁴⁷ *Asher v. Ter.*, 7 Okla. 188, 54:

§ 316. "Female" immaterial.—An indictment failed to allege the person ravished was a female, but the name is of a female, and in the indictment she is spoken of and referred to by the use of the feminine pronoun. The indictment was held sufficient on a motion in arrest.⁴⁸

§ 317. By personating husband.—An indictment charging the defendant with attempting to commit rape on a married woman by fraud in personating her husband, need not state the name of the husband of the woman; nor need the facts constituting the fraud be stated.⁴⁹

§ 318. Duplicity—Rape; assault with intent.—An indictment charging that the defendant did unlawfully and carnally know and abuse a female child under the age of sixteen, and also that he made an assault with intent to commit rape, is not bad for duplicity.⁵⁰

§ 319. Indictment—Joining several defendants.—Several persons may be indicted jointly for the same charge of rape where they aid and abet each other in the commission of the offense.⁵¹

§ 320. Attempt, act essential.—An indictment charging that the defendant assaulted a girl (naming her) under the age of ten years, with intent to carnally know her, is defective under a statute, which reads as follows: "Any person who has carnal knowledge of any female under ten years of age, or abuses such female, in the attempt to have carnal knowledge of her, must, on conviction, be punished by death or imprisonment in the penitentiary for life." The indictment fails to allege any physical act toward the commission of the crime.⁵²

Pac. 445; *S. v. Hutchinson*, 95 Iowa 566, 64 N. W. 610; *Barnard v. S.*, 88 Wis. 656, 60 N. W. 1058; *S. v. Langford*, 45 La. 1177, 14 So. 181. *Contra*, *Hays v. S.*, 57 Miss. 783; *S. v. Porter*, 48 La. 1539, 21 So. 125.

⁴⁸ *S. v. Fielding*, 32 Me. 585; *Barker v. S.*, 40 Fla. 178, 24 So. 69; *S. v. Hussey*, 7 Iowa 409; *O'Rourke v. S.*, 8 Tex. App. 70; *Taylor v. Com.*, 20 Gratt. (Va.) 825; *S. v. Ward*, 35 Minn. 182, 28 N. W. 192; *S. v. Warner*, 74 Mo. 83; *Anderson v. S.*, 34 Ark. 257.

⁴⁹ *Franklin v. S.*, 34 Tex. Cr. 203, 29 S. W. 1088; *P. v. Snyder*, 75 Cal.

323, 17 Pac. 208 (fraud). But see *S. v. Vorey*, 41 Minn. 135, 43 N. W. 324.

⁵⁰ *Com. v. Hackett*, 170 Mass. 194, 48 N. E. 1087; *S. v. Elswood*, 15 Wash. 453, 46 Pac. 727; *De Berry v. S.*, 99 Tenn. 207, 42 S. W. 31; *Ox-sheer v. S.*, 38 Tex. Cr. 499, 43 S. W. 335; *Buchanan v. S.* (Tex. Cr. App. 1899), 52 S. W. 769.

⁵¹ *S. v. Harris*, 150 Mo. 56, 51 S. W. 481.

⁵² *Toulet v. S.*, 100 Ala. 72, 14 So. 403; *S. v. Frazier*, 53 Kan. 87, 36 Pac. 58.

§ 321. **Simple assault included.**—An indictment, though defective as to the charge of assault with intent to commit rape, may be sufficient for simple assault.⁵³

§ 322. **"Assault and battery"—When essential.**—Where an assault and battery is made an element of the offense of assault and battery with intent to commit rape, an indictment charging the offense must allege the battery, otherwise it will be defective.⁵⁴

§ 323. **Indictment sufficient.**—An indictment charging rape alleging, with proper averments, the time and place, that the defendant in and upon a certain female (naming her), about the age of fourteen years, unlawfully, violently and feloniously did make an assault on her, and then and there unlawfully, forcibly and against her will, feloniously did ravish and carnally know her, is sufficient.⁵⁵

ARTICLE IV. EVIDENCE; VARIANCE.

§ 324. **Female's complaint.**—Where the complaining witness has complained to her father about having been ravished, such complaint is proper evidence on the trial, only of the fact of making the complaint, and not of who the person was that committed the offense.⁵⁶

⁵³ Com. v. McCarty, 165 Mass. 37, 42 N. E. 336.

⁵⁴ Wilson v. S., 103 Tenn. 87, 52 S. W. 869.

⁵⁵ S. v. Harris, 150 Mo. 56, 51 S. W. 481.

⁵⁶ Bean v. P., 124 Ill. 582, 16 N. E. 656; Stevens v. P., 158 Ill. 121, 41 N. E. 856; Lowe v. S., 97 Ga. 792, 25 S. E. 676; Harmon v. Ter., 5 Okla. 368, 49 Pac. 55; Benstine v. S., 2 Lea (Tenn.) 169, 3 Am. C. R. 390; S. v. Niles, 47 Vt. 82, 1 Am. C. R. 648; S. v. Baker, 106 Iowa 99, 76 N. W. 509; S. v. Hunter, 18 Wash. 670, 52 Pac. 247; P. v. Lambert, 120 Cal. 170, 52 Pac. 307; Reddick v. S., 35 Tex. Cr. 463, 34 S. W. 274; S. v. Clark, 69 Iowa 294, 28 N. W. 606; Barnett v. S., 83 Ala. 40, 3 So. 612; S. v. Ivins, 36 N. J. L. 233; Maillet v. P., 42 Mich. 262, 3 N. W. 854, 3 Am. C. R. 380; Polson v. S., 137 Ind. 519, 35 N. E. 907; S. v. Yocum, 117

Mo. 622, 23 S. W. 765. *Contra*, Brown v. P., 36 Mich. 203, 2 Am. C. R. 587; S. v. Cook, 92 Iowa 483, 61 N. W. 185; Burt v. S., 23 Ohio St. 394, 2 Green C. R. 545; Reg. v. Lillyman, L. R. (1896) 2 Q. B. D. 167; S. v. Neel, 21 Utah 157, 60 Pac. 510. If the complaint of the prosecutrix is so closely connected with the time or place, when or where the offense was committed, then all the details of what she said on making such complaint, may be shown in evidence as forming part of the *res gestae*: S. v. Jerome, 82 Iowa 749, 48 N. W. 722; S. v. Fitzsimon, 18 R. I. 236, 27 Atl. 446; S. v. Byrne, 47 Conn. 465; Castillo v. S., 31 Tex. Cr. 145, 19 S. W. 892; P. v. Glover, 71 Mich. 303, 38 N. W. 874; Barner v. S., 88 Ala. 204, 7 So. 38. *Contra*, as to person committing the assault, see cases under § 325.

§ 325. **Female's complaint, particulars improper.**—Evidence that the female assaulted made complaint is competent for the purpose of proving the assault and identifying the person who assaulted her, but the details of what she said at the time of complaining is incompetent.⁵⁷ If the defendant desires to inquire into the particulars of the complaint made by the female, he can do so on cross-examination, and the particulars may be proven by the prosecution by way of confirming the witness after she has been impeached.⁵⁸

§ 326. **Complaint of female—Res gestae.**—Evidence of the complaint of the female alleged to have been ravished is competent, not as part of the *res gestae* or for the purpose of disproving consent, but as tending to corroborate her testimony.⁵⁹

§ 327. **Complaint of female—Pain.**—Where a child, in making complaint of a criminal assault upon her, gave expressions of pain, it is competent to prove on what part of her person she indicated the pain.⁶⁰

§ 328. **Complaint of female next day.**—On a charge of abusing and ravishing a female under sixteen years of age, it is competent to show on the trial that she complained to her mother the next day, although she was taken home crying and frightened the evening before, when the assault occurred.⁶¹

§ 329. **Complaint—Mother's examination.**—The mother of the child alleged to have been ravished may state as a witness that the

⁵⁷ *S. v. Carroll*, 67 Vt. 477, 32 Atl. 235; *Ter. v. Maldonado*, 9 N. M. 629, 58 Pac. 350. See *Harmon v. Ter.*, 9 Okla. 313, 60 Pac. 115; *Williams v. S.*, 66 Ark. 264, 50 S. W. 517.

⁵⁸ *Stevens v. P.*, 158 Ill. 121, 41 N. E. 856; *Wood v. S.*, 46 Neb. 58, 64 N. W. 355; *S. v. Niles*, 47 Vt. 82; *S. v. Jones*, 61 Mo. 232; *Baccio v. P.*, 41 N. Y. 265; 3 Greenl. Ev., § 213; *Parker v. S.*, 67 Md. 329, 10 Atl. 219; *Griffin v. S.*, 76 Ala. 29; *S. v. Clark*, 69 Iowa 294, 28 N. W. 606; *S. v. Patrick*, 107 Mo. 147, 163, 17 S. W. 666; *S. v. Freeman*, 100 N. C. 429, 5 S. E. 921; *Underhill Cr. Ev.*, § 410, citing *Castillo v. S.*, 31 Tex. Cr. 145, 151, 19 S. W. 892; *Proper v. S.*, 85 Wis. 615, 55 N. W. 1035; *S. v. Kenney*, 44 Conn. 153; *S. v. Langford*, 45 La. 1177, 14 So. 181.

⁵⁹ *Com. v. Cleary*, 172 Mass. 175, 51 N. E. 746; *Caudle v. S.*, 34 Tex. Cr. App. 26, 28 S. W. 810; *S. v. Cook* (Iowa), 61 N. W. 185. See *P. v. Barney*, 114 Cal. 554, 47 Pac. 41; *S. v. Brown*, 125 N. C. 606, 34 S. E. 105; *S. v. Imlay* (Utah), 61 Pac. 557. *Contra*, *Snowden v. U. S.*, 2 App. D. C. 89; *S. v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446.

⁶⁰ *S. v. Hutchison*, 95 Iowa 566, 64 N. W. 610.

⁶¹ *Com. v. Cleary*, 172 Mass. 175, 51 N. E. 746; *Robertson v. S.* (Tex. Cr. App.), 49 S. W. 398; *P. v. Bernor*, 115 Mich. 692, 74 N. W. 184; *S. v. Sudduth*, 52 S. C. 488, 30 S. E. 408. See *S. v. Peterson*, 110 Iowa 647, 82 N. W. 329; *Underhill Cr. Ev.*, § 409.

child made complaint to her of the assault as soon as she returned home, and that she examined the child, and may also give in evidence the result of such examination as to the condition of the child.⁶²

§ 330. Complaint of female—Delay.—Through shame or fear the girl may conceal or even deny that the act was committed on her. Her after conduct may be of little or no importance, considering her age, intelligence and experience.⁶³

§ 331. Complaint of female incompetent.—If the female alleged to have been assaulted does not testify as a witness, then any complaint she may have made after the assault is not competent, whether she is an imbecile or not.⁶⁴

§ 332. Complaint of female, too remote.—Where the girl alleged to have been ravished remains silent about it for five months before telling any one, giving as a reason that she was afraid of the defendant and that he told her if she told it would be worse for her, such complaint is incompetent to be given in evidence; it is too remote.⁶⁵ Where the evidence on a charge of rape fails to show that the female made any outcry or complaint very soon after the assault alleged to have been made upon her, and without any reasonable excuse for the delay to make complaint when she had opportunity to do so, a conviction should not be had.⁶⁶

§ 333. No complaint or outcry.—That the female made no outcry, that her husband was at the time within a few rods of the place of the alleged rape, and that she and her husband remained for an hour and

⁶² P. v. Baldwin, 117 Cal. 244, 49 Pac. 186; Pefferling v. S., 40 Tex. 486; S. v. Sargent, 32 Or. 110, 49 Pac. 889; S. v. Sanford, 124 Mo. 484, 27 S. W. 1099; Polson v. S., 137 Ind. 519, 35 N. E. 907; Hornbeck v. S., 35 Ohio St. 277; Proper v. S., 85 Wis. 615, 55 N. W. 1035.
⁶³ Sutton v. P., 145 Ill. 288, 34 N. E. 420; Polson v. S., 137 Ind. 519, 35 N. E. 907 (mother absent); S. v. Cross, 12 Iowa 66; S. v. Marshall, Phil. 49. See Crockett v. S., 49 Ga. 185; Bennett v. S., 102 Ga. 656, 29 S. E. 918; Jackson v. S., 91 Wis. 253, 64 N. W. 838; P. v. Lambert, 120 Cal. 170, 52 Pac. 307; S. v. Wilkins, 66

Vt. 1, 10, 28 Atl. 323; Thompson v. S., 33 Tex. Cr. 472, 26 S. W. 987; Bueno v. P., 1 Colo. App. 232, 28 Pac. 248; Underhill Cr. Ev., § 411; P. v. Glover, 71 Mich. 303, 38 N. W. 874 (afraid of whipping).

⁶⁴ S. v. Meyers, 46 Neb. 152, 64 N. W. 697; S. v. Mitchell, 68 Iowa 116, 26 N. W. 44; Proctor v. Com., 14 Ky. L. 248, 20 S. W. 213. *Contra*, Johnson v. S., 17 Ohio 593.

⁶⁵ P. v. Duncan, 104 Mich. 460, 62 N. W. 556.

⁶⁶ P. v. O'Sullivan, 104 N. Y. 481, 10 N. E. 880; Thompson v. S., 33 Tex. Cr. 472, 26 S. W. 987; S. v. Patrick, 107 Mo. 147, 17 S. W. 666.

a half with the defendant, in a friendly manner, are circumstances raising a strong presumption that the crime was not committed.⁶⁷

§ 334. Complaint of attempt.—The rule with respect to the admissibility of the complaint of the prosecutrix must be held to be the same where the charge is an attempt to ravish, as it is when the crime of rape itself is charged.⁶⁸

§ 335. Complaint—Excuse for delay.—When the prosecuting witness offers an excuse for the delay in making complaint against the defendant for assaulting her, she may be cross-examined on the matter of such excuse.⁶⁹

§ 336. Resistance essential.—Where the prosecutrix was conscious and had possession of her natural, mental and physical powers, and was not terrified by threats, or in such a position that resistance would be useless, it must appear that she resisted to the extent of her ability.⁷⁰ The nature and extent of resistance by the female, which ought reasonably to be expected in each particular case, must necessarily depend very much upon the peculiar circumstances attending it, and it is hence quite impracticable to lay down any rule upon that subject as applicable to all cases involving the necessity of showing a reasonable resistance.⁷¹ Even if the view be taken that evidence of want of consent alone is sufficient, yet it must appear that there was resistance, unless some excuse for want of resistance is shown.⁷²

§ 337. Impeaching chastity.—It is a general rule that the character of the prosecutrix for chastity may be impeached; but this must be

⁶⁷ *Barney v. P.*, 22 Ill. 160; *Sutton v. P.*, 145 Ill. 279, 34 N. E. 420; *S. v. Patrick*, 107 Mo. 147, 17 S. W. 666.

⁶⁸ *S. v. Ivins*, 36 N. J. L. 233, 2 Green C. R. 592; *P. v. Barney*, 114 Cal. 554, 47 Pac. 41; *Brazier's Case*, 1 East P. C. 443.

⁶⁹ *P. v. Knight (Cal.)*, 43 Pac. 6.

⁷⁰ *Oleson v. S.*, 11 Neb. 276, 9 N. W. 38; *P. v. Abbott*, 19 Wend. (N. Y.) 194; *Taylor v. S.*, 50 Ga. 79; *S. v. Burgdorf*, 53 Mo. 65, 2 Green C. R. 594; *Whittaker v. S.*, 50 Wis. 518, 7 N. W. 431; *Moran v. P.*, 25 Mich. 356; *Huber v. S.*, 126 Ind. 185, 25

N. E. 904; *O'Boyle v. S.*, 100 Wis. 296, 75 N. W. 989; *P. v. Dohring*, 59 N. Y. 374; *P. v. Morrison*, 1 Park. Cr. R. (N. Y.) 625; *Whitney v. S.*, 35 Ind. 506. But see *S. v. Sudduth*, 52 S. C. 488, 30 S. E. 408.

⁷¹ *Anderson v. S.*, 104 Ind. 467, 4 N. E. 63, 5 N. E. 711, 5 Am. C. R. 607; *P. v. Connor*, 126 N. Y. 278, 27 N. E. 252; *Com. v. McDonald*, 110 Mass. 405; *P. v. Lynch*, 29 Mich. 274; *Hawkins v. S.*, 136 Ind. 630, 36 N. E. 419; 2 Bish. Cr. Law., § 1122; *Underhill Cr. Ev.*, §§ 407, 417.

⁷² *Austine v. P.*, 110 Ill. 248.

done by general reputation in that respect, and not by particular acts.⁷³ A chaste woman is one who never had unlawful sexual intercourse with a male person prior to the intercourse complained of in the indictment.⁷⁴ As a defense to a charge of rape, the defendant offered to prove that the prosecutrix was in the habit of receiving men at her rooms for sexual intercourse, and the offer was properly rejected.⁷⁵

§ 338. Former unchastity incompetent.—Evidence of former unchastity of the female alleged to have been ravished is incompetent, and it is improper to ask her on cross-examination if she had ever had sexual intercourse with other men.⁷⁶

§ 339. Previous acts.—Prior acts of undue intimacy between the defendant and the female are competent as furnishing a predicate for a presumption of consent on the occasion of the alleged consent.⁷⁷ Other acts of sexual intercourse with a female under the age of consent, besides that charged in the indictment, may be shown in evidence, as tending to show the probability of the guilt of the defendant, and as tending to corroborate the testimony of the prosecuting witness.⁷⁸

§ 340. Other voluntary acts.—The prosecutrix on cross-examination may be asked if at certain specified times and places before the time of the commission of the alleged offense she had voluntarily had

⁷³ Maxey v. S., 66 Ark. 523, 52 S. W. 2; Shirwin v. P., 69 Ill. 59; Ter. v. Pino, 9 N. M. 598, 58 Pac. 393; S. v. Brown, 55 Kan. 766, 42 Pac. 363; S. v. Fitzsimon, 18 R. I. 236, 27 Atl. 446, 9 Am. C. R. 347; McCombs v. S., 8 Ohio St. 643; S. v. Knapp, 45 N. H. 148. See S. v. Daniel, 87 N. C. 507; Benstine v. S., 2 Lea (Tenn.) 169; S. v. Campbell, 20 Nev. 122, 17 Pac. 620; Shields v. S., 32 Tex. Cr. 498, 23 S. W. 893; O'Blenis v. S., 47 N. J. L. 279; Anderson v. S., 104 Ind. 467, 4 N. E. 63, 5 N. E. 711; P. v. Jackson, 3 Parker Cr. R. (N. Y.) 391; Rice v. S., 35 Fla. 236, 48 Am. St. 245, 17 So. 286; S. v. Ward, 73 Iowa 532, 35 N. W. 617; P. v. Abbot, 19 Wend. (N. Y.) 192; S. v. Hilberg (Utah), 61 Pac. 215; 3 Greenl. Ev., §§ 27, 214; Gillett Indirect & Col. Ev., § 298.

⁷⁴ Bailey v. S., 57 Neb. 706, 78 N. W. 234.

⁷⁵ Wood v. P., 1 T. & C. (N. Y.) 610, 1 Green C. R. 659; P. v. Jackson, 3 Park. C. R. (N. Y.) 391. See Ter. v. Pino, 9 N. M. 598, 58 Pac. 393.

⁷⁶ Rice v. S., 35 Fla. 236, 17 So. 286; P. v. Johnson, 106 Cal. 289, 39 Pac. 622; Brown v. S., 72 Miss. 997, 17 So. 278. *Contra*, S. v. Hollenbeck, 67 Vt. 34, 30 Atl. 696; P. v. Shea, 125 Cal. 151, 57 Pac. 885.

⁷⁷ Barnes v. S., 88 Ala. 207, 7 So. 38; P. v. Goulette, 82 Mich. 36, 45 N. W. 1124; S. v. Cook, 65 Iowa 560, 22 N. W. 675; Underhill Cr. Ev., § 415, citing P. v. Manahan, 32 Cal. 68; S. v. Robinson, 32 Or. 43, 48 Pac. 357; P. v. Abbott, 97 Mich. 484, 56 N. W. 862; S. v. Patrick, 107 Mo. 147, 17 S. W. 666; S. v. Knapp, 45 N. H. 148, 156.

⁷⁸ Hamilton v. S., 36 Tex. Cr. 372, 37 S. W. 431; P. v. Grauer, 42 N. Y. Supp. 721.

connection with the prisoner, and if she deny it, she may be contradicted by evidence.⁷⁹

§ 341. Acts with other men.—On cross-examination the complaining witness was asked if she ever had sexual intercourse with others previous to the charge against the accused, and she answered in the negative. A witness for the defendant was introduced and asked to prove acts of indecency and illicit intercourse by the complaining witness with persons other than the defendant. Held error in the court rejecting this offered evidence.⁸⁰

§ 342. Impeaching prosecutrix.—The prosecuting witness, the daughter of the defendant, may be asked on cross-examination whether she had not stated that she and her brother and sister were putting up a job on their father for the purpose of sending him to prison, so that the prosecuting witness could live with her sister. This was proper as laying the foundation for impeachment.⁸¹ The accused, in his rebutting evidence, introduced a witness who, on cross-examination, stated that on the night the assault was made and immediately after it occurred, he saw the prosecuting witness, and that she then stated that it was Jillson's hired man who made the assault, and that he wore a white hat at the time. To this answer the prosecution objected, and the evidence was excluded. Held error.⁸²

§ 343. Female's exclamations competent.—Evidence of any exclamations or conduct of the female alleged to have been ravished, may be shown as tending to prove that she was sick and lame.⁸³

§ 344. Female's condition—Lame.—Where a witness for the prosecution testified that the female alleged to have been ravished walked

⁷⁹ *Rex v. Riley*, 16 Cox. C. C. 191, 7 Am. C. R. 99; *Bedgood v. S.*, 115 Ind. 275, 17 N. E. 621; *P. v. Flaherty*, 79 Hun (N. Y.) 48, 29 N. Y. Supp. 641; *S. v. Cook*, 65 Iowa 560, 22 N. W. 675; *P. v. Knight* (Cal.), 43 Pac. 6. *Contra*, *Underhill Cr. Ev.*, § 418, citing *S. v. Cassidy*, 85 Iowa 145, 52 N. W. 1; *S. v. Brown*, 55 Kan. 766, 42 Pac. 363; *Com. v. Harris*, 131 Mass. 336; *S. v. Fitzsimon*, 18 R. I. 236, 22

Atl. 446; *S. v. Campbell*, 20 Nev. 122, 17 Pac. 620.

⁸⁰ *Benstine v. S.*, 2 Lea (Tenn.) 169, 3 Am. C. R. 387. See *Reg. v. Holmes*, 12 Cox C. C. 137; *Shirwin v. P.*, 69 Ill. 55, 1 Am. C. R. 650.

⁸¹ *P. v. Lambert*, 120 Cal. 170, 52 Pac. 307.

⁸² *Kennedy v. P.*, 44 Ill. 285.

⁸³ *Dunn v. S.*, 58 Neb. 807, 79 N. W. 719.

lame, it may be shown by way of contradiction that she walked as usual, and did not appear to be lame.⁸⁴

§ 345. Venereal disease—When competent.—If it appears upon examination of the female that she has a venereal disease, then it is competent to show that the defendant had similar disease about the time of his arrest.⁸⁵ The fact that the female alleged to have been ravished had contracted a venereal disease several years before, by having promiscuous sexual intercourse, is incompetent and no defense to a charge of rape.⁸⁶

§ 346. Other acts of rape.—The defendant was indicted for a rape on his own daughter. On the trial of the indictment the prosecution was permitted to prove that at another time, about two weeks after, he committed a like offense on his other daughter, the court restricting this evidence as going to the credibility of the accused. Held error.⁸⁷ The prosecuting witness having testified to one occasion when the defendant assaulted her, to permit evidence of another distinct assault committed on her and another girl, by the defendant, some days after, is incompetent and prejudicial.⁸⁸

§ 347. Settlement offered.—That the female alleged to have been ravished desired to settle with the defendant from the beginning, is a fact competent to be given in evidence.⁸⁹ If the accused send a person to the prosecution to see if the case can be compromised, it is competent to prove that fact.⁹⁰

⁸⁴ *Hardtke v. S.*, 67 Wis. 552, 30 N. W. 723, 7 Am. C. R. 581. The physical condition of the female alleged to have been ravished, may always be given in evidence, such as bruises and marks on her person, the condition of her clothing and the like: *S. v. Sanford*, 124 Mo. 484, 27 S. W. 1099; *Gonzales v. S.*, 32 Tex. Cr. 611, 620, 25 S. W. 781; *Polson v. P.*, 137 Ind. 519, 35 N. E. 907.

⁸⁵ *P. v. Glover*, 71 Mich. 303, 38 N. W. 874.

⁸⁶ *Brown v. S.*, 72 Miss. 997, 17 So. 278.

⁸⁷ *Janzen v. P.*, 159 Ill. 441, 42 N. E. 862, 10 Am. C. R. 489; *S. v. La page*, 57 N. H. 245, 2 Am. C. R. 574; *P. v. Sharp*, 107 N. Y. 427, 14 N. E.

319; *S. v. Thompson*, 14 Wash. 285, 44 Pac. 533; *S. v. Stevens*, 56 Kan. 720, 44 Pac. 992.

⁸⁸ *Parkinson v. P.*, 135 Ill. 404, 25 N. E. 764; *P. v. Clark*, 33 Mich. 112, 1 Am. C. R. 661; *Porath v. S.*, 90 Wis. 527, 63 N. W. 1061; *S. v. Walters*, 45 Iowa 389; *Thompson v. S.*, 43 Tex. 583; *Com. v. Merrill*, 14 Gray (Mass.) 415; *P. v. Flaherty*, 162 N. Y. 532, 57 N. E. 73, 50 N. Y. Supp. 574. *Contra*, *P. v. Flaherty*, 50 N. Y. Supp. 574.

⁸⁹ *Huff v. S.*, 106 Ga. 432; 32 S. E. 348.

⁹⁰ *Barr v. P.*, 113 Ill. 473; *McMath v. S.*, 55 Ga. 303; *Hardtke v. S.*, 67 Wis. 552, 30 N. W. 723.

§ 348. **Leading questions.**—In a prosecution for rape the witnesses who gave the only testimony tending to prove the charge were two little girls, nine and eleven years old; and the court permitted, over objection, a series of leading questions to be put and answered, relating to the most material parts of the accusation. Held error.⁹¹

§ 349. **Proof of child's age.**—The testimony of the child alleged to have been criminally assaulted as to her age, is competent, and the jury may take into consideration the appearance of the child in determining her age.⁹²

§ 350. **Age material.**—An allegation in the information that the subject of the ravishment was under ten years of age, calling for a severer punishment than if over that age, was a material and substantive part of the crime, and must, therefore, be proved in order to convict the defendant.⁹³

§ 351. **Cruelty of defendant.**—In a prosecution for rape the complaining witness may show in evidence that the accused is her father and a man of great strength, and had been abusive to his family, and often beat his wife, and that at the time of the outrage he was in liquor and she was in great fear.⁹⁴

§ 352. **Result of examination competent.**—The details of the result of a physical examination, by a competent physician, of the female upon whom the crime of rape is alleged to have been committed, may be given in evidence; he may give his opinion whether there had been actual penetration or whether sexual intercourse was possible or not.⁹⁵ The medical expert witness may give an opinion based upon a hypothetical question stating material facts proved, or assumed to be proved, or he may base his opinion as to the causes of the physical condition of the prosecutrix upon the evidence of another physician who, having examined her, describes her condition as he observed it.⁹⁶

⁹¹ Coon v. P., 99 Ill. 369.

⁹² Com. v. Phillips, 162 Mass. 504, 39 N. E. 109.

⁹³ S. v. Erickson, 45 Wis. 86, 3 Am. C. R. 341; Greer v. S., 50 Ind. 267; Mobley v. S., 46 Miss. 501-508; Bish. Stat. Crimes, § 487.

⁹⁴ Maillet v. P., 42 Mich. 262, 3 N.

W. 854, 3 Am. C. R. 379; P. v. Burwell, 106 Mich. 27, 63 N. W. 986.

⁹⁵ Woodin v. P., 1 Park. C. R. (N. Y.) 464; Polson v. S., 137 Ind. 519, 35 N. E. 907; Hardtke v. S., 67 Wis. 552, 30 N. W. 723; Myers v. S., 84 Ala. 11, 4 So. 291.

⁹⁶ Underhill Cr. Ev., § 412, citing

§ 353. **Physician's examination.**—The result of the examination of a physician about four years after the offense charged, is incompetent where the female, in the meantime, had sexual intercourse with others than the defendant.⁹⁷ The opinion of a physician who examined the female alleged to have been ravished, that no girl would have voluntarily submitted to the suffering attending the result of his examination, is incompetent.⁹⁸

§ 354. **Child's condition—Cause.**—Where the condition of the child alleged to have been ravished was shown in evidence as tending to prove the guilt of the defendant, he may show by a physician that the child's condition might have been caused by disease or other means than rape.⁹⁹

§ 355. **No pain, or bleeding.**—The prosecuting witness, a girl thirteen years old, having testified that the act of sexual intercourse with her by the defendant caused no pain nor soreness nor bleeding, that she had never had sexual intercourse before, the defendant may show that sexual intercourse with a girl so young would naturally be followed by pain, soreness and bleeding.¹⁰⁰

§ 356. **Prosecutrix's evidence sufficient.**—The uncorroborated evidence of the prosecutrix alone will warrant a conviction if it convinces the jury beyond a reasonable doubt that the accused is guilty as charged (unless, by statute, corroboration of her evidence is required).¹ But a conviction should not be had on such uncorroborated testimony if the female be impeached for chastity.²

S. v. Watson, 81 Iowa 380, 46 N. W. 868.

⁹⁷ P. v. Cornelius, 55 N. Y. Supp. 723.

⁹⁸ S. v. Hull, 45 W. Va. 767, 32 S. E. 240.

⁹⁹ P. v. Baldwin, 117 Cal. 244, 49 Pac. 186.

¹⁰⁰ P. v. Duncan, 104 Mich. 460, 62 N. W. 556.

¹ S. v. Wilcox, 111 Mo. 569, 20 S. W. 314; Doyle v. S., 39 Fla. 155, 22 So. 272; Shirwin v. P., 69 Ill. 55; Lynn v. Com., 11 Ky. L. 772, 13 S. W. 74; Hammond v. S., 39 Neb. 252, 58 N. W. 92. See P. v. Evans, 72 Mich. 367, 40 N. W. 473.

² S. v. Anderson (Idaho 1899), 59

Pac. 180; S. v. Harris, 150 Mo. 56, 51 S. W. 481. The evidence in the following cases was held sufficient to sustain convictions: Baer v. S. (Neb. 1900), 81 N. W. 856; Sawyer v. S., 39 Tex. Cr. 557, 47 S. W. 650; Payne v. S., 40 Tex. Cr. 202, 49 S. W. 604; Bartlett v. S. (Tex. Cr. 1899), 51 S. W. 918; S. v. Edis, 147 Mo. 535, 49 S. W. 563; S. v. Marcks, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; S. v. Prather, 136 Mo. 20, 37 S. W. 805; S. v. Thomas, 58 Kan. 805, 51 Pac. 228; P. v. Bernor, 115 Mich. 692, 74 N. W. 184 (penetrating); De Berry v. S., 99 Tenn. 207, 42 S. W. 31 (assault); S. v. Williams, 121 N. C. 628, 28 S. E. 405; S. v. Under-

§ 357. **Variance, different offense.**—A statute providing that “every person who shall unlawfully have carnal knowledge of a woman against her will, or of a woman child under twelve years of age, shall be deemed guilty of rape,” enumerates two classes of facts, each of which constitutes rape. Proof of the one class will not sustain a charge of the other class.³

§ 358. **Fraud varies from force.**—Proof of committing rape by fraud will not sustain a charge of committing the offense by force.⁴ If the indictment charging rape contains an averment that the female was ravished with “force and violence” when force and violence is not an element of the offense as defined by statute, then the allegation of force and violence may be treated as surplusage.⁵

§ 359. **Instruction, on consent.**—“If you find from the evidence that, at the time of the alleged commission of the offense, the prosecu-

wood, 49 La. 1599, 22 So. 831; P. v. Rangod, 112 Cal. 669, 44 Pac. 1071; S. v. Hibler, 149 Mo. 478, 51 S. W. 85; Gifford v. P., 87 Ill. 211; Ransbottom v. S., 144 Ind. 250, 43 N. E. 218; S. v. Delong, 96 Iowa 471, 65 N. W. 402; S. v. Rudd, 97 Iowa 389, 66 N. W. 748; Dove v. S., 36 Tex. Cr. 105, 35 S. W. 648; S. v. Harlan, 98 Iowa 458, 67 N. W. 381; Smith v. Com., 98 Ky. 437, 33 S. W. 419; Dickerson v. S., 141 Ind. 703, 40 N. E. 667; Felton v. S., 139 Ind. 531, 39 N. E. 228; S. v. Duffey, 128 Mo. 549, 31 S. W. 98 (age); S. v. Enright, 90 Iowa 520, 58 N. W. 901; Hardtke v. S., 67 Wis. 552, 30 N. W. 723, 7 Am. C. R. 581; P. v. Hamilton, 46 Cal. 540, 2 Green C. R. 432; S. v. Burgdorf, 53 Mo. 65, 2 Green C. R. 593; S. v. Blythe, 20 Utah 379, 58 Pac. 1108. The evidence in the following cases was held not sufficient to sustain convictions: Jacques v. P., 66 Ill. 84; Hancock v. S. (Tex. Cr. App.), 47 S. W. 465; P. v. Tarbox, 115 Cal. 57, 46 Pac. 896; Alexander v. S. (Miss.), 21 So. 923; S. v. Iago, 66 Minn. 231, 68 N. W. 969; Boxley v. Com., 24 Gratt. (Va.) 649, 1 Am. C. R. 655; Cheney v. S., 109 Ga. 503, 35 S. E. 153 (resistance); S. v. Phelps, 22 Wash. 181, 60 Pac. 134; Harvey v. S. (Miss. 1900), 26 So. 931; Wilcox v. S., 102 Wis. 650, 78

N. W. 763; P. v. Brown, 47 Cal. 447, 2 Green C. R. 456; Tittle v. S. (Tex. Cr. App.), 38 S. W. 202; Darden v. S., 97 Ga. 407, 25 S. E. 676; Laco v. S. (Tex. Cr. App.), 38 S. W. 176; Hairston v. Com., 97 Va. 754, 32 S. E. 797; Tway v. S., 7 Wyo. 74, 50 Pac. 188; Arnett v. S., 40 Tex. Cr. App. 617, 51 S. W. 385; O'Boyle v. S., 100 Wis. 296, 75 N. W. 989; Graybill v. S. (Tex. Cr. App. 1899), 53 S. W. 851; Bohlmann v. S., 98 Wis. 617, 74 N. W. 343; S. v. McMillan, 20 Mont. 407, 51 Pac. 827; Ship v. S. (Tex. Cr. App.), 45 S. W. 909; Parnell v. S. (Tex. Cr. App.), 42 S. W. 563; Maxfield v. S., 54 Neb. 44, 74 N. W. 401; Kennon v. S. (Tex. Cr. App.), 42 S. W. 376; Edmonson v. S. (Tex. Cr. App.), 44 S. W. 154; Bozeman v. S., 34 Tex. Cr. 503, 31 S. W. 389; S. v. Biggs, 93 Iowa 125, 61 N. W. 417; S. v. Pilkington, 92 Iowa 92, 60 N. W. 502; Dorsey v. S., 108 Ga. 477, 34 S. E. 135.

³ Greer v. S., 50 Ind. 267, 1 Am. C. R. 645; Dick v. S., 30 Miss. 631; S. v. Noble, 15 Me. 476; Hooker v. S., 4 Ohio 348; S. v. Jackson, 30 Me. 29; 1 Bish. Cr. Proc., § 485.

⁴ Ford v. S. (Tex. Cr. App. 1899), 53 S. W. 846.

⁵ S. v. Austin, 109 Iowa 118, 80 N. W. 303.

trix was under twelve years of age, and that, on account of her tender years, she was incapable of understanding the nature of the act, her consent would be no protection to the defendant." Held proper.⁶

§ 360. Instruction—Caution.—"The charge made against the defendant is in its nature a most heinous one, and well calculated to create a strong prejudice against the accused, and the attention of the jury is directed to the difficulty growing out of the nature of the usual circumstances of the crime in defending against the accusation of rape. So you, the jury, must carefully consider all the evidence in the case, and the law given you by the court in making up your verdict." Held error to refuse this instruction.⁷

⁶Coates v. S., 50 Ark. 330, 7 S. W. 304, 7 Am. C. R. 586.

⁷Reynolds v. S., 27 Neb. 90, 42 N. W. 903, 8 Am. C. R. 665; Conners v. S., 47 Wis. 523, 2 N. W. 1143; 1 Hale P. C. (ed. 1778), 633. It is to be remembered, as has been justly observed by Lord Hale, that rape is

an accusation easily made, hard to be proved, and still harder to be defended by one ever so innocent: 3 Greenl. Ev., § 212; Sherwin v. P., 69 Ill. 58; Austine v. P., 51 Ill. 240; S. v. Burgdorf, 53 Mo. 65, 2 Green C. R. 593; 1 Hale P. C. 635.

CHAPTER VI.

MAYHEM.

ART.	I. Definition and Elements, . . . * . . .	§§ 361-365
	II. Matters of Defense,	§§ 366-367
	III. Indictment,	§§ 368-371
	IV. Evidence,	§§ 372-374

ARTICLE I. DEFINITION AND ELEMENTS.

§ 361. **Definition.**—Mayhem is properly defined to be, as we may remember, the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself or to annoy his adversary.¹ The biting of a person's ear is not mayhem at common law.^{1a} But feloniously and maliciously putting out the eye of another with malice aforethought is mayhem under the statute.² "Every person who from premeditated design evinced by lying in wait for the purpose, or in any other manner with intent to kill or commit any felony, shall cut out or disable the tongue, or put out an eye, or shall slit the lips or destroy the nose, or cut off or disable any limb or other member of another, on purpose," shall be guilty of mayhem.³

§ 362. **"Slit" and "bite."**—The words "slit" and "bite" are not equivalent in meaning under the statute.⁴

§ 363. **Specific intent not essential.**—A specific intent, as under the common law, is not required. The accused shall be held responsible

¹ 4 Bl. Com. 205; 1 Hawk. P. C., ch. 44, § 1; 1 East P. C. 393; Underhill Cr. Ev., § 359; 1 McClain Cr. L., § 432. ² S. v. Baker (Mo.), 19 S. W. 222. ³ Godfrey v. P., 63 N. Y. 209; Tully v. P., 67 N. Y. 15.

^{1a} 58 Ohio St. 417, 51 N. E. 40. ⁴ P. v. Demasters, 105 Cal. 669, 39 Pac. 35.

for the natural and probable consequences of his acts. The intent is a question for the jury, and may be inferred.⁴

§ 364. Specific intent, when essential.—A specific intent is essential in the charge of mayhem, and may be inferred or presumed if the accused did the act deliberately and the disfigurement was the natural and probable consequence of the act.⁵

§ 365. Intent, to be determined.—Under the Texas statute, to “willfully and maliciously cut off or otherwise deprive a person of his hand, arm, toe, foot, leg, nose, ear; put out an eye or in any way deprive a person of any member of his body,” constitutes mayhem. It appeared that the defendant kicked D on the arm while his thumb was in E’s mouth, whereby a portion of his thumb was torn off. Held to be a question of fact for the jury to determine whether mayhem was committed.⁷

ARTICLE II. MATTERS OF DEFENSE.

§ 366. Intent wanting.—The defendant threw a stone at another which destroyed an eye. The mere throwing of the stone of itself indicates no intent to injure. Such injury is not a natural consequence of the assault committed; for the result though possible, must be rare, and may happen without, as well as with intent to injure. Generally such result would be merely accidental.⁸

§ 367. Injury inflicted suddenly.—The injury inflicted is none the less mayhem where the act is done maliciously with the design or intention of disfiguring or mutilating a member of one’s body, though the act be done suddenly while in conflict with another.⁹ The prose-

⁴ U. S. v. Gunther, 5 Dak. 234, 38 N. W. 79; Terrell v. S., 86 Tenn. 523, 8 S. W. 212, 8 Am. C. R. 532; Davis v. S., 22 Tex. App. 45, 2 S. W. 630; S. v. Hair, 37 Minn. 351, 34 N. W. 893, 7 Am. C. R. 369; S. v. Clark, 69 Iowa 196, 28 N. W. 537; P. v. Wright, 93 Cal. 564, 29 Pac. 240; Werley v. S., 11 Humph. (Tenn.) 171. See 4 Bl. Com. 206, 207; Underhill Cr. Ev., § 359. The common law, text writers and statutes are reviewed in the case of Terrell v. S., 86 Tenn. 523, 8 S. W. 212.

⁵ S. v. Jones, 70 Iowa 505, 30 N. W. 750; Terrell v. S., 86 Tenn. 523, 8 S. W. 212; S. v. Ma Foo, 110 Mo. 7, 19 S. W. 222; S. v. Clark, 69 Iowa 196, 28 N. W. 537; Molette v. S., 49 Ala. 18.

⁷ Bowers v. S., 24 Tex. App. 542, 7 S. W. 247.

⁸ S. v. Bloedow, 45 Wis. 279, 2 Am. C. R. 631; S. v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895.

⁹ S. v. Hair, 37 Minn. 351, 34 N. W. 893; S. v. Jones, 70 Iowa 505, 30 N. W. 750; Kitchens v. S., 80 Ga.

cuting witness interfered to prevent a fight between the defendant and another person, and while trying to separate the combatants, the defendant suddenly threw his arm around the neck of the prosecuting witness and bit his ear off. Held to be mayhem; and the defendant's belief that the prosecuting witness was against him in the fight, can not avail as a defense.¹⁰

ARTICLE III. INDICTMENT.

§ 368. **Assault included.**—In an indictment for mayhem by gouging out the eye of a person, is included the offense of assault and battery, or some other lesser offense may be included, according to the circumstances of the case.¹¹

§ 369. **"Premeditated design" essential.**—Under the New York statute "premeditated design" and "on purpose" are elements of the crime of mayhem, and must be alleged in the indictment.¹²

§ 370. **Duplicity—Several ways.**—Under a statute providing that "whoever shall unlawfully shoot or stab another with intention, in committing any of the said acts, to maim, disfigure, disable or kill," shall be guilty of mayhem, an indictment charging the intention in the conjunctive, by averring: "with intention to maim, disfigure, disable and kill," is not bad for duplicity.¹³

§ 371. **"Maliciously" and "willfully" essential.**—The statute defining mayhem uses the words "maliciously and willfully" in describing the offense. An indictment charging an offense under the statute for inflicting a wound less than mayhem, by alleging it was inflicted "feloniously," omitting the words "maliciously and willfully," is defective, and charges no offense on which to base a conviction or judgment on a plea of guilty.¹⁴

810, 7 S. E. 209; Davis v. S., 22 Tex. App. 45, 2 S. W. 630; P. v. Wright, 93 Cal. 564, 29 Pac. 240. See S. v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895; S. v. Skidmore, 87 N. C. 509; Ridenour v. S., 38 Ohio St. 272.

¹⁰ P. v. Wright, 93 Cal. 564, 29 Pac. 240. See S. v. Cody, 18 Or. 506, 23 Pac. 891, 24 Pac. 895.

¹¹ Guest v. S., 19 Ark. 405; Com. v. Blaney, 133 Mass. 571; S. v. Waters, 39 Me. 54; S. v. White, 45 Iowa 325; Barnett v. S., 100 Ind. 171; S. v. Bloedow, 45 Wis. 279.

¹² Tully v. P., 67 N. Y. 15; Godfrey v. P., 63 N. Y. 207.

¹³ Angel v. Com., 2 Va. Cas. 231.

¹⁴ S. v. Watson, 41 La. 598, 7 So. 125.

ARTICLE IV. EVIDENCE.

§ 372. **Burden on prosecution.**—Where the prosecution shows that the defendant inflicted an injury on the prosecuting witness, the burden is not shifted on the defendant to show that his act was justifiable.¹⁵

§ 373. **Intent inferred.**—The intent to disfigure is *prima facie* to be inferred from an act which does in fact disfigure, unless the presumption be repelled by evidence of a different intent, or at least the absence of the intent mentioned in the statute.¹⁶

§ 374. **Previous threats.**—It is competent to show that a few minutes before the defendant actually assaulted the prosecutor, he threatened to make such assault.¹⁷

¹⁵ S. v. Conahan, 10 Wash. 268, 38 240; S. v. Crawford, 2 Dev. (N. C.) Pac. 996. 425; Foster v. P., 1 Colo. 293.

¹⁶ S. v. Evans, 1 Hayw. (N. C.) 281; ¹⁷ P. v. Demasters, 109 Cal. 607, 42 P. v. Wright, 93 Cal. 564, 29 Pac. Pac. 236.

PART TWO

OFFENSES AGAINST PROPERTY

CHAPTER VII.

LARCENY.

ART.	I. Definition and Elements,	§§ 375-404
	II. Matters of Defense,	§§ 405-426
	III. Indictments,	§§ 427-450
	IV. Evidence, Variance,	§§ 451-491

ARTICLE I. DEFINITION AND ELEMENTS.

§ 375. **Definition.**—Larceny is the felonious stealing, taking and carrying away of the personal goods of another.¹ The stealing of goods above the value of twelve-pence is called grand larceny, under the common law; and when of goods to that value or under, is petit larceny.² Under the statute of California, if the value of the property stolen exceeds fifty dollars, it is grand larceny; and whether it be stolen from the person of another or not is not material.³ And under the statute of Alabama defining grand larceny, the place from which the property was stolen is immaterial.⁴

§ 376. **Stealing essential.**—The word “stealing,” as applied to larceny, is a technical word, and is absolutely essential to a proper definition of the crime, as defined by the statute of Illinois.⁵

§ 377. **Asportation sufficient.**—Where the evidence shows that the defendant put his hands into the pocket of a man and took the man’s

¹ 4 Bl. Com. 229; 2 East P. C. 553; ⁴ Turner v. S., 124 Ala. 59, 27 So. 1 Hale P. C. 503; Johnson v. P., 113 Ill. 99. 272.

² 4 Bl. Com. 229; 1 Hale P. C. 530. ⁵ Hix v. P., 157 Ill. 385, 41 N. E. 862. *Contra*, S. v. Lee Yan Yan, 10

³ P. v. Garcia, 127 Cal. xviii, 59 Pac. 576. Or. 365.

pocketbook into his hand and drew it half way out, when, on being discovered, he let go his hold on the pocketbook and ran away, it was held sufficient asportation to sustain a conviction of larceny.⁶ Where the accused was indicted for stealing cloth, and it was proved the cloth was packed in a bale, which was placed lengthwise in a wagon, and that the prisoner had only raised and set the bale on one end in the place where it lay, and had cut the wrapper but had not taken the cloth out of the bale, it was held not to be larceny.⁷

§ 378. Secrecy essential.—While secrecy is the usual evidence of a felonious intent when one takes the goods of another, it is by no means the only evidence of such intent. The intent may be inferred from the facts proved.⁸ The mere fact of taking the goods of another, without concealment, would be pregnant evidence to the jury that the taking was without felonious intent.⁹

§ 379. Stealing stray animal.—In order to constitute larceny in permitting a stray heifer to stray and feed with one's own cattle, the accused must have intended to appropriate the animal to his own use at the time he first took possession of it, and a conversion in pursuance of a subsequently formed intention would not make him guilty of larceny.¹⁰

§ 380. Intention with act essential.—The intention to steal the property must accompany the act of taking it—that is, the criminal intent must exist at the very time of the taking of the property; otherwise the taking is not larceny.¹¹ But this rule does not apply to a

* *Flynn v. S.*, 42 Tex. 301, 1 Am. C. R. 424; *S. v. Chambers*, 22 W. Va. 779. See *S. v. Taylor*, 136 Mo. 66, 37 S. W. 907; *Harrison v. P.*, 59 N. Y. 518, 10 Am. R. 517; *Price v. S.*, 41 Tex. 215, 1 Am. C. R. 423; *Garris v. S.*, 35 Ga. 247; *Madison v. S.*, 16 Tex. App. 435; 3 Greenl. Ev., §§ 154, 155. See also *Harrison v. P.*, 50 N. Y. 518; *Com. v. Luckis*, 99 Mass. 431; 1 McClain Cr. L., § 548; 3 Greenl. Ev., § 154; *S. v. Higgins*, 88 Mo. 354; *Edmonds v. S.*, 70 Ala. 8, 45 Am. R. 67; *S. v. Craige*, 89 N. C. 475, 45 Am. R. 696; *Eckels v. S.*, 20 Ohio St. 508.

⁷ 3 Greenl. Ev., § 154. See 4 Bl. Com. 231; 1 McClain Cr. L., § 548; *Hicks v. S.*, 101 Ga. 581, 28 S. E. 917; *P. v. Murphy*, 47 Cal. 103;

Williams v. S., 63 Miss. 58, 57 Am. D. 272; *S. v. Gilbert*, 68 Vt. 188, 34 Atl. 697.

⁸ *S. v. Powell*, 103 N. C. 424, 9 S. E. 627, 8 Am. C. R. 458; *S. v. Fenn*, 41 Conn. 590, 1 Am. C. R. 379; *S. v. McKee*, 17 Utah 370, 53 Pac. 733.

⁹ 3 Greenl. Ev., § 157.

¹⁰ *Starck v. S.*, 63 Ind. 285, 3 Am. C. R. 251; *Umpfrey v. S.*, 63 Ind. 223; *Reg. v. Matthews*, 12 Cox C. C. 489; *Beckham v. S.*, 100 Ala. 15, 14 So. 859. See *Lamb v. S.*, 40 Neb. 312, 58 N. W. 963.

¹¹ *S. v. Wood*, 46 Iowa 116; *P. v. Moore*, 37 Hun (N. Y.) 84; *Weaver v. S.*, 77 Ala. 26; *Levy v. S.*, 79 Ala. 259; *S. v. Cummings*, 33 Conn. 260, 89 Am. D. 208; *Keely v. S.*, 14 Ind. 36. See *P. v. Taugher*, 102 Mich.

bailee or other person to whom property has been delivered and entrusted for some specific purpose.¹²

§ 381. **Pecuniary gain not essential.**—Where the intent in taking property is to deprive the owner of the same, it is not essential that the taking should be with a view to pecuniary profit to the taker.¹³

§ 382. **Value is market value.**—The value of a chattel, as a statutory subject of larceny, is its market value; and evidence that it is worth twenty dollars to its owner, and worth nothing to anybody else, does not show its market value to be twenty dollars. To be of the market value of twenty dollars, it must be capable of being sold for that sum at a fairly conducted sale. A printed list of names not being a "writing containing evidence of an existing debt," does not come within the statute, and is not the subject of larceny.¹⁴

§ 383. **Adding values.**—The value of sundry articles stolen at different times and by distinct acts of larceny, although from the same person, can not be added together to make the offense grand larceny.¹⁵

§ 384. **Building, shop, store-house.**—A building in which goods are sold or in which tools are kept, is a "shop" within the meaning of the statute relating to larceny in or from any store or shop.¹⁶ On a charge of larceny "from a store-house," it must appear that the house was actually used as a store-house at the time of the larceny; it is not sufficient that the house was built for a store-house.¹⁷

598, 61 N. W. 66; *P. v. Brown*, 105 Cal. 66, 38 Pac. 518; *Roberts v. S.*, 21 Tex. App. 460, 1 S. W. 452; *S. v. Woodruff*, 47 Kan. 151, 27 Pac. 842.

¹² *S. v. Coombs*, 55 Me. 477, 92 Am. D. 610; *S. v. Stone*, 68 Mo. 101; *Dignowitty v. S.*, 17 Tex. 521; *Phelps v. P.*, 72 N. Y. 334.

¹³ *S. v. Slingerland*, 19 Nev. 135, 7 Pac. 280, 7 Am. C. R. 339; *Hamilton v. S.*, 35 Miss. 219; *S. v. Caddle*, 35 W. Va. 73, 12 S. E. 1098; *Dignowitty v. S.*, 17 Tex. 530. *Contra*, *P. v. Woodward*, 31 Hun (N. Y.) 57; *Wilson v. P.*, 39 N. Y. 459; *U. S. v. Durkee*, 1 McAll. 196. See 3 Greenl. Ev. (Redf. ed.), § 157.

¹⁴ *S. v. James*, 58 N. H. 67, 4 Am. C. R. 348; *S. v. Doecke*, 68 Mo. 208;

4 Bl. Com. 234; *Payne v. P.*, 6 Johns. 103; *Rex v. Mead*, 4 C. & P. 535; *Reg. v. Morris*, 9 C. & P. 347; 3 Greenl. Ev., § 153; *S. v. Smith*, 48 Iowa 595; *Cooksie v. S.*, 26 Tex. App. 72, 9 S. W. 58; *S. v. Scott*, 48 Iowa 597.

¹⁵ *Scarver v. S.*, 53 Miss. 407; *Rapalje on Larceny*, § 13, p. 15; *Monaghan v. P.*, 24 Ill. 340; *Lacey v. S.*, 22 Tex. App. 657, 3 S. W. 343.

¹⁶ *S. v. Hanlon*, 32 Or. 95, 48 Pac. 353. See *Bennett v. S.*, 52 Ala. 370; *Com. v. Riggs*, 14 Gray (Mass.) 376, 77 Am. D. 333; *S. v. Moore*, 38 La. 66. And a store house includes a ware house: *Bailey v. S.*, 99 Ala. 143, 13 So. 566.

¹⁷ *Jefferson v. S.*, 100 Ala. 59, 14 So. 627.

§ 385. **Possession, ownership.**—Possession with general acts of ownership, such as riding a horse to a hotel and putting up as a guest, are sufficient to warrant and sustain a verdict, where there is no evidence offered to rebut or contradict the right of property.¹⁸ An innkeeper would acquire a sufficient special property to support an allegation of ownership.¹⁹

§ 386. **Possession, when constructive.**—The owner of property may have constructive possession of it within the meaning of the law; as a horse on its accustomed range is in the possession of the owner; and so where property is placed at some particular place and forgotten by the owner.²⁰

§ 387. **Owner, general or special.**—A superintendent of the plantation of another, properly speaking, is a servant of his employer, an overseer employed to carry on the business of the plantation according to directions, and whose duty it is to look after and take care of the interests of his employer. Such overseer is not regarded as having any special property in the thing of which he has such supervision.²¹

§ 388. **Farm products, ownership.**—Grain and other farm products raised on shares between the owner of the farm and his tenant or a laborer under a contract, belong to the owner of the farm until the same are divided.²²

§ 389. **Wild animals—Dogs.**—Larceny can not be committed of such animals in which there is no property, either absolute or qualified, as of beasts that are *ferae naturae*, and unreclaimed, such as deer, hares and conies in a forest, chase or warren, or wild fowls at their natural liberty.²³ At common law the words "goods and chattels," on

¹⁸ Barnes v. P., 18 Ill. 53; S. v. Patton, 1 Marv. (Del.) 552, 41 Atl. 193. See Greenl. Ev. (Redf. ed.), § 161; 1 McClain Cr. L., § 546.

¹⁹ Barnes v. P., 18 Ill. 52.

²⁰ Huffman v. S., 28 Tex. App. 174, 12 S. W. 588; Lawrence v. S., 1 Humph. (Tenn.) 228, 34 Am. D. 644; Pritchett v. S., 2 Sneed (Tenn.) 285, 62 Am. D. 468; P. v. M'Garren, 17 Wend. (N. Y.) 460; Owen v. S., 6 Humph. (Tenn.) 330.

²¹ Heygood v. S., 59 Ala. 50, 3 Am. C. R. 253; S. v. Jenkins, 78 N. C. 478. See note in 3 Am. C. R. 255.

²² S. v. Jacobs, 50 La. 447, 23 So. 608 (cotton); S. v. Webb, 87 N. C. 558.

²³ Com. v. Chace, 9 Pick. (Mass.) 15; 4 Bl. Com. 235; Aldrich v. Wright, 53 N. H. 398; S. v. Repp, 104 Iowa 305, 73 N. W. 829; S. v. Krider, 78 N. C. 481. See also S. v. Murphy, 8 Blackf. (Ind.) 498; Harvey v. Com., 23 Gratt. (Va.) 941, 2 Green C. R. 656; 3 Greenl. Ev., § 163. "Neither wild animals unclaimed and confined nor things annexed to or savoring of the realty and unsevered" are the subject of larceny by the common law: Greenl. Ev. (Redf. ed.), 163; 4 Bl. Com. 232. See also S. v. Berryman, 8 Nev. 262, 1 Green C. R. 338; P. v. Williams, 35 Cal. 673; Com. v. Steimling, 176 Pa. St. 400, 27 Atl. 297; Clement v. Com., 20 Ky. L. 683, 47 S. W. 450.

a charge of larceny, do not include dogs. It will be time enough for the courts to say that a dog is the subject of larceny when the law-making power of the state has so declared.²⁴

§ 390. Water, when subject of larceny.—Water supplied by a water company to consumers may be the subject of larceny at common law.²⁵

§ 391. Concealing for reward.—The wrongful taking of the property of another without his consent with intent to conceal it until a reward is offered by the owner, is larceny of the property.²⁶

§ 392. Getting possession by trick, fraud.—Any trick or fraud resorted to for the purpose of getting possession of another's property, with intent to steal it, is larceny: as, for example, where the negotiation for goods was to be a cash transaction, the accused, by handing the collector a worthless check in payment, knowing it to be worthless, is guilty of larceny.²⁷ The prosecutor was induced to place his money upon a game of chance upon the assurance of Lewis, one of the prisoners, that he was to win, and he could have his money back, or that, in case of loss, other money would be procured upon a check which Lewis claimed to have in his possession, and paid in place of that lost. Held larceny, the prosecutor not intending to part with the possession or ownership of the money.²⁸ Where the consent of the owner to the taking of property has been obtained by fraud and deception, as getting possession under the pretense of hiring or borrowing with

²⁴ *S. v. Lymus*, 26 Ohio St. 400, 2 Am. C. R. 338; 4 Bl. Com. 236; *S. v. Butler* (Del. 1899), 43 Atl. 480; *P. v. Campbell*, 4 Parker C. R. (N. Y.) 386; *S. v. Harriman*, 75 Me. 562; *S. v. Holder*, 81 N. C. 527; *S. v. Doe*, 79 Ind. 9; *S. v. McDuffie*, 34 N. H. 523. *Contra*, *Hamby v. Samson*, 105 Iowa 112, 74 N. W. 918.

²⁵ *Ferens v. O'Brien*, L. R. 11 Q. B. D. 21, 4 Am. C. R. 611.

²⁶ *Berry v. S.*, 31 Ohio St. 219; *Com. v. Mason*, 105 Mass. 166; *P. v. Juarez*, 28 Cal. 380; *Keely v. S.*, 14 Ind. 36; *P. v. Wiley*, 3 Hill (N. Y.) 194; *Rex v. Cabbage*, Russ. & R. 292; *Baker v. S.*, 58 Ark. 513, 25 S. W. 603.

²⁷ *Shipply v. P.*, 86 N. Y. 375; *Stinson v. P.*, 43 Ill. 397; *P. v. Laurence*,

137 N. Y. 517, 33 N. E. 547; 3 Greenl. Ev., § 160; *Devore v. Ter.*, 2 Okla. 562, 37 Pac. 1092; *P. v. Berlin*, 9 Utah 383, 35 Pac. 498; *Mitchell v. S.*, 92 Tenn. 668, 23 S. W. 68; *Fleming v. S.*, 136 Ind. 149, 36 N. E. 154; *Com. v. Lannan*, 153 Mass. 287, 26 N. E. 858; *Defrese v. S.*, 3 Heisk. (Tenn.) 33, 1 Green C. R. 356.

²⁸ *Loomis v. P.*, 67 N. Y. 322, 2 Am. C. R. 345; *Doss v. P.*, 158 Ill. 660, 41 N. E. 1093; *Queen v. Gumble*, 2 C. C. R. 1, 1 Am. C. R. 396; *Com. v. Lannan*, 153 Mass. 287, 26 N. E. 858; *Miller v. Com.*, 78 Ky. 15. See *Crum v. S.*, 148 Ind. 401, 47 N. E. 833; *S. v. Bryant*, 74 N. C. 124; *P. v. Shaughnessy*, 110 Cal. 598, 43 Pac. 2.

intent to deprive the owner of the property, it is larceny.²⁹ The prosecutor having a cart loaded with onions, met the prisoners, who agreed to buy all the onions for three pounds sixteen shillings, the prisoners saying: "You shall have your money directly the onions are unloaded." The onions were accordingly unloaded by the prosecutor and the prisoners together at the place designated by the prisoners. The prisoners asked for a bill, and one of them said they must have a receipt from the prosecutor. They refused to pay the price or restore the onions. The jury convicted the prisoners, finding by their verdict that the prisoners never intended to pay for the onions. The conviction was sustained.³⁰ The evidence in a case showed that the prosecuting witness was induced to place his money in the hands of the defendant upon the assurance that he would have permanent employment, and that the defendant and his confederate feloniously conspired to procure the money so deposited and converted it to their own use. Held to be larceny.³¹

§ 393. **Changing bill, money.**—The owner of a five-dollar bill handed the same to the accused, a hack driver, to get changed in order that he might pay the hack driver twenty-five cents out of the same, being his charges for conveying him from the railroad depot to a hotel. The hack driver did not return, but appropriated the money to his own use. Held to be larceny.³² The accused was the daughter of a man who traveled about attending fairs with a merry-go-round, and was in charge of it. Marie Lovell got into the merry-go-round and handed the accused a sovereign in payment for the ride, asking for

²⁹ *S. v. Humphrey*, 32 Vt. 569; *Coldwell v. S.*, 59 Tenn. 429; *Loomis v. P.*, 67 N. Y. 322; *Richards v. Com.*, 13 Gratt. 803; *S. v. Woodruff*, 47 Kan. 151, 27 Pac. 842; *P. v. Jersey*, 18 Cal. 337; *P. v. Sumner*, 53 N. Y. Supp. 817, 13 N. Y. C. R. 318.

³⁰ *Reg. v. Slowly*, 12 Cox 269, 1 Green C. R. 30; *Frazier v. S.*, 85 Ala. 17, 4 So. 691; *Com. v. Lannan*, 153 Mass. 289, 26 N. E. 858; *S. v. Hall*, 76 Iowa 85, 40 N. W. 107, 8 Am. C. R. 463; *Q. v. Russett*, 2 Q. B. D. 312, 9 Am. C. R. 514; *Fleming v. S.*, 136 Ind. 149, 36 N. E. 154. See *P. v. Hughes*, 91 Hun 354, 36 N. Y. Supp. 493.

³¹ *P. v. Tomlinson*, 102 Cal. 22, 36 Pac. 508. See *P. v. Montarial*, 120

Cal. 691, 53 Pac. 355; *P. v. Martin*, 116 Mich. 446, 74 N. W. 653; *S. v. Will*, 49 La. 1337, 22 So. 378. The case of *P. v. Tomlinson* is one where the defendants advertised in a newspaper for a servant to work for them. They required a deposit with them to secure faithful service.

³² *Farrell v. P.*, 16 Ill. 506. See *Queen v. Hollis*, 12 Q. B. D. 25, 4 Am. C. R. 609; *Levy v. S.*, 79 Ala. 259; *Finkelstein v. S.*, 105 Ga. 617, 31 S. E. 589; *Loomis v. P.*, 67 N. Y. 316, 23 Am. R. 123; *Com. v. Flynn*, 167 Mass. 460, 45 N. E. 924; *Hildebrand v. P.*, 56 N. Y. 394; *Murphy v. P.*, 104 Ill. 528; *Justices v. P.*, 90 N. Y. 12, 43 Am. R. 135.

her change. The accused handed her eleven pence, saying she would give her the balance when the ride was finished, as the merry-go-round was about to start. Marie assented to this, and about ten minutes after she asked the accused for her change, and the accused said in reply that she had given her the change. Held that the accused could not be convicted for the larceny of the nineteen shillings because she had not taken the nineteen shillings from the prosecutrix.³³

§ 394. Paid by mistake.—A bank by mistake paid the defendant five hundred dollars more than his check called for. Held that if at the time he so received the same he formed the criminal design to appropriate it to his own use, and did so appropriate it, it would be larceny.³⁴

§ 395. Goods found.—If goods be found in the highway or elsewhere which contain no marks to identify the owner, the finder, in converting the same to his own use *animus furandi*, can not be guilty of larceny unless he knew the owner at the time he found the goods.³⁵

§ 396. Building includes.—The term "building" will include a structure covered with shingles and inclosed with wire, erected for the purpose of the safe keeping of birds, and stealing from this structure is "larceny from a building."³⁶ But stealing from a "buggy shed" is not larceny from a "buggy shed house."³⁷

³³ Reg. v. Bird, 12 Cox 257, 1 Green C. R. 1. See Hecox v. S., 105 Ga. 625, 31 S. E. 592.

³⁴ Fulcher v. S., 32 Tex. Cr. App. 621, 25 S. W. 625, 9 Am. C. R. 734; Queen v. Ashwell, L. R. 16 Q. B. D. 190, 6 Am. C. R. 355. See Queen v. Flowers, L. R. 16 Q. B. D. 643, 6 Am. C. R. 388; Wolfstein v. P., 6 Hun (N. Y.) 121; Reg. v. Middleton, 12 Cox 260, 1 Green C. R. 7, 10; Bailey v. S., 58 Ala. 414; S. v. Ducker, 8 Or. 394. See also, Com. v. Hays, 14 Gray (Mass.) 62, 74 Am. D. 662.

³⁵ Lane v. P., 5 Gilm. (Ill.) 308; Tyler v. P., Breese (Ill.) 293; P. v. Anderson, 14 Johns. (N. Y.) 294; Bailey v. S., 52 Ind. 462, 3 Greenl. Ev. 160; Starck v. S., 63 Ind. 285, 3 Am. C. R. 251. See S. v. Levy, 23 Minn. 104, 3 Am. C. R. 276; Baker v. S., 29 Ohio St. 184, 2 Am. C. R.

337-8; Com. v. Titus, 116 Mass. 42, 1 Am. C. R. 417; Reg. v. Wood, 3 Cox 453; Perrin v. Com., 87 Va. 554, 13 S. E. 76; S. v. Hayes, 98 Iowa 619, 67 N. W. 673; Ransom v. S., 22 Conn. 153; Lamb v. S., 40 Neb. 312, 58 N. W. 963; Smith v. S., 103 Ala. 40, 16 So. 12; Allen v. S., 91 Ala. 19, 8 So. 665; Brooks v. S., 35 Ohio St. 46; S. v. Taylor, 25 Iowa 273; 3 Greenl. Ev., § 159; Martinez v. S., 16 Tex. App. 122; Hunt v. Com., 13 Gratt. (Va.) 757, 70 Am. D. 443; Griggs v. S., 58 Ala. 425; P. v. Swan, 1 Park. C. R. (N. Y.) 9; S. v. Boyd, 36 Minn. 538, 32 N. W. 780.

³⁶ Williams v. S., 105 Ga. 814, 32 S. E. 129.

³⁷ Thompson v. S., 92 Ga. 448, 17 S. E. 265.

§ 397. **Larceny from house.**—Evidence showing that the property taken by the defendant was not in the warehouse, but outside of it in an alley, proves only simple larceny, and not “larceny from the house,” or of goods hanging outside of a store.³⁸

§ 398. **Larceny from person when asleep.**—The defendant entered a store and asked that he be permitted to look at some watches. While the owner was showing the watches to him, the defendant stole two of them. Held to be larceny from the person of the owner and not “from the building.”³⁹ The defendant was in the act of taking the owner’s pocketbook from the coat pocket of the owner. In fact, he had taken it from the space it occupied. The owner, by physical exertion in throwing up his arm, caught it as the accused was taking it, and regained possession of it. Held to be larceny.⁴⁰ The mere fact that the owner of the property may have been asleep at the time the property was taken from him would render the crime no less a “taking from the person.”⁴¹ The taking from the person must be without the knowledge or consent of the owner.⁴²

§ 399. **Attempt, when impossible.**—A person may be guilty of an attempt to commit larceny though it be impossible to actually commit the crime, as attempting to steal by picking one’s pocket when it has nothing in it; also as to robbery.⁴³ To constitute an attempt to commit the crime of larceny, an overt act must be committed coupled with a criminal intent.⁴⁴

§ 400. **Servant’s possession is master’s.**—It is now the settled law that goods in the bare charge or custody of a servant are legally in

³⁸ Middleton v. S., 53 Ga. 248, 1 Am. C. R. 422; Martinez v. S., 41 Tex. 126, 1 Am. C. R. 420; Lynch v. S., 89 Ala. 18, 7 So. 829; Henry v. S., 39 Ala. 679.

³⁹ Com. v. Lester, 129 Mass. 103; Rex v. Owen, 2 East P. C. 645. See 4 Bl. Com. 240; 1 McClain Cr. L., § 576; Com. v. Smith, 111 Mass. 429; Simmons v. S., 73 Ga. 609, 54 Am. R. 885.

⁴⁰ Harrison v. P., 50 N. Y. 518, citing Rex v. Thompson, 1 Moody 78; Com. v. Luckis, 99 Mass. 431. See 3 Greenl. Ev., § 155; 4 Bl. Com. 241.

⁴¹ Hall v. P., 39 Mich. 717. See Clemmons v. S., 39 Tex. Cr. 279, 45

S. W. 911; Higgs v. S., 113 Ala. 36, 21 So. 353; P. v. McElroy, 116 Cal. 583, 48 Pac. 718.

⁴² Moyer v. S., 65 Ga. 754, 57 Am. D. 273. See Burke v. S., 74 Ga. 372; Woodard v. S., 9 Tex. App. 412.

⁴³ P. v. Moran, 123 N. Y. 254, 25 N. E. 412; P. v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 9 Am. C. R. 85; Clark v. S., 86 Tenn. 511, 8 S. W. 145; Hamilton v. S., 36 Ind. 280; S. v. Wilson, 30 Conn. 500; P. v. Jones, 46 Mich. 441, 9 N. W. 486; Reg. v. Jarman, 14 Cox C. C. 112.

⁴⁴ S. v. Hollingsworth, 1 Marv. (Del.) 528, 41 Atl. 143; Henry v. Com., 20 Ky. L. 543, 47 S. W. 214.

the possession of the master, and the servant may be guilty of trespass and larceny by the fraudulent conversion of such goods to his own use.⁴⁵ It is not larceny for a servant to convert property delivered to him by a third person for his master, provided he converts it before the goods have reached their destination or something more has happened to reduce him to a mere custodian.⁴⁶ The defendant, who was employed as a servant, was directed by one member of the firm by which he was employed to take a sum of money to another member of the firm. He feloniously appropriated it to his own use. Held to be larceny and not embezzlement, he having only the custody of the money and not the legal or separate possession of it.⁴⁷

§ 401. Carrier opening package.—If a carrier or other bailee opens a package of goods and takes away or disposes of them or any of them to his own use *animus furandi*, it is larceny, although it is not if he takes away and converts the whole package entire.⁴⁸ Or if by any other means the bailee, by his wrongful act, terminates the contract of bailment and converts the property or any part to his own use, he will be guilty of larceny.⁴⁹

§ 402. Three classes of cases of apparent possession.—There are three classes of cases in which convictions for larceny at common law are sustained where apparent possession is in the accused: first, where the accused has the mere custody of property as contradistinguished from possession, as in the case of servants and the like; second, where he obtains the custody and apparent possession by means of fraud or with a present purpose to steal the property; and third, where one has acquired possession by a valid contract of bailment, which is

⁴⁵ *Crocheron v. S.*, 86 Ala. 64, 5 So. 649, 8 Am. C. R. 473; *P. v. Perini*, 94 Cal. 573, 29 P. 1027; *Holbrook v. S.*, 107 Ala. 154, 18 So. 109; *P. v. Wood*, 2 Park. C. R. (N. Y.) 22; *Warmoth v. Com.*, 81 Ky. 133; *S. v. Schingen*, 20 Wis. 74; *Com. v. Perry*, 99 Mass. 428, 96 Am. D. 767.

⁴⁶ *Com. v. Ryan*, 155 Mass. 527, 30 N. E. 364, 31 Am. St. 56; *Kibs v. P.*, 81 Ill. 599; *P. v. Johnson*, 91 Cal. 265, 27 Pac. 663; *Reg. v. Brackett*, 4 Cox 274.

⁴⁷ *Com. v. Berry*, 99 Mass. 430; *Phelps v. P.*, 72 N. Y. 334; *Rex v. Murry*, 1 Moody 276; *S. v. Schingen*,

20 Wis. 74; *S. v. McCartey*, 17 Minn. 76; *Crocheron v. S.*, 86 Ala. 64, 5 So. 649; *Brown v. P.*, 20 Colo. 161, 36 Pac. 1040; *Smith v. S.*, 28 Ind. 321; 1 Hale P. C. 506; *P. v. Belden*, 37 Cal. 51.

⁴⁸ *S. v. Fairclough*, 29 Conn. 47; *Nichols v. P.*, 17 N. Y. 114; *Jenkins v. S.*, 62 Wis. 63, 21 N. W. 232; 3 Greenl. Ev. (Redf. ed.), § 162; *Robinson v. S.*, 1 Coldw. (Tenn.) 120, 78 Am. D. 487; 4 Bl. Com. 230; *U. S. v. Clew*, 4 Wash. C. C. 700.

⁴⁹ *Com. v. Barry*, 116 Mass. 1; *Johnson v. P.*, 113 Ill. 99; *Com. v. Davis*, 104 Mass. 548.

subsequently terminated by some tortious act of the bailee or otherwise, whereby possession reverts to the owner, leaving the custody merely in the former, and the bailee, while being thus a mere custodian, feloniously converts the property to his own use.⁵⁰

§ 403. Bailee converting—Constable.—Where a bailee, having a special property in goods, by reason of being under a special contract with respect to them, converts the same to his own use, no conviction of larceny can be had without proving a fraudulent or felonious intention on his part at the time he received the goods in bailment.⁵¹ A sum of money was placed in the hands of the accused by the prosecutor for the purpose of purchasing coals from a colliery company. The prisoner did not buy any coals, but used part of the money to pay his own indebtedness to the company. Held to be a clear case of larceny as bailee.⁵² A horse was intrusted with the defendant to sell for the prosecutor and to deliver the proceeds of the sale to the prosecutor. The defendant, after selling the horse, converted the proceeds of the sale to his own use. He became bailee of the money and was guilty of larceny as bailee.⁵³ A constable seized goods on an execution put in his hands, sold the same at private sale, contrary to law, and converted the proceeds to his own use. Held not guilty of larceny as bailee, the general property in the goods being in the judgment debtor until sold according to law.⁵⁴

§ 404. Owner—Stealing.—A general owner of property may be guilty of larceny in stealing it from a special owner; as, where a constable has seized and levied upon property by virtue of an execution, the owner in taking the property from the constable with the fraudulent design of charging the constable with the value of it, commits larceny.⁵⁵

⁵⁰ Johnson v. P., 113 Ill. 103, 105.

⁵¹ Crocheron v. S., 86 Ala. 64, 5 So. 649, 8 Am. C. R. 474; S. v. Stone, 68 Mo. 101, 3 Am. C. R. 278; P. v. Campbell, 127 Cal. 278, 59 Pac. 593. See P. v. DeGraaff, 127 Cal. 676, 60 Pac. 429; Siemers v. S. (Tex. Cr. 1900), 55 S. W. 334.

⁵² Reg. v. Aden, 12 Cox 512, 1 Green C. R. 47. See Reg. v. Holloway, 18 Cox C. C. 631.

⁵³ Queen v. DeBanks, L. R. 13 Q.

B. D. 29, 4 Am. C. R. 602; Bergman v. P., 177 Ill. 244, 52 N. E. 363.

⁵⁴ Zschocke v. P., 62 Ill. 128, 2 Green C. R. 560; Kibs v. P., 81 Ill. 600. See 1 McClain Cr. L., § 554.

⁵⁵ Adams v. S., 45 N. J. L. 449, 4 Am. C. R. 331; P. v. Stone, 16 Cal. 369; P. v. Long, 50 Mich. 249, 15 N. W. 105; Com. v. Green, 111 Mass. 392; S. v. Webb, 87 N. C. 558; White-side v. Lowney, 171 Mass. 431, 50 N. E. 931; Com. v. Shertzer, 3 Lack. L. N. (Pa.) 8; S. v. Fitzpatrick, 9

ARTICLE II. MATTERS OF DEFENSE.

§ 405. **When false pretense.**—If the owner parts with the possession and title of his goods or money, then neither the taking nor the conversion is felonious; it amounts to a fraud only; it is obtaining goods by false pretense. But if he parts with possession only, it is larceny.⁵⁶

§ 406. **Taking to secure claim.**—Where a person having the care and control of the property of his employer, takes it in good faith to secure his wages, or claim due him from his employer, he will not be guilty of larceny, although his claim may be disputed.⁵⁷

§ 407. **Intent essential.**—The defendant may show that he took the property, not to steal it, but to aid him in making his escape from arrest, and he may show that he carried with him a friend by whom the property was returned.⁵⁸

§ 408. **Believing to be his own.**—On a charge of larceny the defendant has a right to show that he took the property in question in good faith, believing at the time that it belonged to him.⁵⁹

Houst. (Del.) 385, 32 Atl. 1072; S. v. Powell, 34 Ark. 693.

⁵⁶ Welsh v. P., 17 Ill. 339; Stinson v. P., 43 Ill. 398; Murphy v. P., 104 Ill. 533; P. v. Tomlinson, 102 Cal. 20, 36 Pac. 506; Bailey v. S., 58 Ala. 414; Com. v. Barry, 124 Mass. 325; State v. Anderson, 25 Minn. 66; P. v. Abbott, 53 Cal. 284; P. v. McDonald, 43 N. Y. 61; Hildebrand v. P., 56 N. Y. 394; Steward v. P., 173 Ill. 464, 50 N. E. 1056; Johnson v. P., 113 Ill. 106; Haley v. S., 49 Ark. 147, 4 S. W. 746, 7 Am. C. R. 333; Kellogg v. S., 26 Ohio St. 15; Loomis v. P., 67 N. Y. 329; S. v. Will, 49 La. 1337, 22 So. 378; S. v. Skinner, 29 Or. 599, 46 Pac. 368; Miller v. Com., 78 Ky. 15, 39 Am. R. 194; Zink v. P., 77 N. Y. 114, 33 Am. R. 589.

⁵⁷ P. v. Eastman, 77 Cal. 171, 19 Pac. 266; Phelps v. P., 55 Ill. 337; P. v. Hillhouse, 80 Mich. 580, 45 N. W. 484; Durrett v. S., 62 Ala. 434. See S. v. Waltz, 52 Iowa 227, 2 N. W. 1102; S. v. Sherman, 55 Mo. 83, 2 Green C. R. 613; Reg. v. Waller, 10 Cox C. C. 360; Umphrey v. S., 63

Ind. 223, 3 Am. C. R. 248; S. v. Davis, 38 N. J. L. 176, 1 Am. C. R. 398.

⁵⁸ S. v. Dillon, 48 La. 1365, 20 So. 913. See Lucas v. S., 33 Tex. Cr. 290, 26 S. W. 213; Robinson v. S., 113 Ind. 510, 16 N. E. 184; Johnson v. S., 36 Tex. 375, 1 Green C. R. 347; Hart v. S., 57 Ind. 102; Williams v. S., 26 Ala. 85.

⁵⁹ Dean v. S. (Fla. 1899), 26 So. 638; Hunter v. S. (Tex. Cr. App.), 37 S. W. 323; Baker v. S., 17 Fla. 406; Black v. S., 38 Tex. Cr. 58, 41 S. W. 606; Vance v. S., 34 Tex. Cr. 395, 30 S. W. 792; Barnes v. S., 103 Ala. 44, 15 So. 901; Brooks v. S. (Tex. Cr. App.), 27 S. W. 141; S. v. Johnson, 49 Iowa 141; S. v. Holmes, 17 Mo. 379, 57 Am. D. 269; S. v. Thompson, 95 N. C. 596; Dis-muke v. S. (Tex. Cr. App.), 20 S. W. 562. See Com. v. Green, 111 Mass. 392; P. v. Devine, 95 Cal. 227, 30 Pac. 378; Morningstar v. S., 55 Ala. 148. Bullard v. S., 40 Tex. Cr. 270, 50 S. W. 348.

§ 409. **Believing to be worthless.**—The defendant took some old records which he found stored in a barn; he took them as old paper without knowledge of their character, believing them to be worthless and abandoned. Held not guilty of larceny.⁶⁰

§ 410. **Taking by mistake.**—If one innocently takes another's property by mistake and afterward converts it to his own use, it is not larceny.⁶¹

§ 411. **Husband appropriating wife's goods.**—The husband does not commit larceny in appropriating the property of his wife to his own use, nor does the wife, in appropriating her husband's property, even though she may have committed adultery in violation of her marriage contract. They are one person, in law.⁶² "Suppose the wife did consent to the taking away of the property of her husband (whom she had repudiated), if the accused took it with the felonious intent of depriving the husband of it, her consent, when she had repudiated her relation of wife, would not help it."⁶³

§ 412. **Possession alone insufficient.**—Mere possession of stolen property alleged to have been stolen will not sustain a conviction. It must be shown that the property has been stolen, before the burden of accounting for the possession of it is imposed on the defendant.⁶⁴

§ 413. **Legal custodian appropriating.**—At common law, where a party is in legal custody of the property of another, he can not commit larceny of it, although he should fraudulently appropriate it to his own use.⁶⁵

§ 414. **Joint owner—Tenant appropriating.**—A person owning property jointly with others can not be guilty of stealing it unless the

⁶⁰ U. S. v. DeGroat, 30 Fed. 764; S. v. Swayze, 11 Or. 357, 3 Pac. 574.

⁶¹ P. v. Miller, 4 Utah 410, 11 Pac. 514.

⁶² Queen v. Kenny, 2 Q. B. D. 307, 3 Am. C. R. 451; Beasley v. S., 138 Ind. 552, 38 N. E. 35; Thomas v. Thomas, 51 Ill. 165; Queen v. Brittleton, 12 Q. B. D. 266, 4 Am. C. R. 605; Watkins v. S., 60 Miss. 323.

⁶³ P. v. Swalm, 80 Cal. 46, 22 Pac. 67, 8 Am. C. R. 480; P. v. Cole, 43 N. Y. 508; Rex v. Flatman, 14

Cox 396; P. v. Schuyler, 6 Cowen (N. Y.) 572. See 3 Greenl. Ev., § 158.

⁶⁴ Smathers v. S., 46 Ind. 449; Hunt v. Com., 13 Gratt. (Va.) 757; S. v. Furlong, 19 Me. 225; S. v. Tucker, 76 Iowa 232, 40 N. W. 725; P. v. Williams, 57 Cal. 108.

⁶⁵ S. v. Butler, 21 S. C. 353, 5 Am. C. R. 208; Com. v. Ryan, 155 Mass. 523, 30 N. E. 364; Com. v. King, 9 Cush. (Mass.) 284; P. v. McDonald, 43 N. Y. 61; Reg. v. Betts, Bell 90.

person or persons from whom it was taken was entitled to the exclusive possession of it.⁶⁶ The defendant, an attorney, sold property for his client and was entitled, by contract, to compensation out of the proceeds to the amount of ten dollars for his services. He sold the property and appropriated the entire sum. Held guilty of larceny, he having no property in the whole sum when it was not yet divided.⁶⁷ A tenant by contract having a half interest in corn raised by him on the farm of his landlord, can not be convicted of larceny in appropriating to his own use the entire crop of corn, they being joint owners.⁶⁸

§ 415. Breach of trust only.—The defendant was authorized to sell a lot for the owner and loan the money received therefor at interest for the owner. He sold the lot, but instead of loaning the money as instructed, he lost it at gaming. This was not larceny at common law, the prosecutor never having had possession of the money at any time.⁶⁹

§ 416. Value of property.—Bonds, bills and notes, which concern mere choses in action, were at the common law held not to be such goods whereof larceny might be committed, being of no intrinsic value, and not importing any property in possession of the person from whom they were taken.⁷⁰

§ 417. Railroad ticket.—A railroad ticket which is not signed, stamped and dated is worthless and not the subject of larceny.⁷¹

§ 418. Owner's unlawful conduct.—The defendant offered to show on the trial that the owner of the property stolen had made a fraudulent mortgage on it, and had been indicted therefor. Held no defense.⁷²

§ 419. Several owners—One offense.—If a person steal divers articles of property at the same time and place, owned by the same person

⁶⁶ *Fairy v. S.*, 18 Tex. App. 314. See *Morrisette v. S.*, 77 Ala. 71; *Phelps v. S.*, 109 Ga. 115, 34 S. E. 210.

⁶⁷ *Com. v. Lannan*, 153 Mass. 287, 26 N. E. 858.

⁶⁸ *S. v. McCoy*, 89 N. C. 466; *S. v. Copeland*, 86 N. C. 691. See *Bell v. S.*, 7 Tex. App. 25.

⁶⁹ *Kibs v. P.*, 81 Ill. 601, citing *Whar. Cr. L.* (7th ed.), § 1830.

⁷⁰ 4 Bl. Com. 234; 2 Bish. Cr. L. (new ed.), § 769; 1 McClain Cr. L., § 543.

⁷¹ *McCarty v. S.*, 1 Wash. St. 377, 25 Pac. 299.

⁷² *Gillespie v. P.*, 176 Ill. 238, 52 N. E. 250.

or different persons, his indictment, trial and conviction for the larceny of any one of such articles will bar a prosecution for the theft of the others.⁷³

§ 420. Jeopardy—When one offense.—An acquittal under an indictment for breaking and entering a dwelling house with intent to steal, is a bar to a second indictment for grand larceny, if the larceny formed part of the same transaction as the burglary.⁷⁴ Although the property stolen belonged to distinct persons, it having been taken at the same time and place, constituted but one offense.⁷⁵

§ 421. Two offenses—One occasion.—Stealing the property of two different persons in the same room on the same occasion where the property of one was in one part of the room, and the goods of the other in another part of the room so that the goods of each could not be taken at the same moment of time, constitute two different offenses.⁷⁶

§ 422. Jeopardy—Splitting transaction.—Where a person has been properly tried and convicted in a justice court for stealing "from the person," being a misdemeanor over which the justice had jurisdiction, this is a bar to an indictment on the same transaction for stealing "from the person," under a statute making it a felony.⁷⁷ An acquittal on a charge of larceny is a bar, not only to an indictment for the larceny of the property, but also for any other offense of which such larceny is an essential element, which includes robbery.⁷⁸

⁷³ *S. v. Nelson*, 29 Me. 329; 1 Hale P. C. 531; *Hudson v. S.*, 9 Tex. App. 151; *Simco v. S.*, 2 Cr. L. Mag. 30; *S. v. McCormack*, 8 Or. 236, 2 Cr. L. Mag. 112; *Ackerman v. S.*, 7 Wyo. 504, 54 Pac. 228; *United States v. Lee*, 4 Cranch (U. S.) 446; *S. v. Congrove*, 109 Iowa 66, 80 N. W. 227; *S. v. Colgate*, 31 Kan. 511, 5 Am. C. R. 75, 3 Pac. 346; *Bell v. S.*, 42 Ind. 335; *Wilson v. S.*, 45 Tex. 77, 2 Am. C. R. 356. See also, *Lowe v. S.*, 57 Ga. 171, 2 Am. C. R. 344; *Lorton v. S.*, 7 Mo. 55, 37 Am. D. 179; *S. v. Bynum*, 117 N. C. 752, 23 S. E. 219; *S. v. Emery*, 68 Vt. 109, 34 Atl. 432; *S. v. English*, 14 Mont. 399, 36 Pac. 815.

⁷⁴ *Triplett v. Com.*, 84 Ky. 193, 1

S. W. 84; *Turner v. S.*, 22 Tex. App. 42, 2 S. W. 619; *Gordon v. S.*, 71 Ala. 315; *S. v. Bruffey*, 75 Mo. 389.

⁷⁵ *S. v. Warren*, 77 Md. 121, 26 Atl. 500; *Fulmer v. Com.*, 97 Pa. St. 503; *S. v. Hennessey*, 23 Ohio St. 339; *S. v. Merrill*, 44 N. H. 624; 2 East P. C., § 136.

⁷⁶ *Phillips v. S.*, 85 Tenn. 551, 3 S. W. 434, 7 Am. C. R. 318.

⁷⁷ *S. v. Gleason*, 56 Iowa 203, 9 N. W. 126; *S. v. Wiles*, 26 Minn. 381, 4 N. W. 615; 1 McClain Cr. L., § 575.

⁷⁸ *S. v. Mikesell*, 70 Iowa 176, 30 N. W. 474; *Com. v. Curtis*, 11 Pick. (Mass.) 134. See *S. v. Wiles*, 26 Minn. 381, 4 N. W. 615, 2 Am. C. R. 621.

§ 423. **Property found.**—A general belief among the people that property found without marks to indentify it belongs to the finder, is no defense to a charge of larceny.⁷⁹

§ 424. **Minor stealing.**—That the defendant was a minor and acted under the direction and control of his mother or another, is no defense.⁸⁰

§ 425. **Giving consent, is defense.**—It is for the defendant to show as a matter of defense that the owner of the property gave his consent to the taking of the property alleged to have been stolen.⁸¹

§ 426. **Venue—What county—Or state.**—A person may be indicted in any county where found in possession of the stolen goods. He is guilty of stealing in any county or place where he has the goods.⁸² There are many cases holding that a state, into which stolen goods are carried by a thief from another state, has no jurisdiction of larceny of the goods; and *a fortiori* if the goods were stolen in a foreign country.⁸³

ARTICLE III. INDICTMENT.

§ 427. **Description of property.**—An indictment charging the larceny of several articles of property, in the same count, at the same time, which sufficiently describes some of the articles, is good, though the others are not sufficiently described.⁸⁴

⁷⁹ S. v. Welch, 73 Mo. 284, 39 Am. R. 515.

⁸⁰ P. v. Richmond, 29 Cal. 414.

⁸¹ Holmes v. S., 38 Tex. Cr. 370, 42 S. W. 979. See Hoskins v. S. (Tex. Cr. App.), 43 S. W. 1003.

⁸² Stinson v. P., 43 Ill. 400; P. v. Burke, 11 Wend. 129; Myers v. P., 26 Ill. 176; Com. v. Andrews, 2 Mass. 114; Baker v. S., 58 Ark. 513, 25 S. W. 603, 9 Am. C. R. 456. On receiving, Allison v. Com., 83 Ky. 254, 7 Am. C. R. 301; Johnson v. S., 47 Miss. 671, 1 Green C. R. 341. See Stanley v. S., 24 Ohio St. 166, 2 Am. C. R. 352; Bryant v. S., 116 Ala. 445, 23 So. 40; S. v. Johnson, 2 Or. 115; P. v. Garcia, 25 Cal. 531; S. v. McGraw, 87 Mo. 161; Thomas v. Com., 12 Ky. L. 903, 15 S. W. 861; S. v. McCoy, 42 La. 228, 7 So. 330; 4 Bl.

Com. 305; 3 Greenl. Ev. (Redf. ed.), § 152.

⁸³ Stanley v. S., 24 Ohio St. 166, 2 Am. C. R. 353; P. v. Gardner, 2 Johns. (N. Y.) 477; S. v. LeBlanch, 2 Vroom (N. J.) 82; Simmons v. Com., 5 Binn. (Pa.) 617; Simpson v. S., 4 Humph. (Tenn.) 456; Beal v. S., 15 Ind. 378; S. v. Reonnals, 14 La. 278; Lee v. S., 64 Ga. 203, 37 Am. D. 67; Watson v. S., 36 Miss. 593; 3 Greenl. Ev. (Redf. ed.), § 152. *Contra*, S. v. Bartlett, 11 Vt. 650; S. v. Underwood, 49 Me. 181; S. v. Bennett, 14 Iowa 479; S. v. Johnson, 2 Or. 115; Reg. v. Hennessy, 35 U. C. Q. B. 603, 1 Am. C. R. 411.

⁸⁴ Reid v. S., 88 Ala. 36, 6 So. 840. See S. v. Anderson, 42 La. 590, 7 So. 687; Shaffer v. S., 74 Ind. 90. See Haskins v. P., 16 N. Y. 314.

§ 428. **Description of property.**—An indictment charging the defendant with stealing “one book of the value of six dollars,” is sufficient description of the property, though general.⁸⁵ An indictment describing the stolen property as “four pairs of shoes, four pairs of pants, one lot of jewelry, one lot of shirts and cravats,” is sufficient description of the property.⁸⁶ An indictment charging the larceny of “fifty ears of corn, the same being a part of an outstanding crop of corn,” the property of the owner, is sufficient.⁸⁷

§ 429. **Description of animal.**—On a charge of horse stealing, the indictment, in alleging that the defendant feloniously took and carried away “one horse,” then and there the property of a person, naming him, is sufficient description.⁸⁸ An indictment describing the stolen property as “a certain hog,” is sufficient description of the animal—without stating the color, kind, weight, mark or brand; and so, “one cow” is sufficient description.⁸⁹

§ 430. **Description of money.**—An indictment charging the larceny of “sixty dollars United States currency,” or “divers bank bills,” is sufficient description of the money where it alleges that the number and denomination of the pieces of such money were to the grand jurors unknown.⁹⁰ In an indictment for larceny, neither the number nor de-

⁸⁵ Turner v. S., 102 Ind. 426, 1 N. E. 869; Waller v. P., 175 Ill. 221, 51 N. E. 900; P. v. Burns, 121 Cal. 529, 53 Pac. 1096; S. v. Carter, 33 La. 1214; S. v. Labauve, 46 La. 548, 15 So. 172; Palmer v. S., 136 Ind. 393, 36 N. E. 130; Churchwell v. S., 117 Ala. 124, 23 So. 72; Peters v. S., 100 Ala. 10, 14 So. 896; 2 Bish. Cr. Pro. (3d ed.), § 700; S. v. Martin, 82 N. C. 672; P. v. Freeman, 1 Idaho 322; Grissom v. S., 40 Tex. Cr. 146, 49 S. W. 93; S. v. Logan, 1 Mo. 532. But see McCowan v. S., 58 Ark. 17, 22 S. W. 955.

⁸⁶ S. v. Curtis, 44 La. 320, 10 So. 784; Powell v. S., 88 Ga. 32, 13 S. E. 829; Johnson v. S. (Tex. Cr.), 58 S. W. 69.

⁸⁷ Schamberger v. S., 68 Ala. 543; Com. v. Pine, 2 Pa. L. J. R. 154; S. v. Ballard, 97 N. C. 443, 1 S. E. 685.

⁸⁸ McBride v. Com., 76 Ky. 337; S. v. Friend, 47 Minn. 449, 50 N. W. 692; Mizell v. S., 38 Fla. 20, 20 So. 769; Oxier v. U. S.

(Ind. Ter.), 38 S. W. 331; Oats v. U. S. (Ind. Ter.), 38 S. W. 673; S. v. Stelly, 48 La. 1478, 21 So. 89. See S. v. Brookhouse, 10 Wash. 87, 38 Pac. 862; Nightengale v. S., 94 Ga. 395, 21 S. E. 221; Barnes v. S., 40 Neb. 545, 59 N. W. 125; S. v. Hoffman, 53 Kan. 700, 37 Pac. 138.

⁸⁹ P. v. Stanford, 64 Cal. 27, 28 Pac. 106; S. v. Crow, 107 Mo. 341, 17 S. W. 745. See S. v. White, 129 Ind. 153, 28 N. E. 425; S. v. Baden, 42 La. 295, 7 So. 582; P. v. Warren, 130 Cal. 683, 63 Pac. 86; P. v. Machado (Cal. 1900), 63 Pac. 66.

⁹⁰ Leonard v. S., 115 Ala. 80, 22 So. 564; Ter. v. Anderson, 6 Dak. 300, 50 N. W. 124; Travis v. Com., 96 Ky. 77, 27 S. W. 863. See Davis v. S., 32 Tex. Cr. 377, 23 S. W. 794; S. v. Hoke, 84 Ind. 137; S. v. Tilney, 38 Kan. 714, 17 Pac. 606; Merrill v. S., 45 Miss. 651; Hart v. S., 55 Ind. 599; Croker v. S., 47 Ala. 53; Carden v. S., 89 Ala. 130, 7 So. 801; Green v. S., 28 Tex. App. 493, 13 S. W. 784.

nomination of bank notes stolen need be specified, nor need it be stated that their number or denomination was to the grand jurors unknown. "Sundry bank bills, current within said commonwealth amounting to the sum of two hundred and ten dollars of the goods, chattels and money of one Patrick Dorsey," is sufficient.⁹¹ An indictment alleged the larceny of "seven national bank bills, each of the denomination of twenty dollars;" held sufficient description, and that it was not necessary to state the name of the bank issuing the bills nor to allege that the bills were genuine.⁹² The indictment in describing the money as "twelve five dollars and one ten dollars notes, to-wit: United States promissory or bank notes of the value of seventy dollars," was held sufficient description.⁹³ An indictment describing the money as "United States paper currency money" includes treasury notes, commonly called "greenbacks," silver certificates and gold certificates.⁹⁴ Considerable latitude should be allowed in charging the larceny of money, because where a parcel consisting of a great number of notes or coins is stolen, and has not been recovered, the owner will generally be unable to specify with legal certainty the bills and coins taken.⁹⁵ A general description of the property, as "sundry bank bills, issued by authority of the United States of America, usually known as 'greenbacks,' amounting in all to one hundred and eighty dollars, or in the aggregate to five hundred and eighty-nine dollars," is plainly not sufficient description.⁹⁶ Describing the money alleged to have been stolen as "one hundred dollars," is not sufficient, without a reason for a better description.⁹⁷

⁹¹ *S. v. Hurst*, 11 W. Va. 54, 3 Am. C. R. 110, 111; *Com. v. Stebbins*, 8 Gray (Mass.) 492; *Com. v. Sawtelle*, 11 Cush. 142; *S. v. Taunt*, 16 Minn. 109. See *Haskins v. P.*, 16 N. Y. 344; *S. v. Palmer*, 20 Wash. 207, 54 Pac. 1121; *Wilson v. S.*, 66 Ga. 591; *Grant v. S.*, 55 Ala. 201. *Contra*, *Hamblett v. S.*, 18 N. H. 384.

⁹² *S. v. Stevens*, 62 Me. 284, 2 Green C. R. 481; *S. v. Evans*, 15 Rich. (S. C.) 31.

⁹³ *Bell v. S.*, 41 Ga. 589; *S. v. Boyce*, 65 Ark. 82, 44 S. W. 1043; *Kelley v. S.*, 34 Tex. Cr. 412, 31 S. W. 174. See *Goldstein v. S.* (Tex. Cr.), 23 S. W. 686.

⁹⁴ *Rucker v. S.* (Tex. Cr.), 26 S. W. 65. See *Ex parte Prince*, 27 Fla. 196, 9 So. 659; *Randall v. S.*, 53 N. J. L. 485, 22 Atl. 45.

⁹⁵ *Keating v. P.*, 160 Ill. 486, 43 N. E. 724; *S. v. Hurst*, 11 W. Va. 54, 3 Am. C. R. 109; *S. v. Tilney*, 38 Kan. 714, 17 Pac. 606; *S. v. Patton*, 1 Marv. (Del.) 554, 41 Atl. 193; *Wesley v. S.*, 61 Ala. 282; *S. v. Anderson*, 25 Minn. 66. See *Riggs v. S.*, 104 Ind. 261, 3 N. E. 886, 6 Am. C. R. 394.

⁹⁶ *Ter. v. Shipley*, 4 Mont. 468, 2 Pac. 313, 4 Am. C. R. 492; *Merwin v. P.*, 26 Mich. 298. *Contra*, *S. v. Burns*, 19 Wash. 52, 52 Pac. 316.

⁹⁷ *Barton v. S.*, 29 Ark. 68, 2 Am. C. R. 340; *Brown v. P.*, 173 Ill. 37, 50 N. E. 106; *Jackson v. S.*, 34 Tex. Cr. 90, 29 S. W. 265; *S. v. Oakley*, 51 Ark. 112, 10 S. W. 17; *Merwin v. P.*, 26 Mich. 298, 1 Green C. R. 349; *S. v. Murphy*, 6 Ala. 846. *Contra*, *Randall v. S.*, 132 Ind. 539,

§ 431. **Describing money—Coin.**—An indictment charging the larceny of coin should describe the coin as so many pieces of gold or silver, giving the name or denomination. But where the description is unknown then a general description will answer, such as so many dollars in specie, coin of the United States, the denomination and description of which is to the grand jury unknown.⁹⁸ An indictment alleging the larceny of “four dollars and fifty cents, specie coin of the United States, the denomination and description of which is to the grand jury unknown,” sufficiently describes the property.⁹⁹

§ 432. **Describing notes, checks.**—An indictment charging the larceny of “ten promissory notes, for the payment of divers sums of money, amounting in all to fifty dollars of the value of fifty dollars,” sufficiently describes the notes.¹⁰⁰ An indictment for larceny describing the property as “one paper, purporting to be a check for the payment of one hundred and twenty-five dollars, of the value of one hundred and twenty-five dollars, the goods and chattels” of the owner, is sufficient.¹

§ 433. **Aggregating values.**—An indictment is sufficient in alleging the separate value of the several articles stolen without stating the aggregate value; or in stating the aggregate value of all the articles without stating the separate value of each.²

32 N. E. 103; S. v. Fisher, 106 Iowa 658, 77 N. W. 456; Wofford v. S., 29 Tex. App. 536, 16 S. W. 535; S. v. Green, 27 La. 598. See S. v. Hanchew, 3 Wash. 12, 27 Pac. 1029. Under a statute for the larceny of any note of any bank “of this or any other state” the indictment need not allege that the note was of any particular bank: Foster v. S., 71 Md. 553, 18 Atl. 972.

⁹⁸ Lord v. S., 20 N. H. 404; Croker v. S., 47 Ala. 53; S. v. Rush, 95 Mo. 199, 8 S. W. 221; P. v. Ball, 14 Cal. 101; P. v. Bogart, 36 Cal. 245; Porter v. S., 26 Fla. 56, 7 So. 145.

⁹⁹ Bolling v. S., 98 Ala. 80, 12 So. 782; Porter v. S., 26 Fla. 56, 7 So. 145.

¹⁰⁰ P. v. Jackson, 8 Barb. (N. Y.) 637.

¹ Whalen v. Com., 90 Va. 544, 19

S. E. 182; Com. v. Brettun, 100 Mass. 206, 97 Am. D. 95.

² Com. v. Collins, 138 Mass. 483, 5 Am. C. R. 345; S. v. Hart, 29 Iowa 268; S. v. Kelliher, 32 Or. 240, 50 Pac. 532; S. v. O’Connell, 144 Mo. 387, 46 S. W. 175; Edson v. S., 148 Ind. 283, 47 N. E. 625; S. v. Shelton, 90 Tenn. 539, 18 S. W. 253; S. v. Brew, 4 Wash. 95, 29 Pac. 762; P. v. Robles, 34 Cal. 591; Jackson v. S., 69 Ala. 249; Com. v. Grimes, 76 Mass. 470, 71 Am. D. 666. *Contra*, as to aggregate value: Hamblett v. S., 18 N. H. 384. The legislature has power to enact a law which might prevent the stealing or embezzling of an article which has no value, and impose a penalty for a violation of such law: McDaniels v. P., 118 Ill. 302, 8 N. E. 687.

§ 434. **Value not an element.**—Under a statute making it larceny to steal a horse or other animal, or other property, without reference to the value of the property, an indictment need not allege the value.³ The indictment need not aver the value of a railroad ticket under the Illinois statute, the value not being an element of the crime.⁴

§ 435. **Ownership of property.**—The indictment, in charging the larceny of property, may lay the ownership to be in either the general owner or special owner, at the election of the pleader. If, for example, the property is stolen from a common carrier, the indictment may allege the ownership to be in the common carrier or the general owner or both in different counts.⁵ The property stolen must be laid to be in some one who has a property of some kind in the same, who has the general property in him, or who has a special property. It is not sufficient to charge it to be the property of one who is a mere servant, although he may have actual possession at the time of the larceny; as where the property was owned by the railroad and not by its agent at its depot, who had possession of the goods at the time of the larceny.⁶

§ 436. **Company as owner.**—If the property is owned by a company, or by several different persons not incorporated, then the name of each owner must be alleged.⁷ An indictment alleging the property to be

³ Hoge v. P., 117 Ill. 35, 6 N. E. 796; Hughes v. Ter., 8 Okla. 23, 56 Pac. 708; S. v. Kyle, 14 Wash. 550, 45 Pac. 147; Chesnut v. P., 21 Colo. 512, 42 Pac. 656; S. v. Hill, 46 La. 736, 15 So. 145; Ter. v. Pendry, 9 Mont. 67, 22 Pac. 760; S. v. Bowers (Mo.), 1 S. W. 288; P. v. Townsley, 39 Cal. 405. See S. v. Young, 13 Wash. 584, 43 Pac. 881; S. v. Webster, 156 Mo. 257, 56 S. W. 893.

⁴ McDaniels v. P., 118 Ill. 303, 8 N. E. 687. See Hoge v. P., 117 Ill. 35, 6 N. E. 796. See also Wells v. S., 11 Neb. 409, 9 N. W. 552; S. v. Small, 26 Kan. 209; Sheppard v. S., 42 Ala. 531; S. v. Sharp, 106 Mo. 106, 17 S. W. 225. But see P. v. Belcher, 58 Mich. 325, 25 N. W. 303.

⁵ Murphy v. P., 104 Ill. 534; S. v. Gorham, 55 N. H. 156, 165; S. v. O'Connell, 144 Mo. 387, 46 S. W. 175; S. v. Farris (Idaho), 51 Pac. 772; S. v. Jenkins, 78 N. C. 478, 4

Am. C. R. 336; Edson v. S., 148 Ind. 283, 47 N. E. 625; S. v. Lewis, 49 La. 1207, 22 So. 327; Kennedy v. S., 31 Fla. 428, 12 So. 858; S. v. McRae, 111 N. C. 665, 16 S. E. 173; Fowler v. S., 100 Ala. 96, 14 So. 860; S. v. Somerville, 21 Me. 14; Billard v. S., 30 Tex. 367, 94 Am. D. 317.

⁶ S. v. Jenkins, 78 N. C. 478, 4 Am. C. R. 336; Phillips v. S. (Tex. Cr.), 42 S. W. 557; Crook v. S., 39 Tex. Cr. 252, 45 S. W. 720; Pratt v. S., 35 Ohio St. 514; Reed v. Com., 7 Bush (Ky.) 641; Long v. S. (Tex. Cr.), 20 S. W. 576.

⁷ Wallace v. P., 63 Ill. 452; 1 Whar. Cr. L. (8th ed.), § 941; McCowan v. S., 58 Ark. 17, 22 S. W. 955. *Contra*, S. v. Mohr, 68 Mo. 303, 3 Am. C. R. 65; P. v. Ah Sing, 19 Cal. 598.

owned by the "American Merchants' Union Express Company," is not sufficient, in failing to state that body to be a corporation.⁸

§ 437. Ownership—When doubtful.—If it be doubtful from the evidence whether the stolen goods were the property of one person or another, then in such case, one count alleging the ownership in one person and another alleging the ownership in another person, is proper.⁹

§ 438. Owner of estray—Unknown owner.—A person who has taken up a horse as an estray may be alleged in the indictment as the owner.¹⁰ If the owner be unknown, provided there be a property, it is larceny to steal it; and an indictment will lie for the goods of a person unknown.¹¹

§ 439. Owner of estate—Burial goods.—The administrator of a dead person's estate is the owner, and in charging larceny thereof the indictment is bad in averring the ownership of the property to be in the administrator and the heirs of the deceased jointly.¹² But an heir of the estate may be alleged as the owner where he has control of it.¹³ "If A dying, be buried, and B opens the grave in the night-time and steals the winding sheet, the indictment can not suppose them the goods of the dead man, but of the executor's, administrator's or ordinary's, as the case falls out."¹⁴

§ 440. Owner's business name.—The owner of goods may adopt a business name or he may acquire a name by reputation by which he is as well if not better known than by any other. On a charge of the larceny of his goods, it is sufficient to allege in the indictment the ownership to be in him by such business name.¹⁵

⁸ Wallace v. P., 63 Ill. 452; McCowan v. S., 58 Ark. 17, 22 S. W. 955; White v. S., 24 Tex. App. 231, 5 S. W. 857; P. v. Bogart, 36 Cal. 245.

⁹ P. v. Thompson, 28 Cal. 216; Mabry v. Com., 2 Va. Cas. 396; Butler v. S., 91 Ala. 87, 9 So. 191. See Hix v. P., 157 Ill. 382, 41 N. E. 862; Kennedy v. S., 31 Fla. 428, 12 So. 858.

¹⁰ Quinn v. P., 123 Ill. 339, 15 N. E. 46. See also Swink v. S., 32 Tex. Cr. 530, 24 S. W. 893.

¹¹ 4 Bl. Com. 236.

¹² Walker v. S., 111 Ala. 29, 20 So. 612.

¹³ S. v. Woodley, 25 Ga. 235; Dreyer v. S., 11 Tex. App. 503.

¹⁴ 2 Hale P. C. 181; Beall v. S., 53 Ala. 460, 2 Am. C. R. 463; S. v. Doepke, 68 Mo. 208, 2 Am. C. R. 638.

¹⁵ P. v. Leong Quong, 60 Cal. 107, 4 Am. C. R. 335; S. v. Bell, 65 N. C. 314; Com. v. Trainor, 123 Mass. 415.

§ 441. **Joining burglary and larceny.**—Burglary and larceny may be joined in the same indictment if they grow out of the same transaction.¹⁶ Likewise embezzlement and larceny, or larceny and receiving, may be joined in the same indictment.¹⁷

§ 442. **Duplicity—Joining counts.**—Buying, receiving and aiding in concealing are but one offense, and may be alleged in one count.¹⁸ Stealing a horse, buggy and harness at the same time is but one transaction, and all may be alleged in the same count.¹⁹

§ 443. **Not duplicity—One act.**—Where several articles of property are stolen at the same time, the transaction being the same, the whole, although they belong to different owners, may be embraced in one count of the indictment, and the taking thereof charged as one offense.²⁰ An information charging in the same count that the defendant stole an article of property belonging to one person, and another article belonging to another person, and which fails to allege that the two articles were taken at the same time, is bad for duplicity.²¹ If the various counts in the indictment are intended to charge but a single transaction, namely, the larceny at the same time of the property of several different persons, only one count is necessary. The court will not assume, however, that they were one and the same offense, though alleged to have been committed on the same day.²²

¹⁶ *Speers v. Com.*, 17 Gratt. (Va.) 570; *Becker v. Com.* (Pa.), 8 Cent. Rep. 388, 9 Atl. 510. See *S. v. Lockwood*, 58 Vt. 378, 3 Atl. 539.

¹⁷ *Murphy v. P.*, 104 Ill. 534, 4 Am. C. R. 323; *Schintz v. P.*, 178 Ill. 321, 52 N. E. 903; *Redman v. S.*, 1 Blackf. (Ind.) 429; *S. v. Blakesley*, 43 Kan. 250, 23 Pac. 570; *S. v. Morrison*, 85 N. C. 561; *Bennett v. P.*, 96 Ill. 605; *Thompson v. P.*, 125 Ill. 260, 17 N. E. 749; *Andrews v. P.*, 117 Ill. 200, 7 N. E. 265; *Tobin v. P.*, 104 Ill. 567; *Hampton v. S.*, 8 Humph. (Tenn.) 69; *Com. v. O'Connell*, 12 Allen (Mass.) 451; *Gabriel v. S.*, 40 Ala. 357; *S. v. Moultrie*, 33 La. 1146; *Brown v. P.*, 39 Mich. 37; *S. v. Lawrence*, 81 N. C. 522.

¹⁸ *Bradley v. S.*, 20 Fla. 738, 5 Am. C. R. 619.

¹⁹ *Waters v. P.*, 104 Ill. 546. See *Phillips v. S.*, 85 Tenn. 551, 3 S. W. 434, 7 Am. C. R. 318; *Clem v. S.*, 42

Ind. 420, 2 Green C. R. 693, 13 Am. R. 369, citing *S. v. Williams*, 10 Humph. (Tenn.) 101.

²⁰ *Waters v. P.*, 104 Ill. 547; *S. v. Hennessey*, 23 Ohio St. 339, 2 Green C. R. 542; *Nichols v. Com.*, 78 Ky. 180; *S. v. Wagner*, 118 Mo. 626, 24 S. W. 219; *S. v. Larson*, 85 Iowa 659, 52 N. W. 539; *S. v. Ward*, 19 Nev. 297, 10 Pac. 133; *P. v. Johnson*, 81 Mich. 573, 45 N. W. 1119; *S. v. Newton*, 42 Vt. 537; *Lowe v. S.*, 57 Ga. 171.

²¹ *Joslyn v. S.*, 128 Ind. 160, 27 N. E. 492; *S. v. Holmes*, 28 Conn. 230; *S. v. Faulkner*, 32 La. 725; *Waters v. S.*, 104 Ill. 544; *S. v. McCormack*, 8 Or. 236; *S. v. Merrill*, 44 N. H. 624.

²² *Bushman v. Com.*, 138 Mass. 507; *Lowe v. S.*, 57 Ga. 171; *S. v. Newton*, 42 Vt. 537; *S. v. Merrill*, 44 N. H. 624; *S. v. Simons*, 70 N. C. 336.

§ 444. **Intent to appropriate.**—Under a statute providing that “any person having possession of personal property of another by virtue of a contract of hiring, or borrowing, or other bailment, who shall, without the consent of the owner, fraudulently convert such property to his own use, with intent to deprive the owner of the value of the same, shall be guilty of theft,” it is not necessary to allege in the indictment an intent to appropriate the property.²³

§ 445. **Allegation as to consent.**—Where larceny, as defined by statute, contains the element of taking the property “without the consent of the owner,” then the indictment must allege the taking without the consent of the owner or person having possession of the property.²⁴

§ 446. **Allegation as to taking.**—Where the statute describing the crime of larceny contains the element of taking the property “from the possession” of the owner, then the indictment must allege the taking “from the possession” of the owner, with the other necessary averments.²⁵

§ 447. **Alleging “against will.”**—An indictment charging that the defendant did “feloniously steal, take and lead away” from the owner’s possession his pair of oxen, is sufficient without stating against the owner’s will or with intent to deprive him of his property.²⁶

§ 448. **Alleging corporation.**—An information charging larceny of property from a corporation need not allege its corporate charter, or the fact of incorporation. It is sufficient to aver its corporate name. And it is only necessary to prove the *de facto* existence of the corporation by reputation or otherwise.²⁷

§ 449. **“Feloniously” essential—“Away.”**—If the word “feloniously” be used in the statutory definition of larceny, an indictment

²³ Purcell v. S., 29 Tex. App. 1, 13 S. W. 993. See S. v. Griffin, 79 Iowa 568, 44 N. W. 813.

²⁴ Johnson v. S., 39 Tex. 393; Thurmond v. S., 30 Tex. App. 539, 17 S. W. 1098; Smith v. S., 21 Tex. App. 133, 17 S. W. 558. But see Burns v. S., 35 Tex. 724. *Contra*, Wedge v. S., 7 Lea (Tenn.) 687.

²⁵ Garner v. S., 36 Tex. 693; S. v.

Mullen, 30 Iowa 203; Garcia v. S., 26 Tex. 209, 82 Am. D. 605.

²⁶ Com. v. Butler, 144 Pa. St. 568, 24 Atl. 910; P. v. Davis, 97 Cal. 194, 31 Pac. 1109; S. v. Hackett, 47 Minn. 425, 50 N. W. 472.

²⁷ Braithwaite v. S., 28 Neb. 832, 45 N. W. 247; S. v. Grant, 104 N. C. 908, 10 S. E. 555; Kossakowski v. P., 177 Ill. 563, 53 N. E. 115.

omitting to allege that the property was feloniously stolen, taken and carried away, is bad.²⁸ The indictment must allege a felonious or fraudulent intent.²⁹ The indictment alleging that the defendant did "unlawfully and feloniously take, steal and carry in a dwelling house one twenty-dollar gold piece," is sufficient, though it is defective in omitting the word "away" after carry.³⁰

§ 450. **Venue—What county.**—If the goods were stolen in one county and carried into another, the indictment will be sufficient in charging the larceny in the latter county without setting out the transaction in the other county.³¹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 451. **Possession—Evidence of guilt.**—The possession of stolen property soon after the commission of a theft is *prima facie* evidence of the guilt of the person in whose possession it is found, and is sufficient to warrant a conviction, unless the other evidence in the case or the surrounding circumstances are such as to raise a reasonable doubt of such guilt.³² That the rule that possession of property recently

²⁸ *Sovine v. S.*, 85 Ind. 576; *Scudder v. S.*, 62 Ind. 13.

²⁹ *McCord v. S.*, 79 Ala. 269; *Gatewood v. S.*, 4 Ohio 386; *Com. v. Pratt*, 132 Mass. 246.

³⁰ *S. v. Witt*, 33 Or. 594, 55 Pac. 1053; *S. v. Parry*, 48 La. 1483, 21 So. 30. *Contra*, *Rountree v. S.*, 58 Ala. 381; *Com. v. Adams*, 73 Mass. 43.

³¹ *Hurlburt v. S.*, 52 Neb. 428, 72 N. W. 471; *P. v. Prather*, 120 Cal. 660, 53 Pac. 259; *Keith v. Ter.*, 8 Okl. 307, 57 Pac. 834; *Hoffman v. S.* (Tex. Cr. App.), 42 S. W. 309; *Morrissey v. P.*, 11 Mich. 327; *Johnson v. S.*, 47 Miss. 671; *McFarland v. S.*, 4 Kan. 68; *P. v. Mellon*, 40 Cal. 648; *Thomas v. S.*, 114 Ala. 31, 21 So. 784. *Contra*, *Hurt v. S.*, 26 Ind. 106; *Alsey v. S.*, 39 Ala. 664.

³² *Keating v. P.*, 160 Ill. 483, 43 N. E. 724; *Smith v. P.*, 103 Ill. 85; *Waters v. P.*, 104 Ill. 544; *Sahlinger v. P.*, 102 Ill. 241; *Comfort v. P.*, 54 Ill. 404; *S. v. Brady*, 27 Iowa 126; *Com. v. Randall*, 119 Mass. 107; *Gunther v. P.*, 139 Ill. 531, 28 N. E. 1101; *S. v. Walker*, 41 Iowa 217, 1 Am. C. R. 433; *Gablick v. P.*, 40 Mich.

292, 3 Am. C. R. 244. See *Walker v. Com.*, 28 Gratt. 969, 3 Am. C. R. 265; 3 Greenl. Ev., §§ 31, 32, 33; *Unger v. S.*, 42 Miss. 642; *S. v. Turner*, 65 N. C. 592; *Tucker v. S.*, 57 Ga. 503; *Brooks v. S.*, 96 Ga. 353, 23 S. E. 413, 10 Am. C. R. 136; *Bryant v. S.*, 116 Ala. 445, 23 So. 40; *Johnson v. S.*, 148 Ind. 522, 47 N. E. 926; *S. v. Kelly*, 50 La. 597, 23 So. 543; *Tomerlin v. S.* (Tex. Cr. App.), 26 S. W. 214; *Branson v. Com.*, 92 Ky. 330, 13 Ky. L. 614, 17 S. W. 1019; *S. v. Moore*, 101 Mo. 316, 14 S. W. 182; *S. v. Jennings*, 81 Mo. 185; *S. v. Butterfield*, 75 Mo. 297; *Tilly v. S.*, 21 Fla. 242; *Ter. v. Casio*, 1 Ariz. 485, 2 Pac. 755; *S. v. Kelly*, 57 Iowa 644, 11 N. W. 635; *Snowden v. S.*, 62 Miss. 100; *S. v. Jordan*, 69 Iowa 506, 29 N. W. 430; *P. v. Mahoney*, 18 Cal. 180; *Foster v. S.*, 52 Miss. 695; *Shepherd v. S.*, 44 Ark. 357; *Hughes v. S.*, 8 Humph. (Tenn.) 75; *Robinson v. S.*, 22 Tex. App. 690, 2 S. W. 539; *Graves v. S.*, 12 Wis. 591. *Contra*, *White v. S.*, 21 Tex. App. 339, 17 S. W. 727; *P. v. Chadwick*, 7 Utah 134, 25 Pac. 737; *Harper v.*

stolen makes out a *prima facie* case of guilt, and throws upon the defendant the burden of explaining that possession, is one of long standing and abundantly fortified by authorities, no one can question.³³ "Possession of stolen property, if immediately subsequent to the larceny, may sometimes be almost conclusive of guilt; but the presumption weakens with the time that has elapsed, and may scarcely arise at all if others besides the accused have had access with himself to the place where it is discovered."³⁴

§ 452. **Possession is presumption of fact.**—The presumption that the person found in possession of recently stolen property is the thief, is not a presumption of law, but one of fact. There is no legal rule on the subject; but much depends on the nature of the property stolen and the circumstances of each particular case. Such presumption establishes no legal rule, ascertains no legal test, defines no legal terms, measures no legal standard, bounds no legal limits.³⁵ To raise a presumption of guilt from the possession of the fruits of the instruments of crime by the prisoner, it is necessary that they be found in his exclusive possession.³⁶

§ 453. **"Satisfactory" explanation of possession.**—The defendant is not required to satisfactorily explain his possession of recently stolen property. If after considering the evidence introduced by him in connection with all the other evidence in the case, there appears a reasonable doubt of his guilt, he must be acquitted.³⁷

S., 71 Miss. 202, 13 So. 882. See 3 Greenl. Ev., § 31; Curtis v. S., 6 Coldw. (Tenn.) 9; P. v. Swinford, 57 Cal. 86; P. v. Noregea, 48 Cal. 123, 1 Am. C. R. 436; S. v. Rosecrans, 9 N. D. 163, 82 N. W. 422; Calloway v. S., 111 Ga. 832, 36 S. E. 63.

³³ S. v. Cassidy, 12 Kan. 550, 1 Am. C. R. 572; S. v. Buckley, 60 Iowa 471, 15 N. W. 289; 1 Greenl. Ev., § 34; Burrill's Circ. Ev., 446; Price's Case, 21 Gratt. (Va.) 864; Unger v. S., 42 Miss. 642; S. v. Turner, 65 N. C. 592; Knickerbocker v. P., 43 N. Y. 177; S. v. Creson, 38 Mo. 372; P. v. Mahoney, 18 Cal. 180; S. v. Daly, 37 La. 576; S. v. Weston, 9 Conn. 527; Ter. v. Casio, 1 Ariz. 485, 2 Pac. 755; Mondragon v. S., 33 Tex. 480; Smith v. P., 103 Ill. 82.

³⁴ Gablick v. P., 40 Mich. 292, 3 Am. C. R. 245; White v. S., 72 Ala. 195;

Belote v. S., 36 Miss. 96, 72 Am. D. 163; Com. v. Montgomery, 11 Metc. (Mass.) 534, 45 Am. D. 227.

³⁵ Smith v. S., 58 Ind. 340, 2 Am. C. R. 375; S. v. Hodge, 50 N. H. 510. See 3 Greenl. Ev., § 31; S. v. Jennett, 88 N. C. 665; Bellamy v. S., 35 Fla. 242, 17 So. 560; Ingalls v. S., 48 Wis. 647, 4 N. W. 785; Jones v. S., 26 Miss. 247; P. v. Fagan, 66 Cal. 534, 6 Pac. 394; Stokes v. S., 58 Miss. 677; S. v. Graves, 72 N. C. 482, 1 Am. C. R. 429; S. v. Walker, 41 Iowa 217, 1 Am. C. R. 433; Yates v. S., 37 Tex. 202, 1 Am. C. R. 434.

³⁶ 3 Greenl. Ev., § 33; S. v. Lackland, 136 Mo. 26, 37 S. W. 812; Robinson v. S., 22 Tex. App. 690, 2 S. W. 539; P. v. Hurley, 60 Cal. 74, 44 Am. R. 55.

³⁷ Hoge v. P., 117 Ill. 44, 6 N. E. 796; S. v. Kirkpatrick, 72 Iowa 500,

§ 454. **Possession long after larceny.**—There are many cases where the possession of stolen goods is so long after the commission of the crime that a court will refuse to submit the question to the jury—deciding as a matter of law that the possession is not recent—but in all other cases the question is one of fact to be submitted to the jury.³⁸ The facts and circumstances were reviewed in detail on the question of stolen property, found in possession of the defendant nearly two years after the larceny, and held sufficient to sustain a conviction.³⁹

§ 455. **Possession—Not exclusive.**—The mere finding of stolen goods in the house of the prisoner, when there are other inmates capable of stealing the property, is insufficient evidence to prove possession by the prisoner.⁴⁰

§ 456. **Possession of part.**—Evidence that the defendant had possession of part of the stolen property, may, in connection with other evidence, warrant a conviction.⁴¹ It is not essential to a conviction that the stolen goods should be found in the possession of the defendant, when the charge is otherwise clearly proven.⁴²

§ 457. **Explaining possession.**—It can make no difference who makes the proof, or how; if it shall appear that the accused came into possession of the stolen property honestly, he is entitled to the benefit of such proof, and an instruction depriving him of that benefit is erroneous.⁴³ "What explanation a person makes while in the possession of stolen property, at the time of finding it in his possession, is admissible as explanatory of the character of his possession."⁴⁴

34 N. W. 301, 7 Am. C. R. 334; Smith v. S., 58 Ind. 340, 2 Am. C. R. 375; Van Straaten v. P., 26 Colo. 184, 56 Pac. 905; S. v. Miner, 107 Iowa 656, 78 N. W. 679; Grentzinger v. S., 31 Neb. 460, 48 N. W. 148; Hyatt v. S., 32 Tex. Cr. 580, 25 S. W. 291; Heed v. S., 25 Wis. 421; S. v. Merrick, 19 Me. 398.

³⁸ S. v. Walker, 41 Iowa 217, 1 Am. C. R. 433; 3 Greenl. Ev., §§ 30, 31, 32; Com. v. Montgomery, 11 Metc. (Mass.) 534; Rex v. Partridge, 7 C. & P. 551; Engleman v. S., 2 Ind. 91.

³⁹ Reg. v. Starr, 40 U. C. Q. B. 268,

1 Am. C. R. 438. See also Galloway v. S., 41 Tex. 289, 1 Am. C. R. 437.

⁴⁰ Conkwright v. P., 35 Ill. 206; S. v. Castor, 93 Mo. 242, 5 S. W. 906; Turbeville v. S., 42 Ind. 490; Gabblick v. P., 40 Mich. 292, 3 Am. C. R. 244. See S. v. Brewster, 7 Vt. 122. *Contra*, P. v. Wilson, 151 N. Y. 403, 45 N. E. 862.

⁴¹ S. v. Phelps, 91 Mo. 478, 4 S. W. 119; Snowden v. S., 62 Miss. 100; S. v. Buckley, 60 Iowa 471, 15 N. W. 289.

⁴² Garrity v. P., 107 Ill. 168.

⁴³ Conkwright v. P., 35 Ill. 206.

⁴⁴ Bennett v. P., 96 Ill. 607.

§ 458. **Explaining possession—What said.**—The defendant in explaining his possession of stolen property is entitled to show what was said to him at the time he received the property.⁴⁵ What the defendant said and did about the property at the time he took it, and his dealings with it afterward as well as his conduct in reference thereto, are competent on the question of intent.⁴⁶ What the defendant said at the time stolen property was found in his possession or at the time of his arrest is admissible as part of the *res gestae*.⁴⁷

§ 459. **Explaining possession—Burden.**—After the defendant has given a reasonable explanation of his possession of the property alleged to have been stolen, rebutting the presumption of guilt arising from his possession, then the burden is on the prosecution to prove that his explanation is false.⁴⁸

§ 460. **Recent possession—Law.**—"The court instructs the jury that possession of property soon after it was stolen is of itself *prima facie* evidence that it was stolen by the defendant." Held error to give this instruction, because it excludes any and all circumstances surrounding the facts of possession.⁴⁹ Instructing the jury that if

⁴⁵ *S. v. Jordan*, 69 Iowa 506, 29 N. W. 430.

⁴⁶ *Beatty v. S.*, 61 Miss. 18; *Com. v. Hurd*, 123 Mass. 438; *McPhail v. S.*, 9 Tex. App. 164; *Wynn v. S.*, 81 Ga. 744, 7 S. E. 689.

⁴⁷ *Hubbard v. S.*, 107 Ala. 33, 13 So. 225; *Bennett v. P.*, 96 Ill. 602; *Smith v. S.*, 108 Ala. 40, 16 So. 12; *Lopez v. S.*, 28 Tex. App. 343, 13 S. W. 219; *Doss v. S.*, 28 Tex. App. 506, 13 S. W. 788; *Ward v. S.*, 41 Tex. 611; *Perry v. S.*, 41 Tex. 485; *Walker v. S.*, 28 Ga. 254.

⁴⁸ *Powell v. S.*, 11 Tex. App. 401; *Brothers v. S.*, 22 Tex. App. 447, 3 S. W. 737; *Jones v. S.*, 30 Miss. 653; *Johnson v. S.*, 12 Tex. App. 385. See *Tilly v. S.*, 21 Fla. 242. But see *S. v. Kimble*, 34 La. 392; *S. v. Brown*, 25 Iowa 561. Possession of recently stolen property—evidence sufficient to sustain convictions in the following cases: *P. v. Vidal*, 121 Cal. 221, 53 Pac. 558; *Ray v. S.* (Tex. Cr. App.), 43 S. W. 77; *Madden v. S.*, 148 Ind. 183, 47 N. E. 220; *S. v. McKinistry*, 100 Iowa 82, 69 N. W. 267; *P. v. Wright*, 11 Utah 41, 39

Pac. 477; *S. v. Filmore*, 92 Iowa 766, 61 N. W. 191; *Pitts v. S.* (Tex. Cr. App.), 30 S. W. 359; *S. v. Hoffman*, 53 Kan. 700, 37 Pac. 138; *P. v. Nicolsi* (Cal.), 34 Pac. 824; *Allen v. S.* (Tex. Cr. App.), 24 S. W. 30; *Freese v. S.* (Tex. Cr. App.), 21 S. W. 189; *Van Emons v. S.* (Tex. Cr. App.), 20 S. W. 1106; *Ford v. S.*, 92 Ga. 459, 17 S. E. 667; *Carreker v. S.*, 92 Ga. 471, 17 S. E. 671; *De Los Santos v. S.* (Tex. Cr. App.), 22 S. W. 924; *Shepperd v. S.*, 94 Ala. 102, 10 So. 663; *S. v. Miller*, 45 Minn. 521, 48 N. W. 401; *Cosby v. Com.*, 12 Ky. L. 982, 16 S. W. 88; *Reed v. S.*, 54 Ark. 621, 16 S. W. 819; *S. v. Guest*, 101 Mo. 234, 13 S. W. 957; *P. v. Hawksley*, 82 Mich. 71, 45 N. W. 1123; *Johnson v. S.*, 77 Ga. 68 (hog marks). But not sufficient in the following: *Hilligas v. S.*, 55 Neb. 586, 75 N. W. 1110; *Moore v. S.*, 100 Ga. 81, 25 S. E. 848; *S. v. Wilks*, 58 Mo. App. 159; *Foresythe v. S.* (Tex. Cr. App.), 20 S. W. 371; *Coleman v. S.* (Tex. Cr. App.), 22 S. W. 41; *S. v. Bulla*, 89 Mo. 595, 1 S. W. 764.

⁴⁹ *Conkwright v. P.*, 35 Ill. 206; *S.*

they find that the defendants had possession of the stolen property, as testified to by Van Epps and Hyatt, and such possession was unexplained, they must find the defendants guilty, is erroneous, in that it directs the jury to exclude from their consideration the evidence of an alibi or other evidence in the case.⁵⁰ The following instruction is erroneous in that it omits the word "stealing:" "The court instructs the jury that larceny is the felonious taking and carrying away the personal goods of another."⁵¹ "The fact of possession of stolen property, standing alone and unconnected with any other circumstance, affords but slight presumption of guilt, for the real criminal may have artfully placed the property in the possession or on the premises of an innocent person the better to conceal his own guilt." Held error to refuse this instruction considering the evidence.⁵²

§ 461. Other stolen property.—In case of larceny, it is competent to show possession of other stolen property, besides that alleged in the indictment.⁵³ But it has been held that evidence of the possession of other stolen property is not competent unless it can be shown such other property was taken at the same time by the same person with that mentioned in the indictment.⁵⁴ Evidence of other stolen property found with that described in the indictment is competent as tending to connect the defendant with the larceny charged in the indictment.⁵⁵ Evidence of other articles of property stolen at the same time and place as that alleged in the indictment, is competent as tending to prove the criminal intent alleged, or to identify the property when its identity is in dispute.⁵⁶

§ 462. Similar coins found on defendant.—Very soon after the larceny with which the defendant was charged, five twenty-dollar gold

v. Hale, 12 Or. 352, 7 Pac. 523, 6 Am. C. R. 402; Robb v. S., 35 Neb. 285, 53 N. W. 134; Fisher v. S., 46 Ala. 717; Matthews v. S., 61 Miss. 155; Gomez v. S., 15 Tex. App. 64. See also, Jones v. P., 12 Ill. 259; Smith v. S., 58 Ind. 340, 2 Am. C. R. 375.

⁵⁰ S. v. Snell, 46 Wis. 524, 1 N. W. 225, 3 Am. C. R. 262.

⁵¹ Hix v. P., 157 Ill. 385, 41 N. E. 862.

⁵² Gablick v. P., 40 Mich. 292, 3 Am. C. R. 245. See also Smith v. S., 58 Ind. 340, 2 Am. C. R. 374.

⁵³ 3 Greenl. Ev., § 31; Webb v. S., 8 Tex. App. 115; Turner v. S., 102

Ind. 425, 5 Am. C. R. 362, 1 N. E. 869. See P. v. Phillips, 42 N. Y. 200. See also P. v. Cunningham, 66 Cal. 668, 4 Pac. 1144, 6 Pac. 700, 846.

⁵⁴ Com. v. Riggs, 14 Gray (Mass.) 376.

⁵⁵ S. v. Ditton, 48 Iowa 677; P. v. Robles, 34 Cal. 591; Com. v. Riggs, 14 Gray (Mass.) 376, 77 Am. D. 333; Yarborough v. S., 41 Ala. 405.

⁵⁶ Robinson v. S. (Tex. Cr. App.), 48 S. W. 176; Johnson v. S., 148 Ind. 522, 47 N. E. 926. See Parker v. U. S. (Ind. Ter.), 43 S. W. 858; S. v. Weaver, 104 N. C. 758, 10 S. E. 486.

coins were found in his stockings. These coins were properly admitted in evidence as tending to identify the money of the prosecuting witness which was similar in description to that found on the defendant.⁵⁷

§ 463. Independent larceny incompetent.—The rule has never been carried so far as to admit evidence against the accused, of an independent larceny, although of the same character as that charged in the indictment, for the purpose of convicting him of the crime alleged.⁵⁸

§ 464. Same artifice on others.—Evidence that the accused on several occasions attempted to practice upon others the same artifice or trick which they resorted to upon the prosecutor to get possession of his property, is competent as tending to show a conspiracy to defraud whoever might be cheated by their artifice.⁵⁹

§ 465. Other stolen goods.—Evidence that other goods known to have been stolen were previously received by the defendant from the same thief, is admissible for the purpose of showing guilty knowledge on the part of the accused that the goods for the receiving of which he is charged, were stolen.⁶⁰

§ 466. Burglary and larceny—Same act.—Evidence of burglary is competent on the trial of a charge of larceny where the burglary and larceny were committed at the same time by the same person, constituting but one transaction.⁶¹

§ 467. Other larceny—Incompetent.—The owner of the cattle alleged to have been stolen was permitted to testify that he had lost about twenty-five head of other cattle from the ranch. Held error, there being nothing to connect the defendant with the loss of such other cattle.⁶²

⁵⁷ *P. v. Piggott*, 126 Cal. 509, 59 Pac. 31. See *S. v. Lucey* (Mont.), 61 Pac. 994.

⁵⁸ *Snapp v. Com.*, 82 Ky. 173. See *S. v. Vinson*, 63 N. C. 335; *S. v. Reavis*, 71 Mo. 419; *P. v. Hartman*, 62 Cal. 562; *Barton v. S.*, 18 Ohio 221; *Carter v. S.*, 23 Tex. App. 508, 5 S. W. 128; *Boland v. P.*, 19 Hun (N. Y.) 80; *Crowell v. S.*, 74 Ga. 396.

⁵⁹ *Defrese v. S.*, 3 Heisk. (Tenn.)

53, 1 Green C. R. 360; *P. v. Lovejoy*, 55 N. Y. Supp. 543; 3 Greenl. Ev., § 90.

⁶⁰ *Shriedley v. S.*, 23 Ohio St. 130, 2 Green C. R. 530; *P. v. Rando*, 3 Park. C. R. (N. Y.) 335; 3 Greenl. Ev., § 15; *Devoto v. Com.*, 3 Metc. (Ky.) 417.

⁶¹ *S. v. Rivers*, 68 Iowa 611, 27 N. W. 781.

⁶² *Isham v. S.* (Tex. Cr. App.), 41 S. W. 622.

§ 468. **Other acts incompetent.**—Evidence that the defendant sold other hogs, together with two hogs alleged to have been stolen, some with and some without earmarks differing from the marks of the two alleged to have been stolen, is not competent.⁶³

§ 469. **Other articles, competent.**—An imitation diamond ring and other cheap jewelry, found in the valise of the defendants, may be introduced in evidence where they are charged with the larceny of a diamond ring, by substituting a cheap one while pretending to buy.⁶⁴

§ 470. **Other larceny incompetent.**—Testimony of an accomplice that after he and the defendant returned to the home of the latter with the stolen goods, they went out the same night and stole other goods, is inadmissible, being a distinct offense.⁶⁵

§ 471. **Defendant seen with money—Changing money.**—It is competent to show on the trial of a defendant for the larceny of money that, shortly after the larceny, he was seen with money lounging about the store on the night of the larceny, and that he had no means of his own before the larceny.⁶⁶ On the trial of a charge for stealing money, evidence that the defendant had money in his possession when arrested, is competent as a circumstance tending to establish his guilt.⁶⁷ Evidence, that on the next morning after the theft, the defendants changed copper for other coin, is not competent on the trial for stealing silver coin.⁶⁸

§ 472. **Defendant's statement as to stealing.**—On a charge of stealing milk cans it is competent to show that the defendant said to another person in the milk business that if he was short of cans he could go out and steal them.⁶⁹

§ 473. **Marks, labels—Brands on animals.**—Testimony as to marks or labels upon goods or upon barrels containing liquors is competent

⁶³ *Tinney v. S.*, 111 Ala. 74, 20 So. 597.

⁶⁴ *Gindrat v. P.*, 138 Ill. 112, 27 N. E. 1085.

⁶⁵ *S. v. Kelley*, 65 Vt. 531, 27 Atl. 203, 9 Am. C. R. 354.

⁶⁶ *Leonard v. S.*, 115 Ala. 80, 22 So. 564; *Martin v. S.*, 104 Ala. 71, 16 So. 82; *Com. v. Montgomery*, 11

Metc. (Mass.) 534; *Gates v. P.*, 14 Ill. 438.

⁶⁷ *S. v. Burns*, 19 Wash. 52, 52 Pac. 316.

⁶⁸ *S. v. Dawson*, 90 Mo. 149, 1 S. W. 827.

⁶⁹ *Com. v. Corkery*, 175 Mass. 460, 56 N. E. 711.

as tending to identify the goods.⁷⁰ The brand with which an animal is marked, and which was recorded before the animal was stolen, is *prima facie* proof of ownership, but not if recorded after the larceny.⁷¹ The brand of the cattle on a charge of larceny may be shown in evidence, though not recorded, to identify the cattle.⁷²

§ 474. **Intent—May be inferred.**—The intent is a question of fact for the jury to determine, and, where the evidence warrants, it may be inferred. But the court can not direct the jury to infer the intent.⁷³

§ 475. **Value—Evidence of.**—The evidence must show that the property stolen was of some value, to sustain a conviction for larceny.⁷⁴

§ 476. **Market value.**—The defendant offered evidence of the market value of other hogs like those alleged to have been stolen, for the purpose of showing that such hogs were not worth as much as stated by the prosecuting witness. Held error to refuse.⁷⁵

§ 477. **Proof as to want of consent.**—Where the taking of the property "without the consent" of the owner is by statutory description an element of the offense, then the prosecution, on the trial, must affirmatively prove the want of consent of the owner.⁷⁶

⁷⁰ S. v. Kiger, 115 N. C. 746, 20 S. E. 456; Cole v. P., 37 Mich. 544; Com. v. Hills, 10 Cush. (Mass.) 530.

⁷¹ Turner v. S., 39 Tex. Cr. 322, 45 S. W. 1020; Unsell v. S., 39 Tex. Cr. 330, 45 S. W. 1022; Harwell v. S., 22 Tex. App. 251, 2 S. W. 606. But see Chavez v. Ter., 6 N. M. 455, 30 Pac. 903.

⁷² Brooke v. P., 23 Colo. 375, 48 Pac. 502. See Black v. S., 38 Tex. Cr. 58, 41 S. W. 606; Lockwood v. S., 32 Tex. Cr. 137, 22 S. W. 413, 26 S. W. 200; Coffelt v. S., 19 Tex. App. 436; McGrew v. S., 31 Tex. Cr. 336, 20 S. W. 740; P. v. Bolanger, 71 Cal. 17, 11 Pac. 799; S. v. Cardelli, 19 Nev. 319, 10 Pac. 433; Harvey v. S., 21 Tex. App. 178, 17 S. W. 158.

⁷³ P. v. Carabin, 14 Cal. 438; P. v. Griswold, 64 Mich. 722, 31 N. W. 809; Doss v. S., 21 Tex. App. 505, 2 S. W. 814, 57 Am. R. 618; S. v. McKee, 17 Utah 370, 53 Pac. 733. Intent

sufficiently proved: S. v. Patton, 1 Marv. (Del.) 552, 41 Atl. 193; Gear v. S. (Tex. Cr. App.), 42 S. W. 285. Intent not sufficiently proved: Jones v. S. (Tex. Cr. App.), 49 S. W. 387; Ross v. Com., 14 Ky. L. 259, 20 S. W. 214; P. v. Dean, 58 Hun 610, 12 N. Y. Supp. 749; Parks v. S., 29 Tex. App. 597, 16 S. W. 532.

⁷⁴ S. v. Gerrish, 78 Me. 20, 2 Atl. 129; Radford v. S., 35 Tex. 15; S. v. Fenn, 41 Conn. 590; Wolverton v. Com., 75 Va. 909; Whitehead v. S., 20 Fla. 841; P. v. Griffin, 38 How. Pr. (N. Y.) 475; Com. v. Burke, 12 Allen (Mass.) 182; Hawkins v. S., 95 Ga. 458, 20 S. E. 217.

⁷⁵ Cannon v. S., 18 Tex. App. 172.

⁷⁶ Anderson v. S., 14 Tex. App. 49; S. v. Moon, 41 Wis. 684; Garcia v. S., 26 Tex. 209; Williamson v. S., 13 Tex. App. 514; Bowling v. S., 13 Tex. App. 338; Foster v. S., 21 Tex. App. 80, 17 S. W. 548.

§ 478. **Ownership—Owner as witness.**—If the owner of the property alleged to have been stolen and his attendance as a witness can be procured, his testimony that the property was taken from him without his consent, is indispensable to a conviction upon the principle that his testimony is the primary and best evidence that the property was taken without his consent; and hence that secondary evidence can not be resorted to until the prosecution shows its inability, after due diligence, to procure the attendance of the owner of the property.⁷⁷ But if the testimony of the owner himself can not be had, then other competent evidence may be resorted to, such as circumstantial evidence.⁷⁸ A person rightfully in possession of property is presumed to be the owner until the contrary is made to appear.⁷⁹

§ 479. **Election, when.**—Where several counts form the indictment, relating to but one transaction, the prosecution will not be required to elect on which count it will ask conviction.⁸⁰

§ 480. **Variance — Larceny, false pretense.**—The indictment charged the accused with the crime of grand larceny, but the evidence showed that the property alleged to have been stolen was obtained by false pretense. Held to be a variance, even though by statute, the offense of obtaining goods by false pretense shall be deemed larceny.⁸¹

§ 481. **Stealing from house—"Warehouse."**—Stealing property of another from his room where he is occupying the room as a lodger is larceny "from the house" of such person.⁸² Evidence of the burglary of a warehouse supports a charge of the burglary of "storehouse." The two words mean the same thing.⁸³

⁷⁷ *S. v. Moon*, 41 Wis. 684, 2 Am. C. R. 65; *S. v. Morey*, 2 Wis. 494.

⁷⁸ *Schultz v. S.*, 20 Tex. App. 308; *Stewart v. S.*, 9 Tex. App. 321; *Love v. S.*, 15 Tex. App. 563; *S. v. Moon*, 41 Wis. 684; *P. v. Wiggins*, 28 Hun (N. Y.) 308, 92 N. Y. 656.

⁷⁹ *S. v. Burns*, 109 Iowa 436, 80 N. W. 545. See Evidence, under chapter on "Robbery;" *Bow v. P.*, 160 Ill. 442, 43 N. E. 593.

⁸⁰ *Andrews v. P.*, 117 Ill. 200, 7 N. E. 265; *Hampton v. S.*, 8 Humph. (Tenn.) 69; *Bennett v. P.*, 96 Ill. 602; *S. v. Halida*, 28 W. Va. 499;

Goodhue v. P., 94 Ill. 46; *Whiting v. S.*, 48 Ohio St. 220, 27 N. E. 96. See *S. v. Daubert*, 42 Mo. 242; *S. v. Hazard*, 2 R. I. 474.

⁸¹ *P. v. Dumar*, 106 N. Y. 503, 13 N. E. 325; *Fulton v. S.*, 13 Ark. 168; *Lott v. S.*, 24 Tex. App. 723, 14 S. W. 277; *Com. v. Berry*, 99 Mass. 423, 96 Am. D. 767. See *Kibs v. P.*, 31 Ill. 599.

⁸² *Farlinger v. S.*, 110 Ga. 313, 35 S. E. 152.

⁸³ *S. v. Sprague*, 149 Mo. 409, 50 S. W. 901.

§ 482. **Receiving, distinct from larceny.**—"Receiving" is a distinct and independent crime from larceny. A person could not be guilty of both in the same transaction.⁸⁴

§ 483. **Variance—Description.**—If an indictment alleges the larceny of a "black gelding horse," such description becomes material and must be proved as described; and, of course, the same rule applies as to the description of any other kind of property.⁸⁵ An allegation in the indictment that the animal stolen had a crop off the left ear and a slit in the right ear, is not supported by evidence that the animal stolen had a crop off the right ear and a slit in the left. Held a fatal variance.⁸⁶

§ 484. **Variance—Sex of animal.**—The indictment charged the larceny of a "roan horse." The evidence showed that the animal was a "roan mare." Held no variance.⁸⁷ But if the allegation be a "roan mare," it will not support proof of a roan horse.⁸⁸

§ 485. **Variance—Description of money.**—An indictment alleging the larceny of "United States currency money" is supported by proof that the money was either United States treasury notes or national bank notes, or United States gold or silver certificates.⁸⁹ The only evidence introduced as to the kind, character or value of the money was the following: "How much money did you have? Ans. One hundred and thirty. Second. In what denominations was the money? Ans. Two fifties and three tens." Held not sufficient to identify treasury notes, national bank bills, greenbacks or gold or silver coin, or any evidence of the value or amount in dollars, or any other denomination of money.⁹⁰ The indictment charged the defendant in one count with stealing "one national bank note of the denomi-

⁸⁴ *Tobin v. P.*, 104 Ill. 567; *S. v. Whitaker*, 89 N. C. 472; *Ross v. S.*, 1 Blackf. (Ind.) 390; *Cohea v. S.*, 9 Tex. App. 173; *George v. S.*, 59 Neb. 163, 80 N. W. 486.

⁸⁵ *Coffelt v. S.*, 27 Tex. App. 608, 11 S. W. 639; *S. v. Jackson*, 30 Me. 29; *Williams v. P.*, 101 Ill. 384; *S. v. Babb*, 76 Mo. 501; *Morris v. S.*, 97 Ala. 82, 12 So. 276. See *P. v. Coon*, 45 Cal. 672.

⁸⁶ *Robertson v. S.*, 97 Ga. 206, 22 S. E. 974.

⁸⁷ *P. v. Pico*, 62 Cal. 52; *S. v. Gooch*, 60 Ark. 218, 29 S. W. 640; *Taylor v. S.*, 44 Ga. 263.

⁸⁸ *Thrasher v. S.*, 6 Blackf. (Ind.) 460. See *Underhill Cr. Ev.*, § 34, citing *Parker v. S.*, 39 Ala. 365 (cow); *S. v. Bassett*, 34 La. 1108 (chickens); *M'Cully's Case*, 2 Lew. C. C. 272 (sheep); *Davis v. S.*, 23 Tex. App. 210, 4 S. W. 590 (horse); *S. v. Godet*, 7 Ired. (N. C.) 210 (hog).

⁸⁹ *Kimbrough v. S.*, 28 Tex. App. 367, 13 S. W. 218. See *Blount v. S.*, 76 Ga. 17; *S. v. Freeman*, 89 N. C. 469.

⁹⁰ *Vale v. P.*, 161 Ill. 311, 43 N. E. 1091, citing *Williams v. P.*, 101 Ill. 382.

nation of five dollars, one treasury note of the denomination of five dollars." The evidence was that only one bill was stolen, and the witnesses said "that they did not know whether the bill was one issued by the treasury department or by some one of the national banks, but it was a bill in usual circulation." The indictment charges the stealing of both a bank note and a treasury note. The evidence not being specific as to which one of the notes was stolen, a conviction could not be sustained.⁹¹

§ 486. **Variance—As to owner—Husband or wife.**—Goods alleged to be the goods of A and B and shown to be A's proves a variance, though A had the possession of them at the time.⁹² The indictment alleged the ownership of the property stolen to be in the husband, and the proof showed that it was owned jointly by the husband and wife. Held no variance.⁹³

§ 487. **Variance—Corporation de facto.**—The evidence showing the existence of a corporation *de facto*, is sufficient to support the allegation of the existence of a corporation, in the absence of any proof to the contrary.⁹⁴

§ 488. **Variance—Different offense.**—By statutory definition, "simple larceny" and "larceny from the person" are distinct offenses, and proof of larceny from the person will not support a charge of simple larceny. Simple larceny is a felony and larceny from the person is a misdemeanor.⁹⁵

§ 489. **Variance—As to amount.**—Proof that the defendant stole a less amount of money than that charged in the indictment or only a part of the articles of property, is sufficient to sustain a conviction.⁹⁶

⁹¹ S. v. Collins, 72 N. C. 144, 1 Am. C. R. 443. See Keating v. P., 160 Ill. 481, 43 N. E. 724; Hamilton v. S., 60 Ind. 193, 28 Am. R. 653.

⁹² Widner v. S., 25 Ind. 234; S. v. Burgess, 74 N. C. 272; McDowell v. S., 68 Miss. 348, 8 So. 508; Morris v. S. (Miss.), 8 So. 295; S. v. Fish, 27 N. J. L. 323; Hogg v. S., 3 Blackf. (Ind.) 326. *Contra*, Brown v. S., 79 Ala. 51; Olibare v. S. (Tex. Cr. App.), 48 S. W. 69.

⁹³ S. v. Dredde, 1 Marv. (Del.) 522, 41 Atl. 925. See Rauguth v. P., 186 Ill. 93, 57 N. E. 832.

⁹⁴ S. v. Habib, 18 R. I. 558, 30 Atl. 462; P. v. Frank, 28 Cal. 507; Smith v. S., 28 Ind. 321; Calkins v. S., 18 Ohio St. 366.

⁹⁵ King v. S., 54 Ga. 184, 1 Am. C. R. 426.

⁹⁶ Jones v. S. (Tex. Cr. App.), 44 S. W. 162; S. v. Thompson, 137 Mo. 620, 39 S. W. 83; Moore v. S. (Tex. Cr. App.), 24 S. W. 900; S. v. Martin, 82 N. C. 672; Rains v. S. (Fla.), 28 So. 57; Williams v. S., 41 Fla. 295, 27 So. 898; Martin v. S. (Ala.), 28 So. 92; White v. S. (Tex. Cr.), 57 S. W. 100.

§ 490. **General verdict.**—The presumption arising from a general and unqualified verdict is that all the goods alleged to have been stolen were stolen and secreted.⁹⁷

§ 491. **Verdict.—Stating value.**—Where the value of the property determines the character of the offense and regulates the mode of punishment, it is necessary for the jury to ascertain the value and state in their verdict.⁹⁸ The verdict of the jury finding the defendant guilty of the "larceny of twelve hundred dollars as charged in the indictment," is sufficient finding of the value of stolen money.⁹⁹ Notes, bills and coins declared to be legal tender in the payment of debts, have a fixed value by law, and the mere introduction of them in evidence, if genuine, authorizes the jury to infer the value.¹⁰⁰

⁹⁷ S. v. Gerrish, 78 Me. 20, 6 Am. C. R. 398, citing Com. v. Lavery, 101 Mass. 207; 2 Bish. Cr. Proc. (3d. ed.), § 714; Mason v. P., 2 Colo. 373; Du Bois v. S., 50 Ala. 139. See S. v. Baker, 70 N. C. 530; S. v. Stroud, 95 N. C. 626.

⁹⁸ Sawyer v. P., 3 Gilm. (Ill.) 53; Collins v. P., 39 Ill. 240; P. v. Willett, 102 N. Y. 251, 6 N. E. 301; Tobin v. P., 104 Ill. 568; Highland v. P., 1 Scam. (Ill.) 392; Sloan v. P., 47 Ill. 76; Meadowcroft v. P., 163 Ill. 85, 45 N. E. 303; S. v. Redman, 17 Iowa 329; Shines v. S., 42 Miss. 331; Parker v. S., 39 Ala. 365; 3 Greenl. Ev., § 153; S. v. McCarty, 73 Iowa 51, 34 N. W. 606; Pittman v. S., 14 Tex. App. 576; Du Bois v. S., 50 Ala. 139; Locke v. S., 32 N. H. 106; S. v. Krieger, 68 Mo. 98; Com. v. Cahill, 12 Allen 540; Whitehead v. S., 20 Fla. 841; Rooney v. S., 51 Neb. 576, 71 N. W. 309; Benjamin v. S., 105 Ga. 830, 31 S. E. 739; Fisher v. S., 52 Neb. 531, 72 N. W. 954. *Contra*, S. v. Kelliher, 32 Or. 240, 50 Pac. 532; Com. v. Butler, 144 Pa. St. 568, 24 Atl. 910; S. v. Colwell, 43 Minn. 378, 45 N. W. 847.

⁹⁹ Hildreth v. P., 32 Ill. 36; S. v. Eastman (Kan., 1901), 63 Pac. 597.

¹⁰⁰ Collins v. P., 39 Ill. 240; S. v. Moseley, 38 Mo. 380; S. v. Gerrish, 78 Me. 20, 2 Atl. 129, 6 Am. C. R. 398; Houston v. S., 13 Ark. 66; Cummings v. Com., 2 Va. Cas. 128; S. v. Harris, 64 N. C. 127; S. v. Brown, 113 N. C. 645, 18

S. E. 51, 9 Am. C. R. 310; McCarty v. S., 127 Ind. 223, 26 N. E. 665; Grant v. S., 55 Ala. 201; Duvall v. S., 63 Ala. 12; S. v. Hyde, 22 Wash. 551, 61 Pac. 719. The evidence in the following cases sustained convictions: Com. v. Cruikshank, 138 Pa. St. 194, 20 Atl. 937; P. v. Suydam, 14 N. Y. Supp. 492, 38 N. Y. St. 850; Carroll v. P., 136 Ill. 456, 27 N. E. 18; P. v. McHale, 15 N. Y. Supp. 496, 39 N. Y. St. 753; P. v. Williams, 58 Hun 278, 12 N. Y. Supp. 249; P. v. Wilkinson, 14 N. Y. Supp. 827, 38 N. Y. St. 994; S. v. Chew Muck You, 20 Or. 215, 25 Pac. 355; S. v. Gray, 106 N. C. 734, 11 S. E. 422 (asportation); S. v. Hall, 79 Iowa 674, 44 N. W. 914; P. v. Hansen, 84 Cal. 291, 24 Pac. 117; S. v. Cardelli, 19 Nev. 319, 10 Pac. 433 (*corpus delicti*); P. v. Raischke, 83 Cal. 501, 23 Pac. 1083; S. v. Graves, 95 Mo. 510, 8 S. W. 739; S. v. Minor, 106 Iowa 642, 77 N. W. 330; S. v. Berndgen, 75 Minn. 38, 77 N. W. 408; Tidwell v. S., 40 Tex. Cr. 38, 47 S. W. 466, 48 S. W. 184 (*corpus delicti*); Hankins v. S. (Tex. Cr. App.), 47 S. W. 992; Piland v. S. (Tex. Cr. App.), 47 S. W. 1007; Watson v. S. (Tex. Cr. App.), 48 S. W. 185; Nicks v. S., 40 Tex. Cr. 1, 48 S. W. 186; Wright v. S. (Tex. Cr. App.), 48 S. W. 191; Randolph v. S. (Tex. Cr. App.), 49 S. W. 591; S. v. Mandich, 24 Nev. 336, 54 Pac. 516; Areola v. S., 40 Tex. Cr. 51, 48 S. W. 195; Newton v. S. (Tex.

Cr. App.), 48 S. W. 507; S. v. Donovan, 121 Mo. 496, 26 S. W. 340; P. v. Luchetti, 119 Cal. 501, 51 Pac. 707; Housh v. P., 24 Colo. 262, 50 Pac. 1036; Johnson v. S., 148 Ind. 522, 47 N. E. 926; P. v. Dunn, 114 Mich. 355, 72 N. W. 172; Taylor v. S. (Tex. Cr. App.), 42 S. W. 285; Baxter v. S. (Tex. Cr. App.), 43 S. W. 87; Simnacher v. S. (Tex. Cr. App.), 43 S. W. 354; Williams v. S. (Tex. Cr. App.), 45 S. W. 494; Cheatham v. S. (Tex. Cr. App.), 45 S. W. 565; Wright v. S. (Tex. Cr. App.), 45 S. W. 723; Dalzell v. S., 7 Wyom. 450, 53 Pac. 297 (*corpus delicti*); Kent v. S., 64 Ark. 247, 41 S. W. 849; P. v. Wong Chong Suey, 110 Cal. 117, 42 Pac. 420; P. v. Mann, 113 Cal. 76, 45 Pac. 182 (attempt); S. v. Stuhlmiller, 94 Iowa 750, 64 N. W. 279; Phillips v. S. (Tex. Cr. App.), 34 S. W. 119; Boyd v. S. (Tex. Cr. App.), 29 S. W. 157; Garcia v. S. (Tex. Cr. App.), 26 S. W. 504; Johnson v. S. (Tex. Cr. App.), 26 S. W. 504; Emmerson v. S., 33 Tex. Cr. 89, 25 S. W. 289; Harrison v. S. (Tex. Cr. App.), 25 S. W. 287; Battle v. S. (Tex. Cr. App.), 24 S. W. 642; Weeks v. S. (Tex. Cr. App.), 24 S. W. 905; May v. S., 38 Neb. 211, 56 N. W. 804; Green v. Com., 15 Ky. L. 566, 24 S. W. 117; Overturf v. S., 31 Tex. Cr. 10, 23 S. W. 147; Olivarez v. S. (Tex. Cr. App.), 20 S. W. 751; Conners v. S., 31 Tex. Cr. 453, 20 S. W. 981; McManus v. S., 91 Ga. 7, 16 S. E. 98; P. v. Evans, 69 Hun 222, 23 N. Y. Supp. 717; P. v. Laurence, 70 Hun 80, 23 N. Y. Supp. 1095; P. v. Hearne, 66 Hun 626, 20 N. Y. Supp. 806; S. v. Davenport, 38 S. C. 348, 17 S. E. 37; P. v. Cassin, 62 Hun 623, 16 N. Y. Supp. 926 (*corpus delicti*); Stalcup v. S., 129 Ind. 519, 28 N. E. 1176; P. v. Davis, 19 N. Y. Supp. 781; Holsey v. S., 89 Ga. 433, 15 S. E. 588; Moss v. S., 88 Ga. 241, 14 S. E. 572; Dickson v. Ter. (Ariz., 1899), 56 Pac. 971; S. v. House, 108 Iowa 68, 78 N. W. 859. The evidence in the following cases sustained convictions on larceny "from the person:" Chezem v. S., 56 Neb. 496, 76 N. W. 1056; S. v. Fisher, 106 Iowa 658, 77 N. W. 456; P. v. Appleton, 120 Cal. 250, 52 Pac. 582; Clemmons v. S., 39 Tex. Cr. 279, 45 S. W. 911. The evidence in the following cases was not sufficient to sustain convictions: McMahon v. P., 120 Ill. 581, 11 N. E. 883; Stuart v. P., 73 Ill. 21; Green v. S. (Tex. App.), 18 S. W. 651; Pittman v. S. (Tex. App.), 17 S. W. 623; Harsdorf v. S. (Tex. App.), 18 S. W. 415; Holley v. S., 21 Tex. App. 156, 17 S. W. 159; Brown v. S. (Tex. App.), 19 S. W. 898; Booker v. S. (Miss.), 9 So. 355; Sharp v. S., 29 Tex. App. 211, 15 S. W. 176; Kirk v. Com., 12 Ky. L. 707, 14 S. W. 1089; Lunsford v. S., 29 Tex. App. 205, 15 S. W. 204; McLin v. S., 29 Tex. App. 171, 15 S. W. 600; S. v. Ballard, 104 Mo. 634, 16 S. W. 525; Day v. S. (Miss.), 7 So. 326; Bromley v. P., 27 Ill. 20; Lincoln v. P., 20 Ill. 365; Bennett v. S., 28 Tex. App. 342, 13 S. W. 142; Schnaubert v. S., 28 Tex. App. 222, 12 S. W. 732; Sweeten v. S. (Tex. Cr. App.), 20 S. W. 712; Ligon v. S. (Tex. Cr. App.), 22 S. W. 403; Sampson v. S. (Tex. Cr. App.), 20 S. W. 711 (value); S. v. Clifford, 86 Iowa 550, 53 N. W. 299; P. v. Curran (Cal.), 31 Pac. 1116; Gilmore v. S. (Tex.), 13 S. W. 646; Tippie v. S. (Tex.), 13 S. W. 777; Clark v. P., 111 Ill. 404 (accomplice); Lockhart v. S. (Tex.), 13 S. W. 993; Hicks v. S. (Tex. Cr. App.), 47 S. W. 1016; Jones v. S. (Tex. Cr. App.), 49 S. W. 387; Wellman v. S., 100 Ga. 576, 28 S. E. 605 (*corpus delicti*); Mitchell v. S., 103 Ga. 17, 29 S. E. 435; Martin v. S., 148 Ind. 519, 47 N. E. 930; S. v. Donnelly, 72 Mo. App. 543; Rema v. S., 52 Neb. 375, 72 N. W. 474; P. v. Rogers, 47 N. Y. Supp. 893, 12 N. Y. C. R. 476; Caldwell v. S. (Tex. Cr. App.), 42 S. W. 304; Shelby v. S. (Tex. Cr. App.), 42 S. W. 306; Lane v. S. (Tex. Cr. App.), 45 S. W. 693 (*corpus delicti*); P. v. Goldberg, 46 N. Y. Supp. 913, 20 App. Div. 444; Mizell v. S., 38 Fla. 20, 20 So. 769; S. v. Storts, 138 Mo. 127, 39 S. W. 483 (conspiracy); Johnson v. S., 36 Tex. Cr. 394, 37 S. W. 424; Hamilton v. S., 142 Ind. 276, 41 N. E. 588; S. v. Déyoe, 97 Iowa 744, 66 N. W. 733; Throckmorton v. Com. (Ky.), 29 S. W. 16; Holmes v. S., 59 Ark. 641, 27 S. W. 225; S. v. Bridgers, 114 N. C. 868, 19 S. E. 607; P. v. Gillette, 76

Hun 611, 28 N. Y. Supp. 101; Bishop App.), 24 S. W. 99; P. v. Fagan, 98 v. S. (Tex. Cr. App.), 25 S. W. 25; Cal. 230, 33 Pac. 60; Kaiser v. S., 35 P. v. Lesser, 76 Hun 371, 27 N. Y. Neb. 704, 53 N. W. 610; S. v. Whor- Supp. 750; S. v. Payne, 6 Wash. 563, ton (Mont., 1901), 63 Pac. 627.
34 Pac. 317; Woods v. S. (Tex. Cr.

CHAPTER VIII.

EMBEZZLEMENT.

ART.	I. Definition and Elements,	§§ 492-524
	II. Matters of Defense,	§§ 525-544
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ARTICLE I. DEFINITION AND ELEMENTS.

§ 492. **Definition.**—Whoever fraudulently converts to his own use, or secretes with intent to convert to his own use, the personal property of another, delivered to him as agent, servant, employe, or under some other fiduciary relation between him and the owner of the property, is guilty of embezzlement.¹ The usual essential elements of embezzlement are (1) that the defendant was an agent, clerk, servant, or bailee; (2) that by virtue of his position or employment he received the money or property of his principal; (3) that he converted it to his own use intending to steal it.²

§ 493. **Property received lawfully.**—In order to constitute the crime of embezzlement it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies to the person whose prop-

¹ *S. v. Mason*, 108 Ind. 48, 8 N. E. 716; *Kibs v. P.*, 81 Ill. 600; *Underhill Cr. Ev.*, § 282; *S. v. Walton*, 62 Me. 106; *S. v. O'Kean*, 35 La. 901; 2 *Bish. New Cr. L.*, § 325. See *Ex parte Hedley*, 31 Cal. 111; *P. v. Gallagher*, 100 Cal. 466, 35 Pac. 80; *S. v. Foster*, 1 Pen. (Del.) 239, 40 Atl. 939. The "property of another" means property not owned by the accused in whole or in part: *S. v. Reddick*, 2 S. Dak. 124, 48 N. W. 846; *P. v. Hennessey*, 15 Wend. (N. Y.) 147; *Fleener v. S.*, 58 Ark. 98, 23 S. W. 1; *S. v. Kusnick*, 45 Ohio St. 535, 4 Am. St. 564, 15 N. E. 481.

² *Ex parte Hedley*, 31 Cal. 109. See *Pullman v. S.*, 78 Ala. 31, 56 Am. R. 21; *S. v. Snell*, 9 R. I. 112; *P. v. Cobler*, 108 Cal. 538, 41 Pac. 401; *Webb v. S.*, 8 Tex. App. 310; *Underhill Cr. Ev.*, § 281.

erty he takes. It differs from larceny in this respect, that the property comes lawfully into his possession and is unlawfully taken by him.³ The offense of embezzlement, while necessarily akin to larceny, and generally regarded as of that family, is nevertheless a separate and distinct offense and essentially variant from the latter; these offenses do not overlap each other.⁴

§ 494. Obtaining order by fraud.—Inducing an imbecile to give an order for a pension check for money, on the pretense of attending to the business of such imbecile, and the conversion of the same to one's own use, is embezzlement, the order having been obtained by fraud.⁵

§ 495. Statute making embezzlement larceny.—The statute of Illinois provides that "whoever embezzles or fraudulently converts to his own use, etc.," money or property delivered or entrusted to him, which may be the subject of larceny, "shall be deemed guilty of larceny." Such statute does not merge the two offenses or make embezzlement larceny.⁶

§ 496. Fiduciary relation.—Where a person is charged with embezzling money or property which came to his possession "by virtue of his office or employment," as provided by statute, it must appear that he received the money or property by virtue of his office or employment.⁷ Before embezzlement can be maintained it must appear that the property was delivered to the accused in some fiduciary capacity—a relation of trust and confidence.⁸

³ U. S. v. Lee, 12 Fed. 816; Johnson v. P., 113 Ill. 99; Kibs v. P., 81 Ill. 599; S. v. Baldwin, 70 Iowa 180, 30 N. W. 476; P. v. Johnson, 91 Cal. 265, 27 Pac. 663; Com. v. Berry, 99 Mass. 428, 96 Am. D. 767; S. v. Wingo, 89 Ind. 206; Smith v. P., 53 N. Y. 111.

⁴ Simco v. S., 8 Tex. App. 406; Com. v. Doherty, 127 Mass. 20; S. v. Harmon, 106 Mo. 635, 18 S. W. 128; P. v. Belden, 37 Cal. 51; Quinn v. P., 123 Ill. 333, 15 N. E. 46. But see Leonard v. S., 7 Tex. App. 417; S. v. Taberner, 14 R. I. 272, 51 Am. R. 382; Underhill Cr. Ev., § 282.

⁵ Hobbs v. P., 183 Ill. 336, 55 N. E. 692.

⁶ Kibs v. P., 81 Ill. 599; Fulton v. S., 13 Ark. 170; S. v. Harmon, 106

Mo. 635, 18 S. W. 128; Hall v. S., 3 Coldw. (Tenn.) 125; Huntsman v. S., 12 Tex. App. 619; Bork v. P., 91 N. Y. 5; S. v. Williams, 40 La. 732, 5 So. 16.

⁷ P. v. Sherman, 10 Wend. (N. Y.) 298, 25 Am. D. 583; Ex parte Hedley, 31 Cal. 108; Brady v. S., 21 Tex. App. 659, 1 S. W. 462; Griffin v. S., 4 Tex. App. 390; Pullman v. S., 78 Ala. 31, 56 Am. R. 21; Johnson v. S., 9 Baxt. (Tenn.) 279; Rex v. Hawtin, 7 C. & P. 281; Reg. v. Harris, 6 Cox C. C. 363; S. v. Bolin, 110 Mo. 209, 19 S. W. 650. See Lee v. Com., 8 Ky. L. 53, 1 S. W. 4; Reg. v. Cullum, 12 Cox C. C. 469; P. v. Gallagher, 100 Cal. 466, 35 Pac. 80; Barlow v. P., 78 N. Y. 377.

⁸ Lee v. Com., 8 Ky. L. 53, 1 S.

§ 497. **Fiduciary character wanting.**—A statute relating to any public officer embezzling public money which, by law, he is authorized to collect, does not apply where such officer collects and appropriates money which he is not authorized to collect by virtue of his office.⁹

§ 498. **Fiduciary relation—Exceeding authority.**—If a person, as agent, clerk, or servant, in receiving the money or property of his employer, exceeds or violates his authority, he will, nevertheless, be charged as having received it by "virtue of his office or employment" under the statute. As for example, where the defendant was the agent of an express company, whose duty it was to draw checks on the company for its use only, and he drew checks which he was not authorized to draw and appropriated the proceeds to his own use, it was held that he received the money by virtue of his employment.¹⁰ It has been held that where one holds himself out as the agent of another, when in fact he is not, and under such assumed agency collects money for his alleged principal, which he fraudulently converts to his own use, he is guilty of embezzlement, and is estopped from denying his agency.¹¹

§ 499. **Criminal intent essential.**—In the crime of embezzlement, like larceny, a criminal intent is an essential element of the offense, and will be implied where not expressly required by statute.¹² There

W. 4. See *Wylie v. S.*, 97 Ga. 207, 22 S. E. 954; *Fulcher v. S.*, 32 Tex. Cr. 621, 25 S. W. 625; *Com. v. Hays*, 14 Gray (Mass.) 62, 74 Am. D. 662; *Griffin v. S.*, 4 Tex. App. 390; *Johnson v. Com.*, 5 Bush (Ky.) 431; *S. v. Stoller*, 38 Iowa 321.

⁹ *Moore v. S.*, 53 Neb. 831, 74 N. W. 319. See *Moore v. U. S.*, 160 U. S. 268, 16 S. Ct. 294.

¹⁰ *Ex parte Hedley*, 31 Cal. 109; *Rex v. Williams*, 6 C. & P. 626. See *S. v. Spaulding*, 24 Kan. 1; *S. v. Rue*, 72 Minn. 296, 75 N. W. 235. *Contra*, *Rex v. Hawtin*, 7 C. & P. 281; *Rex v. Snowley*, 4 C. & P. 390. See *Ex parte Ricord*, 11 Nev. 287; *P. v. Treadwell*, 69 Cal. 226, 10 Pac. 502; *Reg. v. Hastie, Leigh & C.* 269; *Rex v. Rees*, 6 C. & P. 606; *Rex v. Beacall*, 1 C. & P. 457.

¹¹ *P. v. Treadwell*, 69 Cal. 235, 10 Pac. 502; *S. v. Spaulding*, 24 Kan. 1; *S. v. Ezzard*, 40 S. C. 312, 18 S. E. 1025.

¹² *S. v. Baldwin*, 70 Iowa 180, 30 N. W. 476; *Hamilton v. S.*, 46 Neb. 284, 64 N. W. 965; *P. v. Wadsworth*, 63 Mich. 500, 30 N. W. 99; *P. v. Galland*, 55 Mich. 628, 22 N. W. 81; *P. v. Gray*, 66 Cal. 271, 5 Pac. 240; *Beaty v. S.*, 82 Ind. 228; *S. v. Noland*, 111 Mo. 473, 19 S. W. 715; *S. v. Hellwig*, 60 Mo. App. 483; *S. v. Smith*, 47 La. 132, 16 So. 938; *S. v. Marco*, 32 Or. 175, 50 Pac. 799; *Eilers v. S.*, 34 Tex. Cr. 344, 30 S. W. 811; *S. v. Littschke*, 27 Or. 189, 40 Pac. 167; *Williams v. S.*, 25 Tex. App. 733, 8 S. W. 935; *Burnett v. S.*, 60 N. J. L. 255, 37 Atl. 622; *Reg. v. Creed*, 1 C. & K. 63; *S. v. Blue*, 17 Utah 175, 53 Pac. 978. See *Spalding v. P.*, 172 Ill. 40, 49 N. E. 993; *S. v. Carlin*, 90 Me. 142, 37 Atl. 878; *S. v. Kortgaard*, 62 Minn. 7, 64 N. W. 51; *S. v. Adams*, 108 Mo. 208, 18 S. W. 1000; *Robson v. S.*, 83 Ga. 166, 9 S. E. 610; *P. v. Page*, 116 Cal. 386, 48 Pac. 326; *S. v. Eastman*, 60 Kan. 557, 57 Pac.

can be no embezzlement when there is no intent to defraud. There are cases where one uses the money of another as he has a right to use it, and directly converts it to his own use where the intent will be inferred under the statute, but this is not so in all cases.¹³ On a charge of embezzlement the defendant is entitled to an instruction that a criminal intent is an essential element of the offense and to refuse such instruction is error.¹⁴

§ 500. Intent inferred from insolvency.—The receipt of money by a banker deposited when he is insolvent, is *prima facie* proof of his fraudulent intent to convert it to his own use.¹⁵ Where, by statute, it is made embezzlement for a banker to receive deposits when he is insolvent, it can be no defense to say that he did not know of his insolvent condition. He is in duty bound to know that he is solvent, and it is criminal negligence for him not to know of his insolvency.¹⁶

§ 501. Intent, when immaterial.—The defendant was treasurer of a university, a public corporation, and he, in pledging the bonds of the university which he held as such treasurer, to secure a loan to himself, is guilty of embezzlement of the bonds, no matter what his specific intention to pay the debt when it became due may have been, even though he used or intended to use the money obtained by such pledging for the use of the university.¹⁷

§ 502. Mere receipt not sufficient.—It was error to refuse the following instruction on intent: That the mere fact of not paying over the money by the defendant is not sufficient evidence in itself to convict him of a breach of trust with fraudulent intent.¹⁸

109; S. v. Cunningham, 154 Mo. 161, 55 S. W. 282; S. v. Brame, 61 Minn. 101, 63 N. W. 250; S. v. Hopkins, 56 Vt. 250; Com. v. Moore, 166 Mass. 513, 44 N. E. 612.

¹³ P. v. Wadsworth, 63 Mich. 500, 30 N. W. 99; Fitzgerald v. S., 50 N. J. L. 475, 14 Atl. 746; P. v. Gale, 77 Cal. 120, 19 Pac. 231. The defendant in the Wadsworth case was city treasurer, and, following the long standing practice, deposited the money of the city with a bank, which failed, whereby the money was lost. Held a good defense.

¹⁴ S. v. Temple, 63 N. J. L. 375,

43 Atl. 697; S. v. Foster, 1 Pen. (Del.) 289, 40 Atl. 939.

¹⁵ Meadowcroft v. P., 163 Ill. 69, 45 N. E. 303; Amer. Trust & S. Bank v. Gueder, etc., Mfg. Co., 150 Ill. 336, 37 N. E. 227.

¹⁶ Murphy v. P., 19 Bradw. (Ill. App.) 125; Meadowcroft v. P., 163 Ill. 71, 45 N. E. 303. *Contra*, S. v. Myers, 54 Kan. 206, 38 Pac. 296, 9 Am. C. R. 116.

¹⁷ Spalding v. P., 172 Ill. 40, 49 N. E. 993; Com. v. Butterick, 100 Mass. 1. See S. v. Manley, 107 Mo. 364, 17 S. W. 800.

¹⁸ S. v. Butler, 21 S. C. 353, 5

§ 503. **Notes, bills, included.**—Promissory notes, bank bills, bonds, stocks and bills of exchange are included in the term "money and property."¹⁹

§ 504. **Value, when material.**—The value of the property embezzled is not a material element of the offense, unless made so by statute, but the property must have some value.²⁰

§ 505. **Larceny—Not embezzlement.**—The possession of the servant is always deemed the possession of the master, and if he disposes of his master's goods to his own use he is guilty of larceny and not embezzlement.²¹ Where the thing embezzled came to the possession of the servant out of the ordinary course of employment in pursuance of special direction from the master to receive it, the act came within the meaning of the statute.²² A clerk of a bank having charge and access to the funds or money of the bank, and entrusted with the safe-keeping thereof, is the possessor by his employment.²³

§ 506. **Pledging property entrusted.**—Where an agent or servant, for the purpose of raising money for his own use, pawns or pledges the property of his employer, which has been entrusted to him, or by any other means fraudulently converts the property to his own use, he will be guilty of embezzlement.²⁴

§ 507. **Agent collecting and appropriating.**—An agent engaged in the service of another at selling goods on commission or percentage,

Am. C. R. 208. See Robinson v. S., 109 Ga. 564, 35 S. E. 57; S. v. Eastman, 60 Kan. 557, 57 Pac. 109.

¹⁹ Com. v. Stearns, 2 Met. (Mass.) 343; P. v. Williams, 60 Cal. 1; Bork v. P., 91 N. Y. 5; S. v. Orwig, 24 Iowa 102; S. v. White, 66 Wis. 343, 28 N. W. 202; Com. v. Concannon, 5 Allen (Mass.) 502. See Rex v. Bazeley, 2 Leach 973; Rex v. Mead, 4 C. & P. 535.

²⁰ P. v. Bork, 78 N. Y. 346; Wolverton v. Com., 75 Va. 909; P. v. Salorse, 62 Cal. 139; Reg. v. Morris, 9 C. & P. 349; Washington v. S., 72 Ala. 272; Perry v. S., 22 Tex. App. 19, 2 S. W. 600; S. v. Mook, 40 Ohio St. 588; Gerard v. S., 10 Tex. App. 690; Harris v. S., 21 Tex. App. 478, 2 S. W. 830.

²¹ Cobletz v. S., 36 Tex. 353, 1 Green C. R. 647; Warmoth v. Com., 81 Ky. 133; Roeder v. S., 39 Tex. Cr. 199, 45 S. W. 570. See "Larceny."

²² S. v. Costin, 89 N. C. 511, 4 Am. C. R. 171, citing Rex v. Smith, Russ. & R. 516; Rex v. Hughes, 1 Moody 370; P. v. Dalton, 15 Wend. (N. Y.) 581.

²³ Ker v. P., 110 Ill. 627; 1 McClain Cr. L., § 634.

²⁴ Morehouse v. S., 35 Neb. 645, 53 N. W. 571; McAleer v. S., 46 Neb. 116, 64 N. W. 358; S. v. Rue, 72 Minn. 296, 75 N. W. 235; Calkins v. S., 18 Ohio St. 366, 98 Am. D. 121; S. v. Hill, 47 Neb. 456, 66 N. W. 541; S. v. Adams, 108 Mo. 208, 18 S. W. 1000; Penny v. S., 88 Ala. 105, 7 So. 50.

and who is authorized to make collections on his sales, will be guilty of embezzlement in appropriating to his own use money so collected, where by the terms of his employment he is required to remit such collections to his principal and is not permitted to mingle the same with his own money.²⁵ But if the agent, by the terms of his employment, is authorized to mingle money collected by him for his principal with his own or otherwise dispose of it, as to use it in his own business and pay interest for the use of it, his act is not criminal.²⁶

§ 508. Bailee converting.—A bailee having obtained lawful possession of property without fraudulent intent can not be convicted of larceny in appropriating it to his own use while he is such bailee, but will be liable under the statute of embezzlement.²⁷ But if, at the time property is delivered to a person as a bailee, he entertains a criminal intent to convert the same to his own use, he will be guilty of larceny and not embezzlement.²⁸

§ 509. Agent includes.—The term "agent" includes all cases where one person in a distinct capacity is authorized to represent another. And it is by the authority delegated to him that an agent transacts some particular business for his principal.²⁹ An attorney is an agent within the meaning of the term "agent, clerk or servant."³⁰

§ 510. Persons, when not "agents."—Persons who follow the business of making collections on commission as an independent business are not regarded as "agents" under the statutes relating to embezzle-

²⁵ *Com. v. Smith*, 129 Mass. 109; *Brandenstein v. Way*, 17 Wash. 293, 49 Pac. 511; *Campbell v. S.*, 35 Ohio St. 70; *P. v. Civile*, 44 Hun (N. Y.) 497. See *Morehouse v. S.*, 35 Neb. 643, 53 N. W. 571.

²⁶ *Com. v. Stearns*, 2 Metc. (Mass.) 343; *Miller v. S.*, 16 Neb. 179, 20 N. W. 253. See also *S. v. Baumhager*, 28 Minn. 226, 9 N. W. 704.

²⁷ *P. v. Husband*, 36 Mich. 309; *Com. v. Doherty*, 127 Mass. 20; *Moore v. U. S.*, 160 U. S. 269, 16 S. Ct. 294; *Johnson v. P.*, 113 Ill. 99; *Reg. v. Aden*, 12 Cox C. C. 512.

²⁸ *Smith v. P.*, 53 N. Y. 111, 13 Am. R. 474; *P. v. Johnson*, 113 Ill. 99; *Quinn v. P.*, 123 Ill. 333, 15 N. E. 46; *P. v. Salorse*, 62 Cal. 139; *S. v. Coombs*, 55 Me. 477, 92 Am. D. 610.

See *S. v. Taberner*, 14 R. I. 272, 57 Am. R. 382.

²⁹ *Whar. Cr. L.* (8th ed.), §§ 1053a-1055; *Reg. v. Cosser*, 13 Cox C. C. 187; *Pullman v. S.*, 78 Ala. 31, 56 Am. R. 21; *P. v. Treadwell*, 69 Cal. 236, 10 Pac. 502; *Lang v. S.*, 97 Ala. 41, 12 So. 183; *S. v. Smith*, 57 Kan. 657, 47 Pac. 535; *S. v. Hubbard*, 58 Kan. 797, 51 Pac. 290; *Com. v. Foster*, 107 Mass. 221; *George v. P.*, 167 Ill. 417, 47 N. E. 741; *Campbell v. S.*, 35 Ohio St. 76. See *Napoleon v. S.*, 3 Tex. App. 522.

³⁰ *In re Converse*, 42 Fed. 217; *S. v. Smith*, 57 Kan. 657, 47 Pac. 535; *P. v. Converse*, 74 Mich. 473, 42 N. W. 70. See *P. v. Treadwell*, 69 Cal. 226, 10 Pac. 502; *George v. P.*, 167 Ill. 417, 47 N. E. 741.

ment. But persons collecting for their employers, not as an independent business, are agents under the statute.³¹ An ordinary agent will not be included in the statute which enumerates bankers, brokers, attorneys, or other agents fraudulently converting to their own use the money or property of another. The words "or other agent" will be limited to the classes of agents previously enumerated.³²

§ 511. Agent, bailee, receiver.—A "bailee or agent" is not a "clerk or servant" within the meaning of the statute relating to embezzlement. It must appear that the defendant is within the class of persons named in the statute.³³ A receiver is not an agent under a statute making any agent guilty of embezzlement who, on demand, shall refuse to his employer any money which has come to his possession by virtue of his employment.³⁴

§ 512. Casual employment.—A mere casual employment, such as where the defendant "went on errands" for the prosecutor, does not fall within the meaning of the statute relating to embezzlement. The employment referred to in the statute must be the regular employment as agent, clerk, officer and the like.³⁵ The prosecuting witness gave the defendant a check to get cashed at a bank and to bring to him the money. The defendant obtained the money and appropriated it to his own use. The defendant had occasionally worked for the prosecuting witness, but was not in his employ that day. He was to be paid sixpence for fetching the money: Held that he was not a servant of the prosecuting witness.³⁶

§ 513. When not "clerk or servant."—A person whose duty it is to obtain orders for goods when and where he pleases and who forwards

³¹ *Stone v. Com.*, 20 Ky. L. 478, 46. 447; *Reed v. S.*, 16 Tex. App. 586. S. W. 721; *Clark v. Com.*, 16 Ky. L. 703, 29 S. W. 973; *S. v. Butler*, 26 Minn. 90, 1 N. W. 821; *Campbell v. S.*, 35 Ohio St. 70; *P. v. Hanaw*, 107 Mich. 337, 65 N. W. 231; *S. v. New*, 22 Minn. 76. See *S. v. Smith*, 57 Kan. 657, 47 Pac. 535.

³² *Reg. v. Portugal*, L. R. 16 Q. B. D. 487. See *Terry v. S.*, 1 Wash. 277, 24 Pac. 447.

³³ *Reg. v. Negus*, 12 Cox C. C. 492; *Reg. v. Mayle*, 11 Cox C. C. 150. See *Spalding v. P.*, 172 Ill. 45, 49 N. E. 993; *Terry v. S.*, 1 Wash. 277, 24 Pac.

³⁴ *S. v. Hubbard*, 58 Kan. 797, 51 Pac. 290.

³⁵ *Rex v. Hawtin*, 7 C. & P. 281; *Johnson v. S.*, 9 Baxt. (Tenn.) 279; *Reg. v. Mayle*, 11 Cox C. C. 150; *Colip v. S.*, 153 Ind. 584, 55 N. E. 739. *Contra*, *Pullman v. S.*, 78 Ala. 31, 56 Am. R. 21; *S. v. Foster*, 37 Iowa 404; *S. v. Barter*, 58 N. H. 604; *S. v. Costin*, 89 N. C. 511; *Reg. v. Thomas*, 6 Cox C. C. 403. See *Foster v. S.* (Del., 1899), 43 Atl. 265.

³⁶ *Rex v. Freeman*, 5 C. & P. 534. See *Reg. v. Hoare*, 1 F. & F. 647.

such orders to his principal to be filled, and then has three months within which to collect the money for the goods sent, is not a "clerk or servant" within the meaning of the statute.³⁷ One may be a servant of two or more persons at the same time within the meaning of the law relating to embezzlement.³⁸

§ 514. **Clerk or servant—How determined.**—The mode of compensation, whether by commission or otherwise, does not determine whether one is a clerk or servant. It depends upon the nature of the employment.³⁹ The language of the statute does not exempt from its operation agents or servants who receive no compensation for their services or agents or servants who are not employed in a general continuous service.⁴⁰

§ 515. **Principal liable for agent's acts.**—The receipt of deposits by the agent of a bank in the usual course of business, in the absence of officers or persons carrying on the business, is the receipt of the officers or such persons, and they will be liable criminally for the acts of their agent, if they knew of the insolvency of the bank at the time.⁴¹

§ 516. **Public officer refusing to deliver.**—An officer entrusted with the care and custody of public funds who refuses or neglects to deliver to his successor in office the public money in his possession when demand is made on him, is guilty of embezzlement, and such refusal is *prima facie* evidence of his guilt.⁴²

§ 517. **Officer de facto liable.**—An officer *de facto* is punishable the same as an officer *de jure* on a charge of embezzlement, the crime in both cases being of the same ill consequences to the public, and there seems to be no reason that a wrongful officer should have any greater favor than a rightful officer.⁴³

³⁷ Reg. v. Mayle, 11 Cox C. C. 150; Reg. v. Turner, 11 Cox C. C. 557. See Queen v. Negus, 2 Cr. Cas. Res. 34, 1 Am. C. R. 150.

³⁸ Reg. v. Bailey, 12 Cox C. C. 56; Rex v. Leech, 3 Stark. 70; S. v. Heath, 8 Mo. App. 107.

³⁹ Reg. v. Walker, 8 Cox C. C. 1; Reg. v. Hall, 13 Cox C. C. 49; Reg. v. Tite, Leigh & C. 29; Reg. v. Bailey, 12 Cox C. C. 56.

⁴⁰ S. v. Barter, 58 N. H. 604; S. v. Brooks, 85 Iowa 366, 52 N. W. 240;

Reg. v. Smith, 1 C. & K. 423. But see Reg. v. White, 8 C. & P. 742.

⁴¹ Carr v. S., 104 Ala. 4, 16 So. 150, 10 Am. C. R. 84; S. v. Cadwell, 79 Iowa 432, 44 N. W. 700.

⁴² S. v. Ring, 29 Minn. 78, 11 N. W. 233; S. v. Mason, 108 Ind. 48, 8 N. E. 716; S. v. Hunnicut, 34 Ark. 562; P. v. Seeley, 117 Mich. 263, 75 N. W. 609; Whitney v. S., 53 Neb. 287, 73 N. W. 696.

⁴³ 3 Hawk. P. C., ch. 19, §§ 23, 28; S. v. Goss, 69 Me. 22, 3 Am. C. R.

§ 518. "Officer" includes school treasurer.—A statute relating to "public officers" for the embezzlement of funds intrusted to them includes a township treasurer of school funds, and is a distinct offense from that provided by the school law against such township treasurer.⁴⁴

§ 519. "Clerk" not an "officer."—The embezzlement of public funds by "any officer or other person charged with the safe keeping, transfer and disbursement of such public funds" will not include clerks or servants of such public officers.⁴⁵ But under statute, "any person who aids, abets or advises" a public officer in the embezzlement of public funds is guilty of embezzlement, no matter whether he is an officer intrusted with such public funds or not.⁴⁶

§ 520. Public officer included.—The treasurer of the University of Illinois is a public officer within the meaning of the statute relating to embezzlement committed by any "state, county, township, city, town, village or other officer elected or appointed," although the university is not a municipal corporation.⁴⁷

§ 521. Constable not included.—The statute of Illinois providing that: "Whoever embezzles or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money or property delivered to him, which may be the subject of larceny, shall be deemed guilty of larceny," can have no application to a constable who collects money on an execution and converts it to his own use. There is another section of the statute which applies to a constable or other officer.⁴⁸

§ 522. State treasurer.—A state treasurer or deputy of that office who takes money from the treasury or wrongfully diverts it from its

67; *S. v. Sellers*, 7 Rich. (S. C.) 368; *Diggs v. S.*, 49 Ala. 311; *S. v. Stone*, 40 Iowa 547. See also *Bartley v. S.*, 53 Neb. 310, 73 N. W. 744; *S. v. Spaulding*, 24 Kan. 1; *P. v. Cobler*, 108 Cal. 538, 41 Pac. 401; *Fortenberry v. S.*, 56 Miss. 286; *S. v. McIntyre*, 3 Ired. 171.

⁴⁴ *Johnson v. P.*, 123 Ill. 625, 15 N. E. 37. See *Shivers v. S.*, 53 Ga. 149 (tax collector); *Com. v. Morrissey*, 86 Pa. St. 416; *S. v. Walton*, 62 Me. 106, 2 Green C. R. 467; *S. v. Brandt*, 41 Iowa 594; *S. v. Griswold*, 73 Conn. 95, 46 Atl. 829 (collector).

⁴⁵ *Moore v. S.*, 53 Neb. 831, 74 N. W. 319; *S. v. Meyers*, 56 Ohio St. 340, 47 N. E. 138. *Contra*, *S. v. Exnicios*, 33 La. 253; *Culp v. Com.*, 109 Pa. St. 363; *P. v. Gray*, 66 Cal. 271, 5 Pac. 240; *U. S. v. Hartwell*, 6 Wall. 385.

⁴⁶ *Mills v. S.*, 53 Neb. 263, 73 N. W. 761; *Brown v. S.*, 18 Ohio St. 497.

⁴⁷ *Spalding v. P.*, 172 Ill. 45, 49 N. E. 993.

⁴⁸ *Stoker v. P.*, 114 Ill. 323, 2 N. E. 55; *Zschocke v. P.*, 62 Ill. 128; *P. v. Allen*, 5 Den. (N. Y.) 76.

proper use, with intent to use it for his own private benefit, will be guilty of embezzlement.⁴⁹

§ 523. Public officers, includes assistants.—Under the federal statutes relating to embezzlement by public officers having the custody or control of public funds, are included clerks of the treasurer or assistant treasurer, paymasters in the army and clerks of the post-office.⁵⁰

§ 524. Officer of national bank—Director.—Under the federal statute making it embezzlement for any officer of a national bank to wrongfully abstract or willfully misapply the funds of the bank, a director in obtaining money from the bank by over-draft, knowing he has no money to his credit in the bank, and fraudulently converts the same to his own use, is guilty of embezzlement.⁵¹ Cashiers and tellers of national banks come within the statute.⁵²

ARTICLE II. MATTERS OF DEFENSE.

§ 525. When false pretense and not embezzlement.—Where the owner of goods alleged to have been stolen parts with both possession and the title to the goods to the alleged thief, embezzlement will not lie; it amounts to fraud, and obtaining goods by false pretenses.⁵³

§ 526. Owner can not embezzle.—No one can be guilty of stealing or embezzling that which belongs to him or in which he has an interest as partner and of which he is legally entitled to the possession.⁵⁴

⁴⁹ *S. v. Brandt*, 41 Iowa 593; *Bartley v. S.*, 53 Neb. 310, 73 N. W. 744; *P. v. McKinney*, 10 Mich. 54; *Hemingway v. S.*, 68 Miss. 371, 8 So. 317; *S. v. Munch*, 22 Minn. 67; *S. v. Archer*, 73 Md. 44, 20 Atl. 172; *S. v. Noland*, 111 Mo. 473, 19 S. W. 715. See *Moore v. S.*, 53 Neb. 831, 74 N. W. 319, relating to a state auditor.

⁵⁰ *U. S. v. Hartwell*, 6 Wall. 385; *U. S. v. Cook*, 17 Wall. 168. But see *U. S. v. Smith*, 124 U. S. 525, 8 S. Ct. 595.

⁵¹ *U. S. v. Warner*, 26 Fed. 616.

⁵² *Cochran v. U. S.*, 157 U. S. 286, 15 S. Ct. 628; *Com. v. Barry*, 116

Mass. 1; *U. S. v. Taintor*, 11 Blatchf. 374; *S. v. Tuller*, 34 Conn. 281.

⁵³ *Welsh v. P.*, 17 Ill. 339; *Stinson v. P.*, 43 Ill. 398.

⁵⁴ *S. v. Reddick*, 2 S. Dak. 124, 8 Am. C. R. 205, 48 N. W. 846; *S. v. Kent*, 22 Minn. 41, 21 Am. R. 764, 2 Am. C. R. 107; *Carter v. S.*, 53 Ga. 326; *S. v. Butman*, 61 N. H. 511; *Gary v. Northwestern, etc.*, Aid Ass'n, 87 Iowa 25, 53 N. W. 1086; *Van Etten v. S.*, 24 Neb. 734, 40 N. W. 289. See *S. v. Snell*, 9 R. I. 112, 1 Green C. R. 533; *Reg. v. Taffs*, 4 Cox C. C. 169; *Com. v. Berry*, 99 Mass. 428, 96 Am. D. 761; *S. v. Kusnick*, 45 Ohio St. 535, 15 N. E.

Having an interest only in the profits of a business, such as commissions, as agent, does not make the defendant a partner in the ownership of the property or capital of the copartnership.⁵⁵ A person who, by virtue of his agency, receives money of his employer, out of which he is entitled to a commission, is not guilty of embezzlement in appropriating the whole of the money to his own use.⁵⁶

§ 527. Fraternal society—Not partners.—A fraternal and benevolent association, organized not for profit in conducting its business, but for the mutual benefit of its members, is not a partnership in the sense of joint owners, with joint possession, and any one of its members will not be relieved from prosecution for embezzlement in appropriating to his own use the money of the association coming to his hands.⁵⁷

§ 528. Cashier—Taking what due.—The cashier of a mercantile house, having charge of the money of the concern, being about to leave their employment, took of the money of the firm in his hands the amount due him as the balance of his salary, without the knowledge and against the wish of his employers and charged the same against himself on the books of the firm. This is not embezzlement; the employe did only what he had a right to do.⁵⁸ Where a person takes property and converts it to his own use under an honest belief that he is part owner, he is not guilty of embezzlement.⁵⁹

§ 529. Officer—Not debtor, but custodian.—Under a statute requiring the treasurer of public funds to select some responsible depository where the funds would bear interest, and requiring him to account for such interest, he does not become the owner of the funds, making him liable merely as a debtor to account for whatever balance might be due. He is still regarded as custodian or keeper of the funds, and

481, 4 Am. St. 564; Reg. v. Watts, 2 Denison 14; 1 Hale P. C. 513; Dancy v. S. (Tex. Cr., 1899), 53 S. W. 886; S. v. Keith, 126 N. C. 1114, 36 S. E. 169.

⁵⁵ Com. v. Bennett, 118 Mass. 443. See Reg. v. McDonald, Leigh & C. 85; Dancy v. S. (Tex. Cr., 1899), 53 S. W. 886; S. v. Collins, 1 Marv. (Del.) 536, 41 Atl. 144.

⁵⁶ Stone v. Com., 20 Ky. L. 478, 46 S. W. 721; S. v. Kent, 22 Minn. 41, 2

Am. C. R. 107; Com. v. Foster, 107 Mass. 221.

⁵⁷ S. v. Campbell, 59 Kan. 246, 52 Pac. 454.

⁵⁸ Ross v. Innis, 35 Ill. 488, 85 Am. D. 373; Beaty v. S., 82 Ind. 228. See P. v. Bidleman, 104 Cal. 608, 38 Pac. 502; Reg. v. Hodgson, 3 C. & P. 422; Reg. v. Norman, 1 C. & M. 501; S. v. Foster, 1 Pen. (Del.) 289, 40 Atl. 939; P. v. Lapique, 120 Cal. 25, 52 Pac. 40.

⁵⁹ Phelps v. P., 55 Ill. 337.

the fiduciary character remains the same as before the enactment of the statute.⁶⁰

§ 530. Debtor and creditor, when.—Where an employe, to secure the faithful discharge of the duties of his employment, deposits money with his employer, he thereby creates the relation of debtor and creditor and not the relation of bailee and bailor, and a refusal to pay the money so deposited is not embezzlement.⁶¹ Where, by the terms of a contract between the principal and his agent, it appears that the agent may use the money of his employer and pay interest thereon for the time retained by him, he will not be guilty in appropriating his employer's money to his own use, even though he is required to remit all money as soon as collected.⁶²

§ 531. Debtor and creditor, when.—If money be put in the hands of a person to be loaned by him at ten per cent. interest for one year, and he afterward pays back to the owner a part of it, with interest on the whole amount to a future date, promising to pay the balance on thirty days' notice, but fails to do so, and converts the money to his own use, this does not constitute embezzlement.⁶³ A mere breach of a contract or trust can not be enforced in the criminal courts.⁶⁴

§ 532. Commission merchant, liable.—A commission merchant who converts to his own use the proceeds of a sale of goods intrusted to him is guilty of embezzlement, and it is no defense that he sent his check for the proceeds according to agreement, he having no funds in the bank on which it was drawn to pay.⁶⁵

§ 533. Bank deposits—A loan.—Some of the courts hold that a deposit of money in a bank is in the nature of a loan and that the

⁶⁰ *Dreyer v. P.*, 176 Ill. 590, 599, 52 N. E. 372.

⁶¹ *Mulford v. P.*, 139 Ill. 586, 28 N. E. 1096. See *Hamilton v. S.*, 46 Neb. 284, 64 N. W. 965. But see *P. v. Evans*, 69 Hun 222, 23 N. Y. Supp. 717; *P. v. Gottschalk*, 66 Hun 64, 20 N. Y. Supp. 777, 137 N. Y. 569, 33 N. E. 339; *Underhill Cr. Ev.*, § 285; *S. v. Mahan*, 138 Mo. 112, 39 S. W. 465.

⁶² *Miller v. S.*, 16 Neb. 179, 20 N. W. 253. See *S. v. Baumhager*, 28 Minn. 226, 9 N. W. 704; *Leonard v. S.*, 7 Tex. App. 417; *Webb v. S.*, 8

Tex. App. 310; *McAleer v. S.*, 46 Neb. 116, 64 N. W. 358. Compare *S. v. Barton*, 125 N. C. 702, 34 S. E. 553. See *S. v. Thompson*, 155 Mo. 300, 55 S. W. 1013.

⁶³ *Kribs v. P.*, 82 Ill. 426. See *S. v. Covert*, 14 Wash. 652, 45 Pac. 304; *S. v. Cooper*, 102 Iowa 146, 71 N. W. 197; *Rauguth v. P.*, 186 Ill. 93, 57 N. E. 832; *Young v. Glendinning*, 194 Pa. St. 550, 45 Atl. 364.

⁶⁴ *Webb v. S.*, 8 Tex. App. 310; *Com. v. Hays*, 14 Gray (Mass.) 62, 74 Am. D. 662.

⁶⁵ *Warriner v. P.*, 74 Ill. 349.

banker can not be held criminally liable merely because he fails to pay such deposit and makes an assignment, unless it appears that he fraudulently appropriated the money to his own use.⁶⁶

§ 534. Collector, when not liable.—Ferguson was the tax collector for the city, whose duty it was to account to the city treasurer. The defendant was in his employ as clerk and cashier. It was the duty of the defendant to account to Ferguson. It was held that the failure of either to account to the city treasurer for any moneys collected by them did not make either of them guilty of larceny, the money having been received without fraud and as a matter of right.⁶⁷

§ 535. Treasurer depositing in his name.—The mere deposit of money by the treasurer of an association to his own private account will not of itself sustain a charge of embezzlement.⁶⁸

§ 536. Public officer, defense.—A public officer in his defense to a charge of embezzlement has a right to show that the bank with which he deposited the money and funds had failed, that he had been robbed, and the like.⁶⁹

§ 537. Estoppel, no application to criminal.—The defendant, county treasurer, was entitled to show as a defense that he made settlement with the county board with worthless and spurious certificates of deposit instead of cash, and that whatever money he may have converted to his own use was three years before his indictment. The rule of estoppel has no application to criminal prosecutions.⁷⁰

§ 538. General deficiency insufficient.—A general deficiency in an account is not sufficient proof of embezzlement. A specific sum must be alleged and proven, though not necessary to prove the whole of the specific sum alleged.⁷¹

⁶⁶ *P. v. Wadsworth*, 63 Mich. 500, 30 N. W. 99; *Com. v. Rockafellow*, 163 Pa. St. 139, 29 Atl. 757; *Collins v. S.*, 33 Fla. 429, 15 So. 214.

⁶⁷ *Snapp v. Com.*, 82 Ky. 173, 6 Am. C. R. 184. See *Queen v. Foulkes*, 2 Cr. Cas. Res. 150, 1 Am. C. R. 154.

⁶⁸ *P. v. Royce*, 106 Cal. 173, 37 Pac. 630, 39 Pac. 524; *Fleener v. S.*, 58 Ark. 98, 23 S. W. 1; *S. v. Bryan*, 40 Iowa 379; *S. v. O'Kean*, 35 La. 901.

See *P. v. Page*, 116 Cal. 386, 48 Pac. 326.

⁶⁹ *S. v. Bryan*, 40 Iowa 379. Compare *Burnett v. S.*, 62 N. J. L. 510, 41 Atl. 719.

⁷⁰ *S. v. Hutchinson*, 60 Iowa 478, 15 N. W. 298, 4 Am. C. R. 163; 1 McClain Cr. L., § 649.

⁷¹ *Reg. v. Wolstenholme*, 11 Cox C. C. 313; *Rex v. Murray*, 5 C. & P. 145; 1 Whar. Cr. L., § 1044. *Contra*, see 1 McClain Cr. L., § 640.

§ 539. **Return of property no defense.**—The crime of embezzlement having in fact been committed, a return of the property embezzled or settlement with the owner will be no defense.⁷²

§ 540. **"Decoy" letter, no defense.**—It is no defense to a charge of embezzlement from the United States mails that the defendant was detected by means of "decoy" letters.⁷³

§ 541. **Corporation doing unlawful business.**—That a foreign corporation had failed to comply with the laws of a state in which it was doing business is no defense to a charge of embezzlement of its money by an agent of such corporation.⁷⁴

§ 542. **Proceeds of lottery ticket.**—It is no defense to a prosecution for embezzlement of money collected by an agent that he collected it on a lottery ticket issued and sold contrary to the law.⁷⁵

§ 543. **Misappropriating bank's money.**—The cashier of a bank, by using the money of the bank in stock speculations which he carried on with stock brokers in his own name, is guilty of embezzlement, although the officers of the bank knew and sanctioned this use of the bank's funds.⁷⁶

§ 544. **Depreciation of assets.**—The fact that a bank becomes insolvent through depreciation in values of assets incident to the general monetary condition of the country, or through business disasters, for which the accused is not accountable, is no defense to a charge of receiving deposits when the bank was insolvent, unless such

⁷² Robson v. S., 83 Ga. 166, 9 S. E. 610; P. v. De Lay, 80 Cal. 52, 22 Pac. 90; S. v. Pratt, 98 Mo. 482, 11 S. W. 977; Fleener v. S., 58 Ark. 98, 23 S. W. 1; S. v. Noland, 111 Mo. 473, 19 S. W. 715.

⁷³ U. S. v. Dorsey, 40 Fed. 752; Goode v. U. S., 159 U. S. 663, 16 S. Ct. 136; U. S. v. Wight, 38 Fed. 106; U. S. v. Berthea, 44 Fed. 802; U. S. v. Jones, 80 Fed. 513; Walster v. U. S., 42 Fed. 891.

⁷⁴ S. v. Pohlmeier, 59 Ohio St. 491, 52 N. E. 1027.

⁷⁵ Woodward v. S., 103 Ind. 127, 2 N. E. 321, 5 Am. C. R. 214. The

following cases illustrate the same principle: Com. v. Cooper, 130 Mass. 285; S. v. O'Brien, 94 Tenn. 79, 28 S. W. 311; S. v. Shadd, 80 Mo. 358; Com. v. Smith, 129 Mass. 104; S. v. Cloutman, 61 N. H. 143; P. v. Hawkins, 106 Mich. 479, 64 N. W. 736; Leonard v. S., 7 Tex. App. 417. Compare S. v. Cunningham, 154 Mo. 161, 55 S. W. 282; Com. v. Shissler (Pa. 1898), 7 Pa. Dist. R. 344.

⁷⁶ U. S. v. Taintor, 11 Blatchf. 374, 2 Green C. R. 242; 1 McClain Cr. L., § 641.

depreciation caused such insolvent condition of the bank after such deposit was received.⁷⁷

ARTICLE III. INDICTMENT.

§ 545. **Fiduciary character essential.**—The defendant's fiduciary character, which is the distinguishing feature between embezzlement and larceny, must be specially averred in the indictment.⁷⁸ The indictment must set out the facts of embezzlement and then aver that the defendant committed larceny.⁷⁹ Where the property of the owner was delivered to the defendant by virtue of a contract between them, as by hiring or borrowing the property, the indictment will be defective in failing to allege such fiduciary relation of the parties.⁸⁰ An indictment alleging that the defendant was the servant, agent, attorney and bailee of his employer and occupied a fiduciary relation to him, sufficiently states the fiduciary relation without setting out the agreement showing the facts which made the defendant the servant or agent of his employer.⁸¹

§ 546. **Statutory words.**—An indictment substantially in the language of the statute is sufficient.⁸² Where a criminal statute is not to receive a construction as broad as the language used would seem to warrant, but is narrowed by construction, an indictment in the language of the statute will not be sufficient: as where the indictment against a public officer for a failure to turn over the public money to his successor, was defective in failing to allege his act to have been felonious.⁸³

§ 547. **Description of money.**—An indictment alleging the embezzlement of "ninety dollars in paper money of the value of ninety dollars and two dollars in silver money of the value of two dollars," is sufficient description.⁸⁴ An indictment simply alleging the sum of

⁷⁷ Carr v. S., 104 Ala. 4, 16 So. 150, 10 Am. C. R. 85.

⁷⁸ Kibs v. P., 81 Ill. 599; S. v. Stevenson, 91 Me. 107, 39 Atl. 471; P. v. Cohen, 8 Cal. 42; P. v. Tryon, 4 Mich. 665; Rex v. Johnson, 3 M. & S. 539; Com. v. Smart, 6 Gray (Mass.) 15. See Moore v. U. S., 160 U. S. 268, 10 Am. C. R. 284, 16 S. Ct. 294.

⁷⁹ Kibs v. P., 81 Ill. 600. But see S. v. Reinhart, 26 Or. 466, 38 Pac. 822; S. v. Adams, 108 Mo. 208, 18 S. W. 1000.

⁸⁰ Smith v. S., 38 Tex. Cr. 232, 42

S. W. 302; Calkins v. S., 34 Tex. Cr. 251, 29 S. W. 1081.

⁸¹ P. v. Dorthy, 46 N. Y. Supp. 970, 20 App. Div. 308; Gebhardt v. S. (Tex. Cr.), 27 S. W. 136.

⁸² Lycan v. P., 107 Ill. 423; Ker v. P., 110 Ill. 627; Goodhue v. P., 94 Ill. 39 (form).

⁸³ Stropes v. S., 120 Ind. 562, 22 N. E. 773.

⁸⁴ Cody v. S., 100 Ga. 105, 28 S. E. 106. See Walker v. S., 117 Ala. 42, 23 So. 149; S. v. Alverson, 105 Iowa 152, 74 N. W. 770.

money embezzled and stating the value, is sufficient without alleging it to be lawful money of the United States. Such allegation is surplusage.⁸⁵ An indictment alleging the description of the money embezzled as "current money of the United States," a more particular description being to the grand jurors unknown, is sufficient.⁸⁶

§ 548. **Description of money—Value.**—In charging the offense of embezzlement of money, under a statute relating to the embezzlement of money, bullion and the like, and providing that a general description is sufficient, without specifying any particulars, an indictment need not aver the value of the money alleged to have been embezzled.⁸⁷

§ 549. **Description of instrument—"Funds."**—An indictment alleging the embezzlement of "fifty pieces of paper," each of a certain value stated, is sufficient description of the property.⁸⁸ An indictment alleging that the defendant embezzled the "funds" of the owner of the value of an amount stated, is not sufficient description of the property, the word "funds" including several species of property.⁸⁹

§ 550. **Ownership—Defective.**—An indictment charging an insurance agent with the embezzlement of money received as premiums, which he failed to account for, is defective in not alleging to whom the money belonged.⁹⁰ But the indictment need not allege the ownership under a statute not making ownership an element of the crime defined.⁹¹

§ 551. **Demand, when not essential.**—It is not necessary to allege or prove a demand to pay money or deliver property, if such demand is not made an element of the crime by the statute.⁹² When a banker

⁸⁵ *P. v. Hearne*, 66 Hun 626, 20 N. Y. Supp. 806; *S. v. Noland*, 111 Mo. 473, 19 S. W. 715. See *Brown v. P.*, 173 Ill. 34, 50 N. E. 106.

⁸⁶ *Fleener v. S.*, 58 Ark. 98, 23 S. W. 1; *Edelhoff v. S.*, 5 Wyom. 19, 36 Pac. 627. See *S. v. Combs*, 47 Kan. 136, 27 Pac. 818; *McBride v. U. S.*, 101 Fed. 821 (officer).

⁸⁷ *Com. v. Warner*, 173 Mass. 541, 54 N. E. 353. See *S. v. Alverson*, 105 Iowa 152, 74 N. W. 770.

⁸⁸ *Com. v. Parker*, 165 Mass. 526, 43 N. E. 499.

⁸⁹ *U. S. v. Greve*, 65 Fed. 488.

⁹⁰ *S. v. Stearns*, 28 Or. 262, 42 Pac. 615; *Grant v. S.*, 35 Fla. 581, 17 So. 225. See *Com. v. Haggel*, 7 Kulp (Pa.) 10.

⁹¹ *S. v. Fricker*, 45 La. 646, 12 So. 755.

⁹² *Edelhoff v. S.*, 5 Wyom. 19, 36 Pac. 627, 9 Am. C. R. 259; *S. v. New*, 22 Minn. 76; *Wallis v. S.*, 54 Ark. 611, 16 S. W. 821; *Com. v. Hussey*, 111 Mass. 432; *Alderman v. S.*, 57 Ga. 367; *Leonard v. S.*, 7 Tex. App. 419; *S. v. Tompkins*, 32 La. 620.

suspends payment and closes his doors against depositors and creditors and discontinues banking operations, he waives the necessity for a demand by depositors. In such case it is not necessary to allege or prove a demand.⁹³ Where, by statute, a demand is required for the money or property, the demand should be made in such manner as to fairly apprise the party that he would be subject to the penalties of the statute if he failed to comply.⁹⁴

§ 552. Duplicity.—When not.—The indictment charging in the language of the statute that the defendant did unlawfully and feloniously “make way with, secrete and convert to his own use” the money of the owner, states but one offense.⁹⁵

§ 553. Duplicity.—An indictment alleging the ownership of the property embezzled to be in C. E., as administrator, to collect, and in C. E., as administrator generally of the estate of F. E., deceased, is sufficient where it appears from the indictment that the several transactions in the conversion of the several securities form a part of one entire transaction.⁹⁶

§ 554. Duplicity.—Charging embezzlement in the indictment in the usual form and then concluding by alleging that the defendant, “the property embezzled, in manner and form aforesaid, did then and there unlawfully and feloniously steal, take and carry away,” is not bad for duplicity.⁹⁷

§ 555. Public officer.—Averring.—In an indictment against a public officer for embezzlement of public moneys, it is not necessary to allege that he was duly elected or appointed, or that he qualified as such officer; it is sufficient to allege that he was a “public officer” in general terms, naming the office.⁹⁸

⁹³ *Meadowcroft v. P.*, 163 Ill. 82, 45 N. E. 303. See *Dreyer v. P.*, 176 Ill. 590, 52 N. E. 372; *Bartley v. S.*, 53 Neb. 310, 73 N. W. 744; *P. v. Van Ewan*, 111 Cal. 144, 43 Pac. 520; *S. v. Flournoy*, 46 La. 1518, 16 So. 454; *P. v. Carter*, 122 Mich. 668, 81 N. W. 924.

⁹⁴ *Wright v. P.*, 61 Ill. 384, 2 Green C. R. 558; *Warriner v. P.*, 74 Ill. 349; *S. v. Pierce*, 7 Kan. App. 418, 53 Pac. 278; *S. v. Munch*, 22 Minn. 67; *P. v. Royce*, 106 Cal. 173, 37 Pac. 630, 39

Pac. 524; *S. v. Bancroft*, 22 Kan. 170. See *S. v. Hayes*, 59 Kan. 61, 51 Pac. 905; *Kossakowski v. P.*, 177 Ill. 563, 53 N. E. 115.

⁹⁵ *S. v. Manley*, 107 Mo. 364, 17 S. W. 800. See *S. v. Howe*, 27 Or. 138, 44 Pac. 672.

⁹⁶ *Schintz v. P.*, 178 Ill. 320, 52 N. E. 903.

⁹⁷ *S. v. Gilmore*, 110 Mo. 1, 19 S. W. 218; *S. v. Adams*, 108 Mo. 208, 18 S. W. 1000.

⁹⁸ *S. v. Goss*, 69 Me. 22, 3 Am. C.

§ 556. **Indictment sufficient.**—An indictment alleging that the defendant at a certain time was the assignee of certain persons, and intrusted by them with the care and safe-keeping of certain moneys, stating the amount, and that he did then and there unlawfully, fraudulently and feloniously convert the same moneys to his own use, sufficiently states the offense.⁹⁹ An indictment alleging that the defendant was the president of a certain national bank, and that by virtue of his office he took into his possession certain bonds (describing them), the property of said bank, and appropriated the same to his own use, with intent to defraud the said bank association, is sufficient.¹⁰⁰

§ 557. **“By virtue of his office.”**—An indictment which clearly and sufficiently alleges the fiduciary relation between the defendant and the owner of the property embezzled, is not defective in not alleging in the words of the statute that the property came to the defendant's possession, or under his care “by virtue of his agency, office or employment.”¹

§ 558. **Bailee or trustee.**—An indictment alleging that the defendant, being the “bailee and trustee” of certain property, embezzled and converted it to his own use, sufficiently charges larceny as a bailee, the word “trustee” being surplusage.²

§ 559. **Venue defective.**—An indictment alleging that the defendant received certain money in a certain county, and that thereafter he converted said money to his own use, is defective in not stating that he converted the money to his own use in the county where the prosecution was instituted.³

ARTICLE IV. EVIDENCE; VARIANCE.

§ 560. **False book entries, competent.**—False and fraudulent book entries made in books kept by the defendant are competent evidence

R. 66; S. v. Carlin, 90 Me. 142, 37 Atl. 878; S. v. Downing, 15 Wash. 413, 46 Pac. 646; P. v. Van Ewan, 111 Cal. 144, 43 Pac. 520; Rex v. Borrett, 6 C. & P. 124.
⁹⁹ S. v. Whiteman, 9 Wash. 402, 37 Pac. 659. See S. v. Nelson, 79 Minn. 388, 82 N. W. 674.

¹⁰⁰ Claassen v. U. S., 142 U. S. 140, 12 S. Ct. 169.

¹ Evans v. S., 40 Tex. Cr. 54, 48 S. W. 194. See Lang v. S., 97 Ala. 41, 12 So. 183.

² S. v. Thompson, 28 Or. 296, 42 Pac. 1002.

³ S. v. Mayberry, 9 Wash. 193, 37 Pac. 284.

tending to prove embezzlement, whether made before or after the alleged embezzlement.*

§ 561. Book account as evidence.—The cash-book kept by the bookkeeper, under the direction of the defendant, showed the cash receipts and disbursements. At the close of the day's business the defendant would count the cash and furnish a slip to the accountant, who entered the amount and balanced and reported it. Held, *prima facie* evidence of the balance of cash on hand at the several dates.⁵

§ 562. By officer: condition of books.—On a charge against a person for embezzlement while he was a public officer, the condition of a book relating to the business of the office which came to the hands of his successor, is not competent in the absence of any evidence to show that the book was ever in the possession of the defendant and in the same condition when it was received by such successor.⁶ The conclusion reached by public authorities on making an investigation of the accounts of a public officer having the custody of public funds, is not competent on the trial on a charge of embezzlement.⁷

§ 563. Other acts about same time.—Evidence of other acts of embezzlement committed about the same time under like circumstances is admissible to prove guilty intent, but such evidence must be limited to proof of intent.⁸

§ 564. Receipt of other sums.—On a trial of one charged with embezzlement, receipts of other sums of money by the defendant from the prosecutor, shortly after the receipt of the money which the in-

* Jackson v. S., 76 Ga. 551; Com. v. Bennett, 118 Mass. 448; S. v. Baumhager, 28 Minn. 226, 9 N. W. 704; Reg. v. Guelder, 8 Cox C. C. 372. Compare P. v. Blackman, 127 Cal. 248, 59 Pac. 573.

⁵ P. v. Leonard, 106 Cal. 302, 39 Pac. 617; S. v. Reinhart, 26 Or. 464, 38 Pac. 822; P. v. Flock, 100 Mich. 512, 59 N. W. 237. See S. v. Adams, 108 Mo. 208, 18 S. W. 1000; Com. v. Pratt, 137 Mass. 98.

⁶ P. v. Westlake, 124 Cal. 452, 57 Pac. 465.

⁷ Bridges v. S., 110 Ga. 246, 34 S. E. 1037.

⁸ Com. v. Tuckerman, 10 Gray

(Mass.) 173; Stanley v. S., 88 Ala. 154, 7 So. 273; Reeves v. S., 95 Ala. 31, 11 So. 153; P. v. Cobler, 108 Cal. 538, 4 Pac. 401; Com. v. Sawtelle, 141 Mass. 140, 5 N. E. 312, 8 Cr. L. Mag. 355; Jackson v. S., 76 Ga. 551; Gallardo v. S. (Tex. Cr.), 40 S. W. 974; Edelhoff v. S., 5 Wyom. 19, 36 Pac. 627, 9 Am. C. R. 263; P. v. Neyce, 86 Cal. 393, 24 Pac. 1091; Com. v. Shepard, 1 Allen (Mass.) 575; Ter. v. Meyer (Ariz.), 24 Pac. 183; S. v. Holmes, 65 Minn. 230, 68 N. W. 11; Reg. v. Proud, 9 Cox C. C. 22; P. v. Hawkins, 106 Mich. 479, 64 N. W. 736; Underhill Cr. Ev., § 283.

dictment charges him with embezzling, and what he did with it, is competent as tending to show the mode of dealings between the parties, and as bearing on intent.⁹

§ 565. **Distinct embezzlements.**—An agent collected for his employer the sum of eight dollars and seventy-one cents each month for a period of eighteen months, being the rent for a house owned by his employer, and he at all times reported the house unoccupied. It was held that the collection each month constituted a single offense, and that they were not dependent upon each other and did not constitute a single fact of one endeavor. In other words, the several monthly collections did not constitute a series of acts making one offense.¹⁰

§ 566. **Series of acts, one transaction.**—Embezzlement often consists of many acts done in a series of years and the fact at last disclosed that the employer's money and funds are embezzled is the crime. In such case the prosecution should not be required to elect on which of the many acts it would claim a conviction, such acts being a series of acts constituting the *corpus delicti*. It might be otherwise where distinct sums of money are or may be delivered to the accused on different occasions wide apart, where such distinct acts might very readily be susceptible of direct proof.¹¹

⁹ *Dancy v. S.* (Tex. Cr.), 53 S. W. 886. Compare *Hobbs v. P.*, 183 Ill. 336, 55 N. E. 692. The evidence in the following cases was held sufficient to sustain convictions: *P. v. Carter*, 122 Mich. 668, 81 N. W. 924 (ownership); *S. v. Foley*, 81 Iowa 36, 46 N. W. 746; *S. v. Rue*, 72 Minn. 296, 75 N. W. 235; *Price v. S.* (Tex. Cr.), 40 S. W. 596; *Robson v. S.*, 83 Ga. 166, 9 S. E. 610; *P. v. Cobler*, 108 Cal. 538, 41 Pac. 401; *S. v. Hasledahl*, 3 N. Dak. 36, 53 N. W. 430; *S. v. King*, 81 Iowa 587, 47 N. W. 775; *Harris v. S.* (Tex. Cr.), 34 S. W. 922 (intent); *Smith v. S.*, 34 Tex. Cr. 265, 30 S. W. 236 (intent); *S. v. Reinhart*, 26 Or. 466, 38 Pac. 822; *P. v. Gallagher* (Cal.), 33 Pac. 890; *S. v. Samuels*, 111 Mo. 566, 20 S. W. 316; *S. v. Findley*, 101 Mo. 217, 14 S. W. 185; *Kossakowski v. P.*, 177 Ill. 563, 53 N. E. 115; *S. v. Cowdery*

(Minn., 1900), 81 N. W. 750, 48 L. R. A. 92. Not sufficient: *S. v. Baldwin*, 70 Iowa 180, 30 N. W. 476; *P. v. Van Sciever* (Cal.), 42 Pac. 451; *Dix v. S.*, 89 Wis. 250, 61 N. W. 760 (venue); *Rauguth v. P.*, 186 Ill. 93, 57 N. E. 832; *Almond v. S.*, 110 Ga. 883, 36 S. E. 215.

¹⁰ *Edelhoff v. S.*, 5 Wyom. 19, 36 Pac. 627, 9 Am. C. R. 264. Compare *Com. v. Roberts* (Pa., 1899), 22 Pa. Co. R. 214; *Weimer v. P.*, 186 Ill. 503, 58 N. E. 378.

¹¹ *Ker v. P.*, 110 Ill. 646, 4 Am. C. R. 224, 51 Am. R. 706. See *Brown v. S.*, 18 Ohio St. 496, 513; *Gravatt v. S.*, 25 Ohio St. 162. But see *Rex v. Williams*, 6 C. & P. 626; *S. v. Nute*, 63 N. H. 79; *Bolln v. S.*, 51 Neb. 581, 71 N. W. 444; *Jackson v. S.*, 76 Ga. 551; *Underhill Cr. Ev.*, § 289.

§ 567. **Larceny varies from embezzlement.**—A charge of larceny is not supported by proof of embezzlement, nor can a charge of embezzlement be supported by proof of larceny. The offenses are distinct.¹²

§ 568. **When variance—Money, proceeds.**—An indictment charging the county treasurer with the embezzlement of money will not support evidence of appropriating the proceeds of county orders, the county treasurer as such officer having no authority to sell such orders for the county and receive the proceeds as the money of the county.¹³

§ 569. **Proof of part sufficient.**—The prosecution is not required to prove the entire amount of money or all the articles alleged in the indictment to have been embezzled. Proof of any part will sustain a conviction.¹⁴

§ 570. **Conversion, where.**—The crime of embezzlement is not complete until the defendant fraudulently converts to his own use the money or property intrusted to him, and such fraudulent conversion may be in the county where the property is received or in some other county to which it is taken, depending upon the time of the criminal intent.¹⁵

§ 571. **Foreign corporations.**—A statute relating to embezzlement from "any corporate body in this state" does not apply to or include foreign corporations doing business in such state without authority of law.¹⁶

¹² P. v. Salorse, 62 Cal. 139; P. v. Cruger, 102 N. Y. 510, 7 N. E. 555, 55 Am. R. 830; Kibs v. P., 81 Ill. 599; Johnson v. P., 113 Ill. 99; S. v. Harmon, 106 Mo. 635, 18 S. W. 128; S. v. Wingo, 89 Ind. 204; P. v. Johnson, 91 Cal. 265, 27 Pac. 663; Com. v. Doherty, 127 Mass. 20; Com. v. Simpson, 9 Metc. (Mass.) 138; Fulton v. S., 13 Ark. 168.

¹³ Goodhue v. P., 94 Ill. 48; Thalheim v. S., 38 Fla. 169, 20 So. 938. See S. v. Cooper, 102 Iowa 146, 71 N. W. 197; Weimer v. P., 186 Ill. 503, 58 N. E. 378; Com. v. Morton (Del., 1899), 7 Del. Co. R. 521 (agent).

¹⁴ S. v. Foster, 1 Pen. (Del.) 289, 40 Atl. 939; Walker v. S., 117 Ala. 42, 23 So. 149; Meadowcroft v. P., 163 Ill. 77, 45 N. E. 303; S. v. Fourchy, 51 La. 228, 25 So. 109.

¹⁵ S. v. Small, 26 Kan. 209; Reed v. S., 16 Tex. App. 586; S. v. Bailey, 50 Ohio St. 636, 36 N. E. 233; Brown v. S., 23 Tex. App. 214, 4 S. W. 588; P. v. Murphy, 51 Cal. 376; Dix v. S., 89 Wis. 250, 61 N. W. 760; Robson v. S., 83 Ga. 166, 9 S. E. 610; S. v. Baumhager, 28 Minn. 226, 9 N. W. 704.

¹⁶ Cory v. S., 55 Ga. 236, 1 Am. C. R. 166.

§ 572. **Corporation de facto sufficient.**—If the property embezzled is alleged to be owned by a corporation, it is only necessary to prove the *de facto* existence of the corporation by reputation or otherwise, without taking any steps to prove the existence of a corporation *de jure*.¹⁷

§ 573. **Officer de facto sufficient.**—The indictment alleging that the defendant, being then and there an officer, to wit: the financial secretary of the corporation, was sufficiently proved by showing that he was duly elected and installed, and acted as such officer, and it was immaterial whether or not he gave bond as required.¹⁸

ARTICLE V. JURISDICTION; VENUE.

§ 574. **Federal courts.**—The federal courts have exclusive jurisdiction of embezzlement from national banks, by the officers or employes thereof. The state governments have no power to enact laws in reference to national banks.¹⁹

§ 575. **Jurisdiction—What courts.**—The defendant, a clerk in a national bank, was indicted and convicted under the state law for the embezzlement of certain bonds, the property of the prosecuting witness, which were deposited in said bank. The conviction was sustained. The statutes of the United States at that time punished embezzlement of the property of national banks, but not the property of individuals (private persons) deposited with, and in the custody of such banks.²⁰

§ 576. **Jurisdiction—Venue.**—It was the duty of the accused to collect and remit to his employers all moneys at once, either by postal orders or bankers' drafts. He received a sum of money at a point

¹⁷ Kossakowski v. P., 177 Ill. 563, 53 N. E. 115; P. v. Carter, 122 Mich. 668, 81 N. W. 924; Reed v. S., 15 Ohio 217; P. v. Hawkins, 106 Mich. 479, 64 N. W. 736; Burke v. S., 34 Ohio St. 79; Smith v. S., 28 Ind. 321; Fleener v. S., 58 Ark. 98, 23 S. W. 1; Braithwaite v. S., 28 Neb. 832, 45 N. W. 247; S. v. Turner, 119 N. C. 841, 25 S. E. 810; P. v. Oldham, 111 Cal. 648, 44 Pac. 312; Underhill Cr. Ev., § 286.

¹⁸ Com. v. Logue, 160 Mass. 551, 36 N. E. 475; citing S. v. Goss, 69 Me. 22; 1 Bish. Cr. L. (8th ed.), § 464.

¹⁹ S. v. Tuller, 34 Conn. 280; Com. v. Felton, 101 Mass. 204; Com. v. Ketner, 92 Pa. St. 372, 37 Am. R. 692.

²⁰ S. v. Bardwell, 72 Miss. 535, 18 So. 377, 10 Am. C. R. 71, citing Com. v. Tenney, 97 Mass. 50; 1 McClain Cr. L., § 632.

in one county, which he failed to remit or account for, and by his correspondence led his employers to believe that he had not collected it. The accused was indicted in the county of Middlesex instead of in the county of York, where he collected the money. Held, that the court had jurisdiction.²¹ A person while in one state may by criminal means commit the crime of embezzlement in another state.²²

§ 577. **Value immaterial.**—Where neither the character nor mode of the punishment is contingent upon the value of the deposit embezzled by the banker the jury need not ascertain nor state the value of the property or money embezzled in their verdict.²³

§ 578. **Statute not invalid.**—A statute making the receipt of deposits by a banker embezzlement when he is insolvent is not unconstitutional, nor is it class legislation.²⁴

²¹ *Queen v. Rogers*, L. R. 3 Q. B. D. 45 N. E. 303; *Brown v. P.*, 173 Ill. 28, 3 Am. C. R. 503; *Rex v. Taylor*, 37, 50 N. E. 106.
3 B. & P. 596; *Reg. v. Murdock*, 2
Den. 298, 5 Cox C. C. 360. See S. 45 N. E. 303; *Brown v. P.*, 173 Ill.
v. Maxwell (Iowa), 85 N. W. 613. 36, 50 N. E. 106; *Robertson v. P.*, 20

²² *Ex parte Hedley*, 31 Cal. 109.

²³ *Meadowcroft v. P.*, 163 Ill. 86,

Colo. 279, 38 Pac. 326, 9 Am. C. R. 291. See *Cooley Const. Lim.*, 482.

CHAPTER IX.

FALSE PRETENSE.

ART. I.	Definition and Elements,	§§ 579-601
. II.	Matters of Defense,	§§ 602-625
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ARTICLE I. DEFINITION AND ELEMENTS.

§ 579. **Definition.**—A false pretense is such a fraudulent representation of an existing or past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value.¹ Four essential facts must be proved to constitute the crime of false pretense: first, the intent to defraud some particular person or people generally; second, an actual fraud committed; third, the false pretense; and fourth, that the fraud resulted from the employment of the false pretense.² False pretense may be committed by two means: first, by color of any false token or writing; second, by any false pretense, such as a bare lie. The word “token” means a sign, a mark, a symbol. The word “writing” includes lithographing or other mode of representing words and letters.³

¹ *Jackson v. P.*, 126 Ill. 149, 18 N. E. 286; *P. v. Wasservogle*, 77 Cal. 173, 19 Pac. 270; *P. v. Reynolds*, 71 Mich. 343, 38 N. W. 923; *P. v. Tompkins*, 1 Park Cr. (N. Y.) 224; *Com. v. Moore*, 99 Pa. St. 570, 4 Am. C. R. 231. See *Mathews v. S.*, 10 Tex. App. 279; *Scarlett v. S.*, 25 Fla. 719, 6 So. 767; *Keller v. S.*, 51 Ind. 117; *S. v. Renick*, 33 Or. 584, 56 Pac. 275.

² *Underhill Cr. Ev.*, § 436, citing *Com. v. Drew*, 19 Pick. (Mass.) 179; *S. v. Clark*, 46 Kan. 65, 26 Pac. 481; *P. v. Jordan*, 66 Cal. 10, 4 Pac. 773; *P. v. Wakely*, 62 Mich. 297, 28 N. W. 871.

³ *Jones v. S.*, 50 Ind. 473, 1 Am. C. R. 221; *P. v. Gates*, 13 Wend. (N. Y.) 320. See *Bl. Com.* 158; *Wagoner v. S.*, 90 Ind. 504; *Higler v. P.*, 44

§ 580. **Cheating by false weights.**—Cheating by false weights and measures and by selling goods by counterfeit brands or marks or other like false token, being offenses which affect or tend to affect the public generally, are criminal offenses at common law.⁴ But a cheat of a private nature growing out of dealings between individuals, against which common prudence can guard, where the cheat affects only an individual by his own carelessness, is not indictable at common law; it is a mere private injury.⁵

§ 581. **Parting with title, essential.**—To make out a case the owner must part with the title as well as the possession of his property.⁶ If the owner parts with both the possession and title to his goods, even though by fraud or trick of the accused, then neither the taking nor the conversion is felonious; it is a fraud, and is obtaining goods under false pretense.⁷

§ 582. **Obtaining property must be actual.**—Before false pretense can be sustained there must have been an actual and not a constructive obtaining of the property. It is not an offense if the property came to the hands of the accused lawfully without any false representations.⁸ Before a charge of false pretense can be sustained it must

Mich. 299, 38 Am. R. 267, 6 N. W. 664; Shaffer v. S., 82 Ind. 225; Strong v. S., 86 Ind. 208, 44 Am. R. 292. But see S. v. Vanderbilt, 27 N. J. L. 332; S. v. Phifer, 65 N. C. 321; P. v. Johnson, 12 Johns. (N. Y.) 292.

⁴Reg. v. Closs, Dears. & B. 460, 7 Cox C. C. 494; Rex v. Edwards, Trem. P. C. 103, 2 East P. C. 820; Young v. Rex, 3 T. R. 104. See S. v. Vanderbilt, 27 N. J. L. 332; P. v. Gates, 13 Wend. (N. Y.) 316; Com. v. Warren, 6 Mass. 72; P. v. Sully, 5 Park. Cr. R. (N. Y.) 165.

⁵Wright v. P., Breeze (Ill.) 102; P. v. Babcock, 7 Johns. (N. Y.) 201, 5 Am. D. 256; P. v. Miller, 14 Johns. (N. Y.) 371; Rex v. Wheatly, 2 Burr. 1130; Hartmann v. Com., 5 Pa. St. 60.

⁶S. v. Anderson, 47 Iowa 142, 2 Am. C. R. 100; 3 Greenleaf Ev., § 160; Kellogg v. S., 26 Ohio St. 15, 2 Am. C. R. 99; Reg. v. Radcliffe, 12 Cox C. C. 474, 1 Green C. R. 153; P. v. Rae, 66 Cal. 423, 6 Pac. 1, 56

Am. R. 102, 6 Cr. L. Mag. 389; Smith v. P., 53 N. Y. 111, 13 Am. R. 474; Zink v. P., 77 N. Y. 114, 33 Am. R. 589; Porter v. S., 23 Tex. App. 295, 4 S. W. 889; S. v. Dickinson, 21 Mont. 595, 55 Pac. 539.

⁷Welsh v. P., 17 Ill. 339; Kibs v. P., 81 Ill. 601; Stinson v. P., 43 Ill. 398; P. v. Martin, 102 Cal. 558, 36 Pac. 952. See Queen v. Russett, L. R. (1892), 2 Q. B. 312, 9 Am. C. R. 511; Miller v. Com., 78 Ky. 18, 39 Am. R. 194; S. v. Kube, 20 Wis. 225, 91 Am. D. 390; Taylor v. S., 32 Tex. Cr. 110, 22 S. W. 148; Haley v. S., 49 Ark. 147, 4 S. W. 746; Loomis v. P., 67 N. Y. 329, 23 Am. R. 123; Grunson v. S., 89 Ind. 533, 46 Am. R. 178; Collins v. S., 15 Lea (Tenn.) 68.

⁸Watson v. P., 27 Ill. App. 496; Jamison v. S., 37 Ark. 445, 40 Am. R. 103. See S. v. Wilson, 116 N. C. 979, 21 S. E. 692. But see Com. v. Schwartz, 92 Ky. 510, 36 Am. St. 609, 18 S. W. 775, 13 Ky. L. 929, 18 S. W. 358, 19 S. W. 189; Com. v.

appear that the person from whom the property was obtained was actually defrauded and sustained a loss.⁹

§ 583. **Intent is essential.**—The intent to cheat and defraud, in obtaining the property of another, is the gist of the offense, for if the accused had no knowledge of the falsity of his representations and no intention to defraud, there can be no offense, however false his representations may have been.¹⁰ But an intent to defraud generally is sufficient without reference to any particular person.¹¹

§ 584. **Knowledge of county.**—Where the majority of the county commissioners are indicted for obtaining money by false pretenses from the county, the knowledge of these commissioners can not be said to be the knowledge of the county, on the question that the party who parts with his property does so believing the pretense to be true.¹²

§ 585. **Value essential—Notes, checks.**—The property or thing obtained by false pretenses must be of some value.¹³ A promissory note, even though not negotiable, is a “thing of value” within the meaning of the statute, and so also is a check on a bank.¹⁴

§ 586. **Defendant agent for another.**—The fact that the defendant was an agent representing another is no defense to a charge of obtaining goods by false pretense, knowing the representations to be false. He would be guilty of aiding if he was requested to obtain goods for another by false pretense.¹⁵ An officer of a corporation, in obtaining

Hutchison, 114 Mass. 325; S. v. Jamison, 74 Iowa 613, 38 N. W. 509.

⁹ P. v. Wakely, 62 Mich. 303, 28 N. W. 871; Drought v. S., 101 Ga. 544, 28 S. E. 1013; Berry v. S., 97 Ga. 202, 23 S. E. 833; S. v. Clark, 46 Kan. 65, 26 Pac. 481; S. v. Palmer, 50 Kan. 324, 32 Pac. 29; McGee v. S., 97 Ga. 199, 22 S. E. 589; P. v. Cook, 41 Hun (N. Y.) 69; P. v. Jordan, 66 Cal. 10, 56 Am. R. 73, 4 Pac. 773; S. v. Munday, 78 N. C. 460. But see *contra*, May v. S., 15 Tex. App. 436; P. v. Bryant, 119 Cal. 595, 51 Pac. 960; Com. v. Wilgus, 4 Pick. (Mass.) 178. *Contra*, as to obtaining signature: S. v. Pryor, 30 Ind. 350; P. v. Sully, 5 Park. Cr. (N. Y.) 170; S. v. Jamison, 74 Iowa 613, 38 N. W. 509; S. v. Hanscom, 28 Or. 427, 43 Pac. 167.

¹⁰ Weyman v. P., 4 Hun (N. Y.) 516, 62 N. Y. 623; S. v. Smith, 8 Blackf. (Ind.) 491; O'Connor v. S., 30 Ala. 13; P. v. Getchell, 6 Mich. 496; Woodruff v. S., 61 Ark. 179, 32 S. W. 102; Trogdon v. Com., 31 Gratt. (Va.) 862.

¹¹ Schayer v. P., 5 Colo. App. 75, 37 Pac. 43; Carnell v. S., 85 Md. 1, 36 Atl. 117.

¹² Ochs v. P., 124 Ill. 426, 16 N. E. 662.

¹³ S. v. Lewis, 26 Kan. 123; Morgan v. S., 42 Ark. 131; S. v. Shaeffer, 89 Mo. 271, 1 S. W. 293.

¹⁴ S. v. Porter, 75 Mo. 172; S. v. Blauvelt, 38 N. J. L. 307; Tarbox v. S., 38 Ohio St. 581 (check).

¹⁵ S. v. Chingren, 105 Iowa 169, 74 N. W. 946.

money by false pretenses for the corporation, is guilty, though he personally received none of the money so obtained.¹⁶

§ 587. Committed by acts, or words.—The false representation may be inferred from acts, and the pretense may be made by implication as well as by verbal declaration. The defendant presented his own check on a bank with which he had had an account. This implied that he had an account.¹⁷ The accused entered a store wearing a cap and gown the same as were worn by the students of a college and thereby obtained goods, when in fact he was not a student of the college. This act was held sufficient to sustain a charge of false pretense.¹⁸ That the defendant designedly and fraudulently obtained the money by falsely stating to the prosecutor that another person had sent him "after it" is an offense within the meaning of the statute; its language is broad enough to comprehend cheating by false words.¹⁹

§ 588. Passing worthless bill, check.—The evidence was that the accused passed a note of a bank whose bills had ceased to be current as bank bills and worthless as a medium of exchange; held, sufficient on a charge of false pretense.²⁰ Giving a check on a bank in payment of goods, representing that the maker has money in the bank, well knowing that he has not, is obtaining property by false pretense.²¹

¹⁶ *Com. v. Langley*, 169 Mass. 89, 47 N. E. 511.

¹⁷ *Com. v. Drew*, 19 Pick. (Mass.) 179; *S. v. Mickle*, 94 N. C. 843; *P. v. Wasservogle*, 77 Cal. 173, 19 Pac. 270; *Roberts v. P.*, 9 Colo. 458, 13 Pac. 630; *Com. v. Howe*, 132 Mass. 250; *Brown v. S.*, 37 Tex. Cr. 104, 38 S. W. 1008; *Young v. Rex*, 3 T. R. 98; *S. v. Dixon*, 101 N. C. 742, 7 S. E. 870; *P. v. Rice*, 128 N. Y. 649, 29 N. E. 146, 13 N. Y. Supp. 161; *Com. v. Hutchinson*, 2 Pars. Eq. Cas. (Pa.) 309; *S. v. Reidel*, 26 Iowa 430; *S. v. Grant*, 86 Iowa 222, 53 N. W. 120; *Musgrave v. S.*, 133 Ind. 297, 32 S. E. 885; *Com. v. Wallace*, 114 Pa. St. 412, 60 Am. R. 353, 6 Atl. 685; *Com. v. Murphy*, 96 Ky. 28, 27 S. W. 859; *Underhill Cr. Ev.*, § 444.

¹⁸ *Rex v. Barnard*, 7 C. & P. 784. See *Reg. v. Bull*, 13 Cox C. C. 608; *Roberts v. P.*, 9 Colo. 458, 13 Pac. 630; *Com. v. Howe*, 132 Mass. 250.

See *Rex v. Govers*, Say. 206; *Blum v. S.*, 20 Tex. App. 592, 54 Am. R. 530.

¹⁹ *S. v. Dixon*, 101 N. C. 741, 7 S. E. 870; *Reg. v. Butcher*, Bell 6; *P. v. Johnson*, 12 Johns. 292; *Reg. v. Davis*, 11 Cox C. C. 181. *Contra*, *Chapman v. S.*, 2 Head (Tenn.) 36.

²⁰ *Com. v. Stone*, 4 Metc. (Mass.) 43; *Maley v. S.*, 31 Ind. 192; *Reg. v. Martin*, L. R. 5 Q. B. D. 34; *Reg. v. Jarman*, 14 Cox C. C. 111; *Com. v. Hulbert*, 12 Metc. (Mass.) 446.

²¹ *Barton v. P.*, 135 Ill. 408, 25 N. E. 776; *S. v. Cadwell*, 79 Iowa 473, 44 N. W. 711; *P. v. Wasservogle*, 77 Cal. 173, 19 Pac. 270; *Com. v. Karpowski*, 167 Pa. St. 226, 31 Atl. 572; *Com. v. Devlin*, 141 Mass. 430, 6 N. E. 64; *S. v. Dennis*, 80 Mo. 589; *Casily v. S.*, 32 Ind. 62. See *Reg. v. Hazelton*, 13 Cox C. C. 1, 2 Green C. R. 44.

And giving a post-dated check on a bank in payment for goods, knowing it will not be met in the ordinary course of business, is a criminal false pretense.²² The defendant presented a check in payment for goods obtained, representing that the maker of the check had a business and was good, while in fact he knew the check was worthless and was a false token gotten up for the purpose of defrauding. Held, false pretenses.²³ But the mere act of presenting and getting the cash on a check drawn by the accused on a bank in which he had no money deposited, without resorting to any false or deceitful representations, is not an offense.²⁴

§ 589. Fictitious letter.—The following letter was held sufficient to support a charge of false pretense:

“SHEFFIELD, Jan. 17, 1876.

“DEAR SIR: Please send me one truck of regents and one truck of rocks (potatoes), as samples, at your prices named in your letter; let them be good quality, then I am sure a good trade will be done for both of us. I will remit you the cash on arrival of goods and invoice.

Yours truly,

WILLIAM COOPER.”

“P. S.—I may say if you use me well I shall be a good customer. An answer will oblige, saying when they are put on.”²⁵

§ 590. False statement of one's ability to pay.—If a person obtains the property of another by false representations as to his ability to pay, as, if he states that he has ample means to pay all his debts and owes but little, he is guilty of false pretense.²⁶ But where a person obtains goods on credit after becoming insolvent, without disclosing his insolvency, and without making any false representations, he is not guilty of false pretense.²⁷

²² *Barton v. P.*, 35 Ill. App. 573; *S. v. McCormick*, 57 Kan. 440, 46 Pac. 777; *Foote v. P.*, 17 Hun (N. Y.) 218; *Rex v. Jackson*, 3 Camp. 370; *P. v. Donaldson*, 70 Cal. 116, 11 Pac. 681; *Com. v. Drew*, 19 Pick. (Mass.) 179.

²³ *Lesser v. P.*, 73 N. Y. 78. But see *Rex v. Lara*, 6 Term R. 565.

²⁴ *Blackwell v. S.* (Tex. Cr., 1899), 51 S. W. 919.

²⁵ *Queen v. Cooper*, L. R. 2 Q. B. D. 510, 3 Am. C. R. 459.

²⁶ *S. v. Call*, 48 N. H. 126; *P. v. Wieger*, 100 Cal. 357, 34 Pac. 326; *P. v. Haynes*, 11 Wend. (N. Y.) 557; *Hathcock v. S.*, 88 Ga. 96, 13 S. E. 959; *Com. v. Drew*, 153 Mass. 588, 27 N. E. 593; *Com. v. Wallace*, 114 Pa. St. 411, 6 Atl. 685; *Com. v. Schwartz*, 92 Ky. 510, 18 S. W. 775.

²⁷ *P. v. Moore*, 37 Hun (N. Y.) 84; *Com. v. Eastman*, 1 Cush. (Mass.) 219.

§ 591. **Pretending to represent another.**—If a person falsely represents that he has authority from another to purchase goods, to be charged to the latter, he is guilty of false pretense, whether his pretended authority be verbal or written.²⁸

§ 592. **Publication in newspaper.**—An advertisement inserted in a newspaper is addressed to the public generally, for the purpose of obtaining money or property from any person who may act upon it; and if a particular person happen to see or hear of the advertisement and acts upon it and goes to the person who caused it to be inserted, and on the faith of it parts with his money, it becomes a false pretense to the particular person.²⁹

§ 593. **Concealing defects or quality.**—Where the purchaser of goods calls the attention of the person selling them to flaws or defects, and the salesman makes a false statement regarding such defects for the purpose of deceiving the purchaser, and makes him believe they are such goods as he represents them to be, he is guilty of false pretense.³⁰ The defendant sold a horse, representing him to be a useful animal, a swift traveler and not balky, knowing the same to be false. Held, false pretense.³¹ It is a false pretense for a person in selling goods to falsely or fraudulently misrepresent the kind or quality, weight or price of the goods on a matter of fact within his knowledge, not calling for the exercise of judgment or expression of an opinion.³²

§ 594. **Mortgaging property.**—Where a person falsely represents that he owns a farm, and by that means obtains the property of another, he is guilty of false pretense, and also in giving a mortgage

²⁸ *S. v. Mickle*, 94 N. C. 843; *Bozier v. S.*, 5 Tex. App. 220; *Reg. v. Davis*, 11 Cox C. C. 181; *Reg. v. Burnside*, Bell 282, 8 Cox C. C. 370; *Lowe v. S.*, 111 Ga. 650, 36 S. E. 856.

²⁹ *Reg. v. Silverlock*, 18 Cox C. C. 104, 10 Am. C. R. 325. See also *Dorsey v. S.*, 111 Ala. 40, 20 So. 629; *S. v. Hanscom*, 28 Or. 427, 43 Pac. 167; *S. v. Bokien*, 14 Wash. 403, 44 Pac. 889; *S. v. Sarony*, 95 Mo. 349, 8 S. W. 407; *Jackson v. P.*, 126 Ill. 139, 18 N. E. 286. Indictment set out and held sufficient: *Reg. v. Silverlock*, 18 Cox C. C. 104, 10 Am. C. R. 325.

³⁰ *P. v. Crissie*, 4 Den. (N. Y.) 525;

S. v. Wilkerson, 103 N. C. 337, 9 S. E. 415.

³¹ *Jackson v. P.*, 126 Ill. 139, 18 N. E. 286; *S. v. Stanley*, 64 Me. 157, 1 Am. C. R. 209. See also *Reg. v. Foster*, L. R. 2 Q. B. D. 301, 3 Am. C. R. 447; *Watson v. P.*, 87 N. Y. 561; *Com. v. Jackson*, 132 Mass. 16; *S. v. Mangum*, 116 N. C. 998, 21 S. E. 189.

³² *Hafner v. Com.*, 18 Ky. L. 423, 36 S. W. 549; *Reg. v. Foster*, L. R. 2 Q. B. D. 301; *Parks v. S.*, 94 Ga. 601, 20 S. E. 430; *Reg. v. Ridgway*, 3 F. & F. 838 (weight); *Com. v. Wood*, 142 Mass. 461, 8 N. E. 432 (price).

on property he does not own.³³ Where a person obtains money from another by mortgaging property which he falsely represents to be free from incumbrances, he is guilty of false pretense if he knew his representations were false.³⁴ Where a person falsely represents that he has purchased a lot of cattle, and by that means induces the prosecutor to loan him money, he is guilty of false pretense, although he may give a mortgage on other incumbered cattle as security at the time of obtaining the money.^{34a}

§ 595. False personation—Officer.—If a person falsely represents that he is an officer and that he has a warrant for the arrest of another, and by such false representations obtains money from the latter, he is guilty of false pretense.³⁵

§ 596. False statement as to business.—If a person obtains the money or property of another by misrepresenting his business or profession, as by using and sending false business letter-heads representing himself to be a dealer in groceries or merchandise, he will be guilty of false pretense.³⁶

§ 597. Pretending to procure position.—If a person falsely represents to another that he has a situation in view for him and can and will secure it, and on the strength of such representations obtains money from such person, he is guilty of false pretense.³⁷

§ 598. Inducing to pay too much.—Inducing a person through false representations to pay more than was due on a claim, is false pretense.³⁸

§ 599. Continuing offense without repeating.—The offense of false pretense is a continuing one, that is, the false representations may be made on one day and the money or property delivered at some future

³³ *S. v. Penley*, 27 Conn. 587; *S. v. Fooks*, 65 Iowa 452, 21 N. W. 561, 773; *Tuttle v. S.* (Tex. Cr.), 49 S. W. 82; *Williams v. S.*, 105 Ga. 606, 31 S. E. 546; *P. v. Kendall*, 25 Wend. (N. Y.) 399, 37 Am. D. 240; *S. v. Hill*, 72 Me. 242; *P. v. Bryant*, 119 Cal. 595, 51 Pac. 960; *Com. v. Lee*, 149 Mass. 179, 21 N. E. 299.

³⁴ *S. v. Butler*, 47 Minn. 483, 50 N. W. 532; *McGee v. S.*, 97 Ga. 199, 22 S. E. 589; *P. v. Sully*, 5 Park. Cr. (N. Y.) 165; *S. v. Munday*, 78 N. C. 460.

^{34a} *Moore v. P.*, 190 Ill. 334.

³⁵ *Ryan v. S.*, 104 Ga. 78, 30 S. E. 678. *Contra*, *Perkins v. S.*, 67 Ind. 276, 33 Am. R. 89.

³⁶ *Taylor v. Com.*, 94 Ky. 281, 22 S. W. 217; *Thomas v. P.*, 34 N. Y. 351; *Bobbitt v. S.*, 87 Ala. 91, 6 So. 378. See *Com. v. Stevenson*, 127 Mass. 446; *Cowen v. S.* (Tex. Cr.), 56 S. W. 751.

³⁷ *Com. v. Parker*, Thach. Cr. Cas. (Mass.) 24; *Com. v. Murphy*, 96 Ky. 28, 27 S. W. 859; *P. v. Winslow*, 39 Mich. 507.

³⁸ *P. v. Luttermoser* (Mich., 1899), 81 N. W. 565.

time, or at different times, without repeating the false representations at each time property is delivered on the faith of such representations.³⁹ But if a person, at the time he purchases and pays for goods, makes a false statement as to his financial condition, such false statement can not be said to apply to future purchases on credit without being repeated, unless it appears that the person to whom such credit was extended knew that the credit was given solely on the faith of such false statements.⁴⁰

§ 600. Corporation, a "person."—Obtaining the property of another "person" by false pretenses, or larceny, includes corporations. In other words, a corporation is a "person" within the meaning of the law, on giving the words of the statute a reasonable construction.⁴¹

§ 601. Attempt.—Where a person by false representations attempts to obtain the property of another who knows such representations to be false, he is guilty of an attempt to commit false pretense.⁴²

ARTICLE II. MATTERS OF DEFENSE.

§ 602. Intention to repay.—It is no defense to false pretense that the defendant intended to repay the money obtained; and evidence of his ability to repay is immaterial.⁴³

§ 603. Honest belief, as to check.—Where a person obtains money by means of a check, which proves to be worthless, yet if he honestly believed, and had good reason to believe, that he had a right to draw it and that it would be honored, he can not be held responsible criminally.⁴⁴ It is not obtaining goods by false pretenses where one

³⁹ *Com. v. Lee*, 149 Mass. 184, 21 N. E. 299. See *S. v. House*, 55 Iowa 466, 8 N. W. 307; *Rothschild v. S.*, 13 Lea (Tenn.) 294; *S. v. Wilkerson*, 98 N. C. 696, 3 S. E. 683; *Reg. v. Greathead*, 38 L. T. N. S. 691. See *Blum v. S.*, 20 Tex. App. 594, 54 Am. R. 530.

⁴⁰ *Broznack v. S.*, 109 Ga. 514, 35 S. E. 123.

⁴¹ *Norris v. S.*, 25 Ohio St. 217, 2 Am. C. R. 91.

⁴² *Reg. v. Ball*, 1 C. & M. 249; *Reg. v. Hensler*, 11 Cox C. C. 570.

⁴³ *Com. v. Coe*, 115 Mass. 481, 2 Green C. R. 305; *Com. v. Mason*, 105 Mass. 163; *S. v. Wilson*, 143 Mo.

334, 44 S. W. 722; *S. v. Thatcher*, 35 N. J. L. 445, 1 Green C. R. 563; *S. v. Neimeier*, 66 Iowa 636, 24 N. W. 247; 1 McClain Cr. L., § 680. See *S. v. McCormick*, 57 Kan. 440, 46 Pac. 777; *P. v. Wieger*, 100 Cal. 354, 34 Pac. 826; *Spaulding v. Knight*, 116 Mass. 154; *Com. v. Schwartz*, 92 Ky. 510, 36 Am. St. 609, 18 S. W. 775, 13 Ky. L. 929, 18 S. W. 358, 19 S. W. 189; *S. v. Hill*, 72 Me. 242; *P. v. Oscar*, 105 Mich. 704, 63 N. W. 971; *P. v. Lennox*, 106 Mich. 625, 64 N. W. 488; *Underhill Cr. Ev.*, § 437.

⁴⁴ *S. v. Lord* (Minn., 1899), 79 N. W. 968.

obtaining goods agrees to pledge in payment a check which did not exist, and which the seller of the goods knew or could have known had no existence. This is not a false statement of an existing fact.⁴⁵

§ 604. Past or present fact, essential.—The false pretense relied upon to constitute an offense under the statute must relate to a past event or to some present existing fact, and not to something to happen in the future. A mere promise is not sufficient.⁴⁶ If the false pretense and a promise to do some act in the future are blended and jointly acted upon by the person parting with his property, whereby he is induced to give faith to the pretense, the case is within the statute.⁴⁷ The defendant, pretending to represent another in an investment enterprise, made an agreement with the prosecutor that on the payment by the prosecutor of a certain sum of money he would procure him a certain other sum of money (much larger); that he had furnished money to others at such rates. The defendant failed to furnish the money as agreed. Held, not to be false pretense, no false representation of any existing fact having been made.⁴⁸

§ 605. Warranty of title.—But where reliance is placed upon the promise or warranty and not upon the false representations, the case is clearly not within the statute, else every case of a breach of warranty would be the basis of a criminal prosecution.⁴⁹

§ 606. Obtaining by promise.—A person can not be deceived by a false representation with reference to some future fact or event to make it the basis of false pretense: as, if a man obtains money from

⁴⁵ *S. v. Whidbee*, 124 N. C. 796, 32 S. E. 318.

⁴⁶ *In re Snyder*, 17 Kan. 542, 2 Am. C. R. 240; *Keller v. S.*, 51 Ind. 111, 1 Am. C. R. 216; *Burrow v. S.*, 12 Ark. 65; *Com. v. Drew*, 19 Pick. (Mass.) 179; *S. v. Green*, 7 Wis. 676; *Rex v. Lee, L. & C.* 309; *Scarlett v. S.*, 25 Fla. 717, 6 So. 767; *Underhill Cr. Ev.*, § 439; *P. v. Morphy*, 100 Cal. 84, 34 Pac. 623; *Holton v. S.*, 109 Ga. 127, 34 S. E. 358; *Com. v. Moore*, 89 Ky. 542, 12 S. W. 1066; *Miller v. S.*, 99 Ga. 207, 25 S. E. 169; *S. v. King*, 67 N. H. 219, 34 Atl. 461; *Martin v. S.*, 36 Tex. Cr. 125, 35 S. W. 976; *Winnett v. S.*, 18 Ohio C. C. 515.

⁴⁷ *S. v. Dowe*, 27 Iowa 273; *Holton*

v. S., 109 Ga. 127, 34 S. E. 358; *Watson v. P.*, 87 N. Y. 561; *Jackson v. P.*, 18 Ill. App. 513; *S. v. Gordon*, 56 Kan. 67, 42 Pac. 346; *Donohoe v. S.*, 59 Ark. 377, 27 S. W. 226; *Com. v. Wallace*, 114 Pa. St. 413, 60 Am. R. 353, 6 Atl. 685; *S. v. Thaden*, 43 Mo. 98; *Thomas v. S.*, 90 Ga. 437, 16 S. E. 94; *S. v. Dorr*, 33 Me. 498; *S. v. Munday*, 78 N. C. 460; *Boscov v. S.*, 33 Tex. Cr. 390, 26 S. W. 625.

⁴⁸ *S. v. Knott*, 124 N. C. 814, 32 S. E. 798.

⁴⁹ *Rex v. Codrington*, 1 C. & P. 661; *P. v. Tompkins*, 1 Park. Cr. (N. Y.) 238; *S. v. Chunn*, 19 Mo. 233; *Com. v. Alsop*, 1 Brews. (Pa.) 339; *S. v. Butler*, 47 Minn. 483, 50 N. W. 532; *Jackson v. P.*, 18 Ill. App. 513.

a woman on the pretense that he intends to marry her and wants the money to buy a wedding suit.⁵⁰ The defendant, by procuring a loan on the false representation that he wanted it to enable him to take a certain public house, is not guilty of obtaining money by false pretense.⁵¹

§ 607. Falsity as to incumbrance.—The statement that the property is unincumbered, when the fact is otherwise, will sustain an indictment for cheating by false pretense, notwithstanding there may have been a warranty, if the false pretense, and not the warranty, was the inducement which operated upon the mind of the party making the exchange or purchase.⁵²

§ 608. Written warranty no defense.—A written warranty on the sale of property, excluding verbal or other representations, does not preclude the prosecution from showing the true state of facts: that is, the representations are not merged in the writing.⁵³

§ 609. Real estate—Claiming to own.—If a person claims to own real estate and induces another to believe such claim, and thereby obtain the title and possession of the property of such other person, it is false pretense; and the person so defrauded is not bound to examine the records as to the title.⁵⁴ That the prosecutor had at hand at the

⁵⁰ Reg. v. Johnson, 2 Moo. C. C. 254; S. v. Magee, 11 Ind. 155; P. v. Blanchard, 90 N. Y. 314; S. v. Kingsley, 108 Mo. 135, 18 S. W. 994; Rothchild v. S., 13 Lea (Tenn.) 300; Glackan v. Com., 3 Metc. (Ky.) 232; S. v. Whidbee, 124 N. C. 796, 32 S. E. 318. See S. v. Renick, 33 Or. 584, 56 Pac. 275. See also as to a promise to do some act in the future: S. v. Haines, 23 S. C. 170; S. v. Phifer, 65 N. C. 325; Canter v. S., 7 Lea (Tenn.) 349; Burrow v. S., 12 Ark. 65; S. v. Crane, 54 Kan. 251, 38 Pac. 270; Strong v. S., 86 Ind. 210, 44 Am. R. 292; Com. v. Moore, 89 Ky. 542, 12 S. W. 1066; S. v. Dowe, 27 Iowa 273, 1 Am. R. 271. Compare Com. v. Walker, 108 Mass. 312.

⁵¹ Reg. v. Woodman, 14 Cox C. C. 179. See Com. v. Warren, 94 Ky. 615, 23 S. W. 193; S. v. De Lay, 93 Mo. 98, 5 S. W. 607; Com. v. Moore, 99 Pa. St. 574; In re Greenough, 31

Vt. 290; S. v. Daniel, 114 N. C. 823, 19 S. E. 100; Underhill Cr. Ev., § 439.

⁵² S. v. Stanley, 64 Me. 157, 1 Am. C. R. 209; S. v. Butler, 47 Minn. 483, 50 N. W. 532; S. v. Munday, 78 N. C. 460. The fact that the incumbrance is recorded is not material: S. v. Hill, 72 Me. 238. But see Com. v. Grady, 13 Bush (Ky.) 285.

⁵³ Jackson v. P., 126 Ill. 144, 18 N. E. 286; S. v. Butler, 47 Minn. 486, 50 N. W. 532; S. v. Wilkerson, 103 N. C. 337, 9 S. E. 415; Com. v. Sebring, 1 Pa. Dist. R. 163.

⁵⁴ Thomas v. P., 113 Ill. 531; Cowen v. P., 14 Ill. 348; S. v. Munday, 78 N. C. 460; S. v. Dorr, 33 Me. 498. See Com. v. Lee, 149 Mass. 179, 21 N. E. 299; Miller v. P., 22 Colo. 537, 45 Pac. 408. *Contra*, Com. v. Grady, 13 Bush (Ky.) 285, 2 Am. C. R. 106; S. v. Young, 76 N. C. 258.

time the false pretense was practiced on him the means of detecting the fraud can not avail as a defense.⁵⁵

§ 610. Fraud in giving order.—Not every act of fraud by which one person cheats another amounts to the offense of false pretense, as, where a person gives an order on his employer for wages to become due and afterward collects the wages himself before the order is presented.⁵⁶

§ 611. Pretenses must be deceptive.—False representations can not be the basis of a charge of false pretense unless they are of a nature calculated to deceive, and as to this it is necessary to consider the ability or capacity of the person to whom made, to detect the falsehood. Should an article the essential value of which consists in the color be offered to a person fully possessed of his sense of sight, and with every opportunity of inspection, with the pretense that it was white, when in fact it was black, under such circumstances the false pretense might be very innocent because not calculated to deceive, but the same pretense made to a blind man would be calculated to deceive.⁵⁷

§ 612. No deception if prosecutor knew.—If, at the time the representations were made to the prosecutor by the defendant, he knew the same to be false, then he could not have been deceived. To constitute the offense the prosecutor must have relied upon the represen-

⁵⁵ *Watson v. P.*, 87 N. Y. 561; *Thomas v. P.*, 113 Ill. 531, 537. See *Oxx v. S.*, 59 N. J. L. 99, 35 Atl. 646; *S. v. Mills*, 17 Me. 211; *Com. v. Lee*, 149 Mass. 179, 21 N. E. 299; *Com. v. Mulrey*, 170 Mass. 103, 49 N. E. 91; *Reg. v. Jessup*, 7 Cox C. C. 399, *Dears. & B.* 442; *Com. v. Norton*, 11 Allen (Mass.) 266.

⁵⁶ *Moulden v. S.*, 5 Lea (Tenn.) 579; *S. v. Moore*, 111 N. C. 667, 16 S. E. 384; *Clifford v. S.*, 56 Ind. 249; *Wallace v. S.*, 11 Lea (Tenn.) 542; *Rothschild v. S.*, 13 Lea (Tenn.) 296; *Com. v. Haughey*, 3 Metc. (Ky.) 225.

⁵⁷ *Cowen v. P.*, 14 Ill. 350. See *Lefler v. S.*, 153 Ind. 82, 54 N. E. 439, 45 L. R. A. 424; *Meek v. S.*, 117 Ala. 116, 23 So. 155; *Canter v. S.*, 7 Lea (Tenn.) 349; *S. v. Whidbee*, 124

N. C. 796, 32 S. E. 318; *S. v. Estes*, 46 Me. 150; *Com. v. Moore*, 99 Pa. St. 570. See also *P. v. Crissie*, 4 Den. (N. Y.) 529; *Buckalew v. S.*, 11 Tex. App. 352; *Woodbury v. S.*, 69 Ala. 242, 44 Am. R. 515; *S. v. Vanderbilt*, 27 N. J. L. 336; *Johnson v. S.*, 36 Ark. 242; *Miller v. P.*, 22 Colo. 530, 45 Pac. 408; *S. v. Montgomery*, 56 Iowa 195, 9 N. W. 120; *S. v. Southall*, 77 Minn. 296, 79 N. W. 1007; *P. v. Summers*, 115 Mich. 537, 73 N. W. 818; *S. v. Moats*, 108 Iowa 13, 78 N. W. 701; *In re Greenough*, 31 Vt. 290; *Bartlett v. S.*, 28 Ohio St. 669; *Ryan v. S.*, 104 Ga. 78, 30 S. E. 678; *P. v. Sully*, 5 Park. Cr. (N. Y.) 166; *Miller v. S.*, 73 Ind. 91; *S. v. Burnett*, 119 Ind. 392, 21 N. E. 972; *Watson v. P.*, 87 N. Y. 561, 565; *Underhill Cr. Ev.*, § 440.

tations as being true, and they must have induced him to part with his property.⁵⁸ That the representations alleged to be false were in fact true and not false is, of course, a good defense to a charge of false pretenses.⁵⁹ It is proper to show that the person alleged to have been defrauded could have ascertained the truth or falsity of the statements made to him by the defendant, as tending to show that the prosecutor was not deceived.⁶⁰

§ 613. Relying on own judgment.—Where the prosecutor relies upon his own judgment or upon other source of information instead of upon the false representation of the defendant, there is no foundation for a charge of false pretense.⁶¹ If a person, before parting with his property, has his attorney examine the title to the land, the defendant will not be guilty of false pretense.⁶²

§ 614. Property obtained before pretense.—If the money or property be obtained by the accused before making the false representations to the prosecutor, then there is no offense.⁶³

§ 615. First mortgagee waiving lien.—Where a person having a mortgage on property, directly or by his acts or conduct, gives his consent that the mortgagor may again pledge the property to obtain money, there can be no false pretense in representing that it is free from incumbrance, because the first mortgagee waives his first lien and the second mortgage becomes the first lien.⁶⁴

⁵⁸ *Therasson v. P.*, 82 N. Y. 238; *S. v. Evers*, 49 Mo. 542; *Clifford v. S.*, 56 Ind. 245; *P. v. Mauritzen*, 84 Cal. 37, 24 Pac. 112; *P. v. Weir*, 120 Cal. 279, 52 Pac. 656; *Watson v. P.*, 87 N. Y. 564, 41 Am. R. 397; *Ladd v. S.*, 17 Fla. 219; *S. v. Dowe*, 27 Iowa 275, 1 Am. R. 271; *S. v. Dorr*, 33 Me. 498; *Meek v. S.*, 117 Ala. 116, 23 So. 155; *S. v. Connor*, 110 Ind. 471, 11 N. E. 454; *S. v. Dennis*, 80 Mo. 956; *S. v. Moore*, 111 N. C. 672, 16 S. E. 384; *Morgan v. S.*, 42 Ark. 138, 48 Am. R. 55; *S. v. Metsch*, 37 Kan. 222, 15 Pac. 251; *S. v. Bloodsworth*, 25 Or. 83, 34 Pac. 1023; *Fay v. Com.*, 28 Gratt. (Va.) 912, 3 Am. C. R. 85; *Haines v. Ter.*, 3 Wyo. 168, 13 Pac. 8; *Thorpe v. S.*, 40 Tex. Cr. 346, 50 S. W. 383; *Rainey v. S.*, 94 Ga. 599, 19 S. E. 892; *Reg. v. Hensler*, 11 Cox C. C. 570; *Epperson v. S.*, 42 Tex. 80. *Contra*, *P. v. Gardner*, 144 N.

Y. 119, 38 N. E. 1003, 9 Am. C. R. 85.

⁵⁹ *Rainforth v. P.*, 61 Ill. 367.

⁶⁰ *S. v. Jones*, 70 N. C. 75; *P. v. Court of Oyer & Terminer*, 83 N. Y. 436, 449; *McKee v. S.*, 111 Ind. 378, 381, 12 N. E. 510; *P. v. Henssler*, 48 Mich. 49, 11 N. W. 804.

⁶¹ *S. v. Crane*, 54 Kan. 251, 38 Pac. 270; *P. v. Stetson*, 4 Barb. (N. Y.) 151; *Reg. v. Mills*, 7 Cox C. C. 263.

⁶² *P. v. Gibbs*, 98 Cal. 661, 33 Pac. 630.

⁶³ *S. v. Willard*, 109 Mo. 242, 19 S. W. 189; *S. v. Moore*, 111 N. C. 672, 16 S. E. 384. See *Com. v. Devlin*, 141 Mass. 423, 6 N. E. 64; *P. v. Haynes*, 14 Wend. (N. Y.) 546, 28 Am. D. 530.

⁶⁴ *S. v. Asher*, 50 Ark. 427, 8 S. W. 177. See *McGee v. S.*, 97 Ga. 199, 22 S. E. 589.

§ 616. **Opinion of value, location.**—Statements by the accused, on a charge of false pretense, as to the value of the lots in question, or that they are “nicely located,” are mere matters of opinion and not facts upon which to base a charge of false pretense, and especially is this true if the prosecutor was not duped thereby.⁶⁵

§ 617. **Opinion—Witch doctor.**—Representations by the accused that he was a witch doctor and could kill and destroy witches; that the person to whom such representations were made was the victim of witches and that unless he employed the accused to exorcise them they would kill him and his family, constitute no offense, being mere expressions of opinion, and not calculated to deceive a man of common understanding.⁶⁶

§ 618. **Collecting claim by false statements.**—Within the true meaning of the statute a man can not be held guilty of procuring money by false pretenses, with intent to defraud, who has merely collected a debt due him, though in making the collection he has used false pretenses: as, where the prosecutor owed the prisoner’s master a sum of money which he would not pay, the prisoner, to secure his master the means of paying himself, went to the prosecutor’s wife and falsely pretended that his master had bought of her husband two sacks of malt and had sent him to fetch them away, and she thereupon gave them to him and he carried them to his master. Held, not false pretense.⁶⁷

⁶⁵ P. v. Jacobs, 35 Mich. 36, 2 Am. C. R. 104; Bishop v. Small, 63 Me. 12; Mooney v. Miller, 102 Mass. 217; S. v. Daniel, 114 N. C. 823, 19 S. E. 100; S. v. Webb, 26 Iowa 262; S. v. Paul, 69 Me. 215; Underhill Cr. Ev., § 439; Woodbury v. S., 69 Ala. 242, 44 Am. R. 515; S. v. Bradley, 68 Mo. 142; S. v. Petty, 119 Mo. 425, 24 S. W. 1016; S. v. King, 67 N. H. 219, 34 Atl. 461. See Com. v. Stevenson, 127 Mass. 448; P. v. Gibbs, 98 Cal. 661, 33 Pac. 630; Com. v. Wood, 142 Mass. 461, 8 N. E. 432; Rothschild v. S., 13 Lea (Tenn.) 294. Compare P. v. Peckens, 153 N. Y. 576, 47 N. E. 883; S. v. Sherrill, 95 N. C. 663; S. v. Burke, 108 N. C. 750, 12 S. E. 1000; Jackson v. P., 126 Ill. 139, 18 N. E. 286.

⁶⁶ S. v. Burnett, 119 Ind. 392, 21 N. E. 972, 8 Am. C. R. 259. See Jules v. S., 85 Md. 305, 36 Atl. 1027. But *contra*, Bowen v. S., 9 Baxt. (Tenn.) 45, 40 Am. R. 71; Reg. v. Lawrence, 36 L. T. N. S. 404; Reg. v. Giles, 10 Cox C. C. 44, 34 L. J. M. C. 50.

⁶⁷ S. v. Hurst, 11 W. Va. 54, 3 Am. C. R. 114, 116; Rex v. Williams, 7 Car. & P. 354, 32 Eng. C. L. R. 540; Com. v. Henry, 22 Pa. St. 256; P. v. Thomas, 3 Hill (N. Y.) 169; Jamison v. S., 37 Ark. 445, 40 Am. R. 103; Matter of Cameron, 44 Kan. 64, 24 Pac. 90; Com. v. McDuffy, 126 Mass. 467. *Contra*, P. v. Smith, 5 Park. Cr. (N. Y.) 490.

§ 619. Title not passing.—The accused was charged with obtaining the property of the prosecutor by false pretense by means of a written agreement which provided, among other things, that the "title, ownership and possession" should not pass from the seller to the purchaser until the latter should pay a note in full, which he had executed under the arrangements. Held, not a basis for false pretense.⁶⁸

§ 620. Keeping false books.—The employes of a company kept false books and made false reports for the purpose of concealing embezzlements of the money of the company. Held, not sufficient for a charge of false pretense, it not appearing that any funds of the company came to their hands by reason of any false representations made by them. The false pretenses charged were held to be too remote to become the basis of a criminal prosecution.⁶⁹

§ 621. Title to lot in prospect.—The accused, expecting to buy a certain lot, sold it to R., telling him he owned it. After thus selling the lot he made a written contract for the lot and paid a portion of the price, but he never paid the full price for the lot, nor did he ever acquire title to it. On a prosecution for obtaining the money of R. by false pretense, the false pretense being the statement that he owned the lot, it was held that if the accused, at the time he made the sale to R. and obtained his money, honestly intended and expected to make title to the lot to R., he did not have the intent to defraud required by the statute and should be acquitted.⁷⁰

§ 622. Pretense must be false.—The representation alleged to be a false pretense must actually be false. The fact that the accused believed it to be false when it was not is not sufficient on which to base a charge of false pretense.⁷¹

§ 623. Pretense as to renewing note.—The particular act alleged was the procuring of the prosecutor's indorsement of the defendant's promissory note, and the false pretense charged consisted in his repre-

⁶⁸ S. v. Anderson, 47 Iowa 142, 2 Am. C. R. 100. 3 Am. C. R. 85; P. v. Griffith, 122 Cal. 212, 54 Pac. 725.

⁶⁹ Watson v. P., 27 Ill. App. 496. See also Hurst v. S., 39 Tex. Cr. 196, 45 S. W. 573; Wagoner v. S., 90 Ind. 507; Reg. v. Larnier, 14 Cox C. C. 497. ⁷¹ Drought v. S., 101 Ga. 544, 28 S. E. 1013; P. v. Reynolds, 71 Mich. 343, 38 N. W. 923. See In re Snyder, 17 Kan. 555; Com. v. Drew, 153 Mass. 588, 27 N. E. 593.

⁷⁰ Fay v. Com., 28 Gratt. (Va.) 912,

senting to the prosecutor that he would use the note so indorsed to take up and cancel another note of the same amount then about maturing and upon which the prosecutor was liable as an indorser. In other words, the note was given as a renewal of another note of like amount. The defendant procured the note to be discounted instead of taking up the other note, and appropriated the proceeds for other purposes. Held, not the subject of false pretense, and not larceny.⁷²

§ 624. "Parting with" for unlawful purpose.—It has been held on a charge of false and fraudulent representations, that if the prosecutor parted with his money for an unlawful purpose, as, if he expected to receive counterfeit money, a conviction can not be had.⁷³ The fact that the party alleged to have been defrauded may have been careless, or in some manner in the wrong, is no defense to a charge of false pretense.⁷⁴

§ 625. Obtaining for charity.—Obtaining money by falsely representing that it is to be used as a charitable gift is not criminal false pretense.⁷⁵

ARTICLE III. INDICTMENT.

§ 626. Statutory words insufficient.—It is not sufficient to charge the crime of false pretense in the statutory language, if it fails to inform the accused of the nature and cause of the accusation.⁷⁶ In charging the offense of obtaining property by false pretenses, "with intent to defraud" the owner, the indictment will not be defective in not stating the intent or other element in the exact words of the statute; stating such intent in substance in other words is sufficient.⁷⁷

⁷² Com. v. Moore, 99 Pa. St. 570, 4 Am. C. R. 230; P. v. Miller, 2 Park. Cr. (N. Y.) 200.

⁷³ P. v. Livingstone, 62 N. Y. Supp. 9, 14 N. Y. Cr. 422. Compare Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77.

⁷⁴ In re Cummins, 16 Colo. 451, 25 Am. St. 291, 27 Pac. 887; P. v. Martin, 102 Cal. 558, 36 Pac. 952; P. v. Watson, 75 Mich. 582, 42 N. W. 1005; Casily v. S., 32 Ind. 66; Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77. *Contra*, S. v. Crowley, 41 Wis. 271, 22 Am. R. 719; McCord v. P., 46 N. Y. 470.

⁷⁵ P. v. Clough, 17 Wend. (N. Y.) 351, 31 Am. D. 303; 1 McClain Cr. L., § 695. But see Musgrave v. S., 133 Ind. 297, 32 N. E. 885; P. v. Lennox, 106 Mich. 625, 64 N. W. 488; Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77.

⁷⁶ 2 Roscoe Cr. Ev., 498, note; 1 McClain Cr. L., § 699, citing P. v. McKenna, 81 Cal. 158, 22 Pac. 488; S. v. Fraker, 148 Mo. 143, 49 S. W. 1017.

⁷⁷ S. v. Southall, 77 Minn. 296, 79 N. W. 1007; P. v. Skidmore, 123 Cal. 267, 55 Pac. 984 (owner).

§ 627. "Relied on" as true.—It is not essential to allege in the indictment, in express terms, that the owner, when parting with his property, relied on the representations of the accused as being true. That he did so was a necessary implication from the allegation that he was induced by the representations to part with his property.⁷⁸ For the failure to allege that the prosecutor relied upon such pretense as true, and upon the faith thereof, purchased from the accused the right to sell the "lifting jacks," and in consideration thereof executed the note set out in the indictment and alleged to have been procured by false pretenses, the indictment must be held bad.⁷⁹

§ 628. "Induced to part with," material.—That the prosecutor was induced by the false pretenses of the accused to part with his money is an essential allegation necessary to constitute the crime, and must be alleged in the indictment.⁸⁰ An indictment charging false pretenses by fraudulently obtaining the signature of a person to a deed which on its face fails to show the connection between the alleged false pretense and the obtaining of such signature, is fatally defective. It should show how such pretenses secured the signature to the deed.⁸¹

§ 629. False pretense and other causes.—"That the false pretenses, either with or without the co-operation of other causes, had a decisive influence upon the mind of the owner, so that, without their weight, he would have parted with his property," is the rule as to what must be alleged in the indictment.⁸² Stating the main inducing cause of the imposition in the indictment, which induced the owner to part with his property, is sufficient, although there may be other minor false pretenses which had their influence.⁸³

⁷⁸ P. v. Jacobs, 35 Mich. 36, 2 Am. C. R. 103; S. v. Penley, 27 Conn. 587; S. v. Benson, 110 Mo. 18, 19 S. W. 213; S. v. Bloodsworth, 25 Or. 83, 34 Pac. 1023; S. v. Palmer, 50 Kan. 318, 32 Pac. 29; Bonnell v. S., 64 Ind. 498; Schleisinger v. S., 11 Ohio St. 669.

⁷⁹ Jones v. S., 50 Ind. 473, 1 Am. C. R. 224. But see P. v. Jefferey, 31 N. Y. Supp. 267, 82 Hun 409.

⁸⁰ S. v. Hurst, 11 W. Va. 54, 3 Am. C. R. 105; Pendry v. S., 18 Fla. 191; Com. v. Strain, 10 Metc. (Mass.) 521.

But see S. v. Bloodsworth, 25 Or. 83, 34 Pac. 1023.

⁸¹ Simmons v. P., 187 Ill. 327, 58 N. E. 906. See Moore v. P., 190 Ill. 334.

⁸² Cowen v. P., 14 Ill. 351; P. v. Haynes, 11 Wend. (N. Y.) 557; Fay v. Com., 28 Gratt. (Va.) 912, 3 Am. C. R. 88; S. v. Thatcher, 35 N. J. L. 445; Smith v. S., 55 Miss. 513, 3 Am. C. R. 97; Com. v. Drew, 19 Pick. (Mass.) 183.

⁸³ Cowen v. P., 14 Ill. 351; Reg. v. Lince, 12 Cox C. C. 451, 1 Green C. R. 133.

§ 630. **Ownership, essential.**—An indictment which fails to state by direct averment the ownership of the property alleged to have been obtained by false pretense, or the property the defendant claimed to own, is fatally defective. That the ownership may be inferred from the indictment is not sufficient.⁸⁴ In an indictment for obtaining goods from a firm by false pretenses, the names of the individual members need not be set out in the indictment: the firm name is sufficient.⁸⁵

§ 631. **Allegation of delivery.**—An information charging, by proper averments, that the defendant “obtained the signature of” a person to a note by certain false pretenses alleged, sufficiently alleges that the note was delivered to the defendant.⁸⁶

§ 632. **Pretenses must be negatived.**—The indictment must, by direct and positive averments, negative the false pretenses alleged. Alleging “the timber and bark having been previously cut and hauled off” is not sufficient: it is argumentative.⁸⁷ An indictment with other proper averments, which charges that the defendant falsely represented that he was the owner of, and in possession of, certain land, should positively and directly negative each of these facts. Alleging that he was not the owner *and* in possession of the land, is not sufficient.⁸⁸

§ 633. **Allegation of scienter**—“Knowingly,” “designedly.”—The indictment alleged that the defendant “did knowingly, designedly, falsely and feloniously pretend,” etc., is a sufficient allegation of the *scienter*. And the indictment is good though the word “knowingly” be omitted.⁸⁹ An indictment alleging by proper averments that the

⁸⁴ *Thompson v. P.*, 24 Ill. 66; *Moulie v. S.*, 37 Fla. 321, 20 So. 554; *Jenkins v. S.*, 97 Ala. 66, 12 So. 110; *Mays v. S.*, 28 Tex. App. 484, 13 S. W. 787; *Jones v. S.*, 22 Fla. 532; *S. v. Miller*, 153 Ind. 229, 54 N. E. 808. See *S. v. Ridge*, 125 N. C. 658, 34 S. E. 440.

⁸⁵ *S. v. Williams*, 103 Ind. 235, 2 N. E. 585, 6 Am. C. R. 256. See *Stoughton v. S.*, 2 Ohio St. 562; *Com. v. Call*, 21 Pick. (Mass.) 515.

⁸⁶ *P. v. Kinney*, 110 Mich. 97, 67 N. W. 1089.

⁸⁷ *S. v. Paul*, 69 Me. 215; *S. v. Pickett*, 78 N. C. 458; *S. v. Smith*, 8 Blackf. (Ind.) 489; *S. v. Palmer*, 50 Kan. 318, 32 Pac. 29; *P. v. Behee*,

90 Mich. 356, 51 N. W. 515; *Com. v. Sanders*, 98 Ky. 12, 32 S. W. 129; *Campbell v. S.*, 154 Ind. 309, 56 N. E. 665.

⁸⁸ *P. v. Griffith*, 122 Cal. 212, 54 Pac. 725.

⁸⁹ *S. v. Hurst*, 11 W. Va. 54, 3 Am. C. R. 106; *Com. v. Hulbert*, 12 Metc. (Mass.) 446; *S. v. Blauvelt*, 38 N. J. L. 306; *Johnson v. S.*, 75 Ind. 556; *P. v. Fitzgerald*, 92 Mich. 328, 52 N. W. 726; *S. v. Bradley*, 68 Mo. 142; *S. v. Moore*, 111 N. C. 672, 16 S. E. 384; *S. v. Nine*, 105 Iowa 131, 74 N. W. 945; *Sharp v. S.*, 53 N. J. L. 511, 21 Atl. 1026. *Contra*, *Maranda v. S.*, 44 Tex. 442, 1 Am. C. R. 225.

defendant "did designedly, falsely represent and pretend" certain facts to be true, sufficiently avers that he knew the facts to be false.⁹⁰ Under a statute providing that "whoever designedly and by any false pretense" obtains the property of another, an indictment will be defective in omitting the word *designedly* or its equivalent in charging the offense.⁹¹

§ 634. **Duplicity, when not.**—An indictment charging with proper averments that the defendant fraudulently obtained the property of another by color of a false token or writing *and* by false representations, in the usual form, is not bad for duplicity.⁹² And under a statute making it a criminal offense to present false or fraudulent claims, an indictment charging the accused with presenting false *and* fraudulent claims against the county, is not bad for duplicity.⁹³

§ 635. **Description of property, or money.**—An indictment for false pretenses which describes the goods alleged to have been obtained as "a large amount of dry and fancy goods" is not sufficient, being too indefinite.⁹⁴ Where an indictment charges the defendant with obtaining property by falsely representing that he was the owner of certain horses, free from incumbrances, and states generally that the horses were in fact incumbered by mortgage, without describing the horses or mortgage, it is fatally defective. It fails to state the "nature of the crime and cause of accusation."⁹⁵ The money alleged to have been obtained by false pretense was described in the indictment as "five thousand dollars in lawful money." Held, sufficient.⁹⁶ The first averment in the indictment is very vague and indefinite. It does not sufficiently describe the real estate alleged to have been owned and sold by the accused, nor is the name of the purchaser given. If the name of the purchaser of the lot was known to the grand jury it should have been stated as well as the description of the lot.⁹⁷

⁹⁰ P. v. Lennox, 106 Mich. 625, 64 N. W. 488.

⁹¹ S. v. Withee, 87 Me. 462, 32 Atl. 1013.

⁹² Pinney v. S. (Ind., 1901), 59 N. E. 383.

⁹³ Wilson v. S. (Ind., 1901), 59 N. E. 380; Ferris v. S. (Ind., 1901), 59 N. E. 475.

⁹⁴ S. v. Appleby, 63 N. J. L. 526, 42 Atl. 847. The property should be described the same as in larceny: S. v. Reese, 83 N. C. 637; S. v. Kube,

20 Wis. 217; Jamison v. S., 37 Ark. 445; Johnson v. S., 75 Ind. 553.

⁹⁵ S. v. Stowe, 132 Mo. 199, 33 S. W. 799. See P. v. Winner, 30 N. Y. Supp. 54, 80 Hun 130; S. v. Cameron, 117 Mo. 371, 22 S. W. 1024; S. v. Kain, 118 Mo. 5, 23 S. W. 763.

⁹⁶ S. v. Knowlton, 11 Wash. 512, 39 Pac. 966.

⁹⁷ Keller v. S., 51 Ind. 111, 1 Am. C. R. 214. The indictment is set out in full in the above case.

§ 636. **Instrument should be described.**—An instrument used as the basis of a charge of false pretenses should be set out or so described that the court can, by inspection, determine whether it is such an obligation that it might be the basis of a criminal charge.⁹⁸

§ 637. **Statute as to description—Unconstitutional.**—A statute making it unnecessary to allege in the indictment the name of the person whose property is obtained or the means used to obtain it, or making it unnecessary to describe the property, is unconstitutional.⁹⁹

§ 638. **Deceiving woman—Sufficient.**—An indictment charged that the defendant falsely represented to a certain woman, naming her, that he intended to marry her, provide her a home and deposit a check in her name for one thousand dollars; that by means of these false representations he induced her to sign and give him a check, asking her to advance him one hundred and twenty-five dollars, but the check turned out to be for seven hundred and twenty-five instead of one hundred and twenty-five, she intending to give him only the latter sum. The indictment set out with sufficient certainty the operative cause which induced the woman to sign the check, and was sufficient under the statute of Indiana.¹⁰⁰

⁹⁸ Langford v. S., 45 Ala. 26; Hardin v. S., 25 Tex. App. 74, 7 S. W. 534. See Moore v. P., 190 Ill. 334.

⁹⁹ S. v. Benson, 110 Mo. 18, 19 S. W. 213; S. v. Reynolds, 106 Mo. 146, 17 S. W. 322; S. v. Kain, 118 Mo. 5, 23 S. W. 763.

¹⁰⁰ S. v. Styner, 154 Ind. 131, 56 N. E. 98. *Contra*, P. v. Weir, 120 Cal. 279, 52 Pac. 656. Indictment held sufficient in the following cases: Barton v. P., 135 Ill. 405, 25 N. E. 776; Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77; P. v. Skidmore, 123 Cal. 267, 55 Pac. 984 (ownership); Garner v. S., 100 Ga. 257, 28 S. E. 24; S. v. Nine, 105 Iowa 131, 74 N. W. 945; Com. v. Sessions, 169 Mass. 329, 47 N. E. 1034; Com. v. Mulrey, 170 Mass. 103, 49 N. E. 91; S. v. Barr (N. J. L.), 40 Atl. 772; Meek v. S., 117 Ala. 116, 23 So. 155; P. v. Summers, 115 Mich. 537, 73 N. W. 818; Oxx v. S., 59 N. J. L. 99, 35 Atl. 646; Hafner v. Com., 18 Ky. L. 423, 36 S. W. 549; S. v. King, 67 N. H. 219, 34 Atl. 461; S. v. Hanscom, 28 Or.

427, 43 Pac. 167; S. v. Hulder, 78 Minn. 524, 81 N. W. 532; Pinney v. S. (Ind., 1901), 59 N. E. 383 (form); Nasets v. S. (Tex. Cr.), 32 S. W. 698; S. v. Bokien, 14 Wash. 403, 44 Pac. 889; Reg. v. Silverlock, L. R. (1894) 2 Q. B. D. 766; S. v. Knowlton, 11 Wash. 512, 39 Pac. 966 (obtained); S. v. Mangum, 116 N. C. 998, 21 S. E. 189; P. v. Millan, 106 Cal. 320, 39 Pac. 605; S. v. Kealy, 89 Iowa 98, 56 N. W. 284; Musgrave v. S., 133 Ind. 297, 32 N. E. 885; Com. v. Blanchette, 157 Mass. 486, 32 N. E. 658; S. v. Morgan, 112 Mo. 202, 20 S. W. 456; P. v. Carolan, 71 Cal. 195, 12 Pac. 52; P. v. Hamberg, 84 Cal. 468, 24 Pac. 298; S. v. Ashe, 44 Kan. 84, 24 Pac. 72; S. v. Cadwell, 79 Iowa 473, 44 N. W. 711; P. v. Moran, 59 N. Y. Supp. 312, 43 App. Div. 155; S. v. Nine, 105 Iowa 131, 74 N. W. 945; S. v. Woodward, 156 Mo. 143, 56 S. W. 880. Indictment not sufficient: P. v. Griffith, 122 Cal. 212, 54 Pac. 725; S. v. Fraker, 148 Mo. 143, 49 S. W. 1017; Cluff v. Ter.

ARTICLE IV. EVIDENCE.

§ 639. **Burden on prosecution.**—Before a conviction can be sustained the prosecution must prove that the pretenses alleged to be false were false in fact. In other words, the burden is on the prosecution to prove the falsity of such representations.¹ But the falsity of the representations need not be shown by direct proof.²

§ 640. **Admissions alone—Insufficient.**—While admissions or confessions of the defendant are competent as tending to show the falsity of the representations, yet they alone are not sufficient to sustain a conviction.³

§ 641. **Main inducing cause, sufficient.**—It is sufficient to constitute false pretense that the main inducing cause be established, although there may have been other minor false pretenses made which had their influence, and possibly, without which the main inducing cause might not have been sufficient to produce the result.⁴

§ 642. **Evidence confined to facts alleged.**—Material matters of fact not alleged in the indictment and negatived by proper averments,

(Ariz.) 52 Pac. 350; Funk v. S., 149 Ind. 338, 49 N. E. 266; Hurst v. S., 39 Tex. Cr. 196, 45 S. W. 573; S. v. Barbee, 136 Mo. 440, 37 S. W. 1119; Roper v. S., 58 N. J. L. 420, 33 Atl. 969; Martin v. S. (Tex. Cr.), 5 S. W. 859; Cummings v. S., 36 Tex. Cr. 152, 36 S. W. 266; S. v. Withee, 87 Me. 462, 32 Atl. 1013 (time); Owens v. S., 83 Wis. 496, 53 N. W. 736; Denley v. S. (Miss.), 12 So. 698; Tennyson v. S., 97 Ala. 78, 12 So. 391; Copeland v. S., 97 Ala. 30, 12 So. 181; S. v. Miller, 153 Ind. 229, 54 N. E. 808; S. v. Trisler, 49 Ohio St. 583, 31 N. E. 881 (negativing); Cain v. S., 58 Ark. 43, 22 S. W. 954; P. v. Behee, 90 Mich. 356, 51 N. W. 515; Jacobs v. S., 31 Neb. 33, 47 N. W. 422; Com. v. Dunleay, 153 Mass. 330, 26 N. E. 870; Jones v. S., 22 Fla. 532; S. v. Clay, 100 Mo. 571, 13 S. W. 827; S. v. McChesney, 90 Mo. 120, 1 S. W. 841.

¹ Babcock v. P., 15 Hun (N. Y.) 347; Morris v. P., 4 Colo. App. 136, 35 Pac. 188; S. v. Hurley, 58 Kan. 668, 50 Pac. 887; Brown v. S., 29

Tex. 503; S. v. Wilbourne, 87 N. C. 529; Bowler v. S., 41 Miss. 576; Underhill Cr. Ev., § 439.

² Com. v. Hershell, Thach. Cr. Cas. (Mass.) 70; Smith v. S., 55 Miss. 521; P. v. Sully, 5 Park. Cr. (N. Y.) 169.

³ S. v. Long, 103 Ind. 481, 3 N. E. 169; S. v. Penny, 70 Iowa 190, 30 N. W. 561.

⁴ Cowen v. P., 14 Ill. 350; Fay v. Com., 28 Gratt. (Va.) 912; Donohoe v. S., 59 Ark. 375, 27 S. W. 226; S. v. Gordon, 56 Kan. 67, 42 Pac. 346; S. v. Fooks, 65 Iowa 196, 452, 21 N. W. 561, 773; Smith v. S., 55 Miss. 522; Trogdon v. Com., 31 Gratt. (Va.) 884; S. v. Dunlap, 24 Me. 77; S. v. Thatcher, 35 N. J. L. 445; Wax v. S., 43 Neb. 22, 61 N. W. 117; Com. v. Stevenson, 127 Mass. 446; S. v. Connor, 110 Ind. 471, 11 N. E. 454; P. v. Miller, 2 Park. Cr. (N. Y.) 199; Underhill Cr. Ev., § 442. *Contra*, P. v. Dalton, 2 Wheeler Cr. Cas. (N. Y.) 180; Bryant v. Com., 20 Ky. L. 790, 47 S. W. 578.

can not be shown in evidence by the prosecution, as, where the indictment charges the defendant with obtaining money by false pretenses the evidence must be confined to the specific sum alleged in the indictment.⁵

§ 643. **Induced to part with, inferred.**—It is not indispensable that the prosecutor should testify that by reason of the false representations alleged he was induced to part with his property. The false representations having once been clearly proven and the intent of the accused to cheat and defraud made apparent, the jury may infer that credit was given to the false representations so made.⁶

§ 644. **Intent—Knowledge, essential.**—That the defendant knew that the representations made by him were false and made with the design or intention of obtaining the property of the prosecutor, is an essential element of false pretense and must be proven.⁷ The intent is a question, not of law but of fact, to be determined by the jury. But the intent may be inferred from the circumstances of the particular case.⁸

§ 645. **"Relied upon," proof of.**—The prosecuting witness may testify directly that he relied upon the false representations made to him

⁵ Barber v. P., 17 Hun (N. Y.) 366; Sharp v. S., 53 N. J. L. 511, 21 Atl. 1026; S. v. Long, 103 Ind. 481, 3 N. E. 169; Prehm v. S., 22 Neb. 673, 36 N. W. 295; Peckham v. S. (Tex. Cr.), 28 S. W. 532; S. v. Green, 7 Wis. 686; Matter of Eberle, 44 Kan. 472, 24 Pac. 958.

⁶ Com. v. Daniels, 2 Pars. Eq. Cas. (Pa.) 335; Com. v. Coe, 115 Mass. 501; S. v. Thatcher, 35 N. J. L. 449; Therasson v. P., 82 N. Y. 239; Reg. v. Burton, 16 Cox C. C. 62; P. v. Hong Quin Moon, 92 Cal. 42, 27 Pac. 1096.

⁷ Jackson v. P., 126 Ill. 139, 18 N. E. 286; P. v. Behee, 90 Mich. 356, 51 N. W. 515; Johnson v. S., 75 Ind. 556; S. v. Haines, 23 S. C. 170; S. v. Fields, 118 Ind. 491, 21 N. E. 252; Dorsey v. S., 111 Ala. 40, 20 So. 629; S. v. Jackson, 112 Mo. 585, 20 S. W. 674; S. v. Garriss, 98 N. C. 733, 4 S. E. 633; Com. v. Devlin, 141 Mass. 423, 430, 6 N. E. 64; S. v.

Clark, 46 Kan. 65, 26 Pac. 481; P. v. Wakely, 62 Mich. 303, 28 N. W. 871; P. v. Oscar, 105 Mich. 704, 63 N. W. 971; P. v. Fish, 4 Park. Cr. (N. Y.) 212; Watson v. P., 87 N. Y. 564, 41 Am. R. 397; Bower v. S., 41 Miss. 578; Com. v. Dean, 110 Mass. 65; Com. v. Coe, 115 Mass. 502; Rosales v. S., 22 Tex. App. 673, 3 S. W. 344; S. v. Oakley, 103 N. C. 408, 9 S. E. 575; Sharp v. S., 53 N. J. L. 511, 21 Atl. 1026; Reg. v. James, 12 Cox C. C. 127; Rex v. Wakeling, R. & R. 504; P. v. Baker, 96 N. Y. 340, 349.

⁸ Jackson v. P., 126 Ill. 139, 18 N. E. 286; Com. v. Walker, 108 Mass. 312; Trogdon v. Com., 31 Gratt. (Va.) 862; Woodruff v. S., 61 Ark. 179, 32 S. W. 102; S. v. Neimeier, 66 Iowa 636, 24 N. W. 247; Dorsey v. S., 110 Ala. 38, 20 So. 450; S. v. Norton, 76 Mo. 180; Underhill Cr. Ev., § 437.

by the defendant as being true, and that by reason thereof he parted with his property.⁹

§ 646. **Insolvency of firm.**—Where the insolvency of a business firm is a material fact in issue it is not competent to prove such fact by showing the insolvency of the members of the firm as to their private affairs.¹⁰

§ 647. **Other similar pretenses.**—Evidence that the accused made similar pretenses to other persons in making sales or purchases a short time previous to the sale in question is admissible to show the intent as to the transaction on which indicted.¹¹ Where several transactions are so connected in time and circumstance as to constitute parts of a general system or scheme of fraud, all such transactions may be proven to show the fraudulent intent in the transaction on which indicted.¹² A paper taken from the defendant, addressed, "To all whom it may concern," in his own handwriting, and containing the same false statements alleged in the indictment, is competent, though he did not use the paper in obtaining the goods in the particular case on trial.¹³

§ 648. **Proving non-existence of place.**—Where it is material on the trial of a charge of false pretense to prove the non-existence of a certain branch office of a business firm, a witness may testify that he

⁹ *Com. v. Drew*, 153 Mass. 588, 27 N. E. 593; *P. v. Hong Quin Moon*, 92 Cal. 42, 27 Pac. 1096; *P. v. Sully*, 5 Park. Cr. (N. Y.) 164; *Trodgon v. Com.*, 31 Gratt. (Va.) 884; *In re Snyder*, 17 Kan. 542, 553.

¹⁰ *Com. v. Davidson*, 1 Cush. (Mass.) 33. See *S. v. Hill*, 72 Me. 238.

¹¹ *Com. v. Jackson*, 132 Mass. 16; *S. v. Long*, 103 Ind. 485, 3 N. E. 169; *Bradley v. Obear*, 10 N. H. 477; *Com. v. Eastman*, 1 Cush. (Mass.) 189; *S. v. Walton*, 114 N. C. 783, 18 S. E. 945; *Com. v. Coe*, 115 Mass. 481, 2 Green C. R. 292; *S. v. Rivers*, 58 Iowa 103, 12 N. W. 117; *P. v. Henssler*, 48 Mich. 49, 11 N. W. 804; *S. v. Chingren*, 105 Iowa 169, 74 N. W. 946; *Hutcherson v. S.* (Tex. Cr.), 35 S. W. 375; *S. v. Meyers*, 82 Mo. 558; *Mayer v. P.*, 80 N. Y. 364; *Trogdon v. Com.*, 31 Gratt. (Va.) 863; *Tarbox v. S.*, 38 Ohio St. 581; *P. v.*

Summers, 115 Mich. 537, 73 N. W. 818; *P. v. Wasservogle*, 77 Cal. 173, 19 Pac. 270; *P. v. Peckens*, 153 N. Y. 576, 47 N. E. 883; *Weyman v. P.*, 4 Hun (N. Y.) 516, 62 N. Y. 623; *S. v. Turley*, 142 Mo. 403, 44 S. W. 267; *Martin v. S.*, 36 Tex. Cr. 125, 35 S. W. 976; *Farmer v. S.*, 100 Ga. 41, 28 S. E. 26; *U. S. v. Snyder*, 14 Fed. 554, 4 McCrary 618; *S. v. Jackson*, 112 Mo. 585, 20 S. W. 674. *Contra*, see *Underhill Cr. Ev.*, § 438.

¹² *S. v. Johnson*, 33 N. H. 456; *Com. v. Jackson*, 132 Mass. 16; *Com. v. Blood*, 141 Mass. 571, 6 N. E. 769; *Carnell v. S.*, 85 Md. 1, 36 Atl. 117; *Strong v. S.*, 86 Ind. 208, 217, 44 Am. R. 292; *P. v. Henssler*, 48 Mich. 49, 11 N. W. 804; *Rafferty v. S.*, 91 Tenn. 655, 16 S. W. 728; *Reg. v. Rhodes*, 68 L. J. Q. B. 83, 19 Cox C. C. 182.

¹³ *Carnell v. S.*, 85 Md. 1, 36 Atl. 117.

tried to find the place but could not find it, but he will not be permitted to tell that the police informed him there was no such office.¹⁴

§ 649. Business relations before date of alleged offense.—Where the false pretense charged grew out of complicated business relations between the prosecutor and the defendant it is competent to show the course of dealing between them, not only before but after the date of the alleged offense, to determine whether deception was practiced. The widest latitude is allowed.¹⁵

§ 650. Authority to sign name.—On the trial of a person indicted for obtaining money under the false pretense that a certain promissory note was genuine, the accused may show that the names signed to such notes had been written by himself under instructions of the apparent makers of the notes.¹⁶

§ 651. In rebuttal.—On a charge of obtaining money from a railroad company by falsely representing to have been injured while in the employ of the company, it may be shown in evidence that the defendant had suffered with the same affliction which he claimed resulted from the alleged injury before the accident in which he claimed he was injured, as testing his credibility as a witness.¹⁷

ARTICLE V. VARIANCE.

§ 652. All alleged false statements not necessary.—Where the indictment sets out several material matters of fact, as false pretenses,

¹⁴Quick v. Com., 17 Ky. L. 938, 33 S. W. 77. See "Forgery."

¹⁵S. v. Rivers, 58 Iowa 108, 43 Am. R. 112, 12 N. W. 117; Lutton v. S., 14 Tex. App. 518; P. v. Shelters, 99 Mich. 333, 58 N. W. 362; P. v. Winslow, 39 Mich. 505; P. v. Gibbs, 98 Cal. 661, 33 Pac. 630; Underhill Cr. Ev., § 437.

¹⁶S. v. Lurch, 12 Or. 95, 6 Pac. 405, 5 Am. C. R. 234. See Com. v. Goddard, 2 Allen (Mass.) 148.

¹⁷S. v. Hulder, 78 Minn. 524, 81 N. W. 532. Evidence held sufficient to sustain convictions in the following cases: Van Eyck v. P., 178 Ill. 199, 52 N. E. 852; Com. v. O'Brien, 172 Mass. 248, 52 N. E. 77; Com. v. Brown, 167 Mass. 144, 45 N. E. 1; P. v. Hong Quin Moon, 92 Cal. 42,

27 Pac. 1096; Com. v. Drew, 153 Mass. 588, 27 N. E. 593; Barton v. P., 135 Ill. 405, 25 N. E. 776; S. v. Burke, 108 N. C. 750, 12 S. E. 1000; In re Snyder, 17 Kan. 542, 2 Am. C. R. 240; S. v. Moats, 108 Iowa 13, 78 N. W. 701. Evidence not sufficient to sustain conviction: Meek v. S., 117 Ala. 116, 23 So. 155; Drought v. S., 101 Ga. 544, 28 S. E. 1013; S. v. Hurley, 58 Kan. 668, 50 Pac. 887; Salter v. S., 36 Tex. Cr. 501, 38 S. W. 212; De Young v. S. (Tex. Cr.), 41 S. W. 598; Lopez v. S., 37 Tex. Cr. 649, 40 S. W. 972; S. v. Crane, 54 Kan. 251, 38 Pac. 270; S. v. Benson, 110 Mo. 18, 19 S. W. 213; Harris v. S. (Tex. App.), 14 S. W. 447; S. v. Clark, 46 Kan. 65, 26 Pac. 481 (cattle).

the prosecution need not prove all of them; it is sufficient to sustain a conviction if any one of such false pretenses be proven which was material in influencing the prosecuting witness to part with his property.¹⁸ An indictment which alleges several matters of false pretense, some of which are not properly negatived, may nevertheless support a conviction if the main fact of false pretense be properly averred and negatived. The prosecution is confined to the false pretenses which are properly set out, but is not bound to prove all of the representations to be false.¹⁹

§ 653. Obtaining from agent.—Evidence that the property was obtained from the agent by false pretense will support an allegation of obtaining from the owner. Property in the hands of an agent is in possession of the owner.²⁰ Making false representations to any officer, clerk or representative of a corporation is making such representations to the corporation.²¹

§ 654. Obtaining from two persons.—Evidence that the defendant, by false pretenses, obtained from two persons their joint note, does not support an allegation of obtaining a note from one of the two persons named.²² Where an indictment alleged money was obtained by two persons, and the proof was that the money was loaned to one of them only, it was held to be a fatal variance.²³

§ 655. Variance—Different member of firm.—On a charge of obtaining credit by false pretenses an averment that the false representations were made to one member of a firm is not supported by evidence that such representations were made to a different member of the firm.²⁴

¹⁸ *S. v. Chingren*, 105 Iowa 169, 74 N. W. 946; *Beasley v. S.*, 59 Ala. 20; *Hathcock v. S.*, 88 Ga. 98, 13 S. E. 959, 9 Am. C. R. 709; *Com. v. O'Brien*, 172 Mass. 249, 52 N. E. 77; *Com. v. Alsop*, 1 Brews. (Pa.) 336; *Cunningham v. S.*, 61 N. J. L. 666, 40 Atl. 696; *Woodruff v. S.*, 61 Ark. 159, 32 S. W. 102; *S. v. Vorback*, 66 Mo. 172; *Webster v. P.*, 92 N. Y. 427; *Limouze v. P.*, 58 Ill. App. 314; *Underhill Cr. Ev.*, § 439.

¹⁹ *Cunningham v. S.*, 61 N. J. L. 666, 40 Atl. 696; *P. v. Perkins*, 153

N. Y. 576, 47 N. E. 883; *Com. v. O'Brien*, 172 Mass. 248, 52 N. E. 77.

²⁰ *Com. v. Blanchette*, 157 Mass. 489, 32 N. E. 658. Compare *Tuttle v. S.* (Tex. Cr., 1899), 51 S. W. 911.

²¹ *S. v. Turley*, 142 Mo. 403, 44 S. W. 267.

²² *P. v. Reed*, 70 Cal. 529, 11 Pac. 676.

²³ 1 *Roscoe Cr. Ev.*, § 89, note; *P. v. Cummings*, 117 Cal. 497, 49 Pac. 576; *Com. v. Pierce*, 130 Mass. 31.

²⁴ *Broznack v. S.*, 109 Ga. 514, 35 S. E. 123.

§ 656. **Board and lodging not included.**—Under a statute against obtaining “money, goods, wares, merchandise, or other property” by false pretenses, will not be included board and lodging.²⁵

§ 657. **Variance—Existing and non-existing fact.**—An allegation that the defendant did falsely and fraudulently represent that he “owned ten acres of cotton, now up and growing in Henry county,” is not supported by evidence that the defendant represented that he “was going to cultivate about ten acres of cotton on land in Henry county.”²⁶

§ 658. **Variance—Judgment or money.**—The defendant procured the consent of the city to the entry of a judgment in his favor against the city by falsely representing that he had been injured on a street in the city by its fault. The defendant, in obtaining the money on the judgment, was held not guilty of obtaining money by false pretense. The judgment was procured by false pretenses.²⁷

ARTICLE VI. VENUE; JURISDICTION.

§ 659. **Committed where property obtained.**—The obtaining the property or signature, as the case may be, by means of false pretenses, with intent to cheat and defraud, completes the crime and determines the place of trial. It is not material where the pretenses were made.²⁸ Delivery of goods to a common carrier is a delivery to the person ordering the goods.²⁹ The accused wrote a letter at Nottingham, in England, containing false representations, and posted it to the prosecutor at a place in France, by means of which the prosecutor sent the accused one hundred and fifty pounds, which he received at Nottingham. Held, that the court at Nottingham had jurisdiction to try the accused.³⁰

²⁵ *S. v. Black*, 75 Wis. 490, 44 N. W. 635. See *Ex parte Williams*, 121 Cal. 328, 53 Pac. 706. *Contra*, *S. v. Snyder*, 66 Ind. 203.

²⁶ *Garlington v. S.*, 97 Ga. 629, 25 S. E. 398.

²⁷ *Com. v. Harkins*, 128 Mass. 79. Compare *Kennedy v. S.*, 34 Ohio St. 310.

²⁸ *S. v. Shaeffer*, 89 Mo. 271, 1 S. W. 293, 6 Am. C. R. 262; *S. v. Wyck-off*, 31 N. J. L. 68; *Norris v. S.*, 25 Ohio St. 217; *Com. v. Mayer*, 22 Pa. Co. R. 38, 8 Pa. Dist. R. 571; *S. v. House*, 55 Iowa 466, 8 N. W. 307;

Adams v. P., 1 N. Y. 173, 3 Den. 190; *P. v. Scully*, 5 Park. Cr. (N. Y.) 142; *Stewart v. Jessup*, 51 Ind. 415; *Underhill Cr. Ev.*, § 445; *Com. v. Van Tuyl*, 1 Metc. (Ky.) 1; *Dechard v. S.* (Tex. Cr.), 57 S. W. 817.

²⁹ *S. v. Lichliter*, 95 Mo. 408, 8 S. W. 720; *Com. v. Taylor*, 105 Mass. 172; *Com. v. Karpowski*, 167 Pa. St. 225, 31 Atl. 572; *Norris v. S.*, 25 Ohio St. 225, 18 Am. R. 291.

³⁰ *Queen v. Holmes*, L. R. 12 Q. B. D. 23, 4 Am. C. R. 591. See *Norris v. S.*, 25 Ohio St. 217, 2 Am. C. R. 85; *Connor v. S.*, 29 Fla. 455, 10 So.

§ 660. Jury to judge facts.—It is for the jury to determine from all the evidence whether the prosecutor was deceived by the false representations charged, and what effect, if any, they may have had in inducing the prosecutor to part with his property.³¹

ARTICLE VII. CONFIDENCE GAME.

§ 661. Definition.—"Every person who shall obtain or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument, or device, commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years,"³²

§ 662. Includes any swindling.—The statute of Illinois will not be construed as limited only to the obtaining money or property by the use of false or bogus checks or by the use of other false or bogus commercial paper, or paper of the same specific class as checks, but will embrace such obtaining by any false representations and tricks with cards or instruments used in such a way as to gain the confidence of the person upon whom the scheme or trick was practiced by the swindler.³³ Obtaining credit by false representations in regard to one's solvency does not come within the provisions of the statute on confidence game.³⁴

§ 663. Indictment—Statutory form.—Following the form of indictment prescribed by statute, alleging that the defendant "unlawfully and feloniously obtained the money of the owner by means of the confidence game," is good and not unconstitutional.³⁵

§ 664. Confidence game, attempt—Variance.—An attempt to obtain money by means of the confidence game as defined by the statute

891; *Com. v. Wood*, 142 Mass. 459, 8 N. E. 432; *P. v. Adams*, 3 Denio (N. Y.) 190.

³¹ *Jackson v. P.*, 18 Ill. App. 513; *P. v. Blanchard*, 90 N. Y. 314; *P. v. Bryant*, 119 Cal. 595, 51 Pac. 960; *S. v. Knowlton*, 11 Wash. 512, 39 Pac. 966; *Meek v. S.*, 117 Ala. 116, 23 So. 155; *P. v. Cole*, 137 N. Y. 530, 33 N. E. 336, 20 N. Y. Supp. 505, 65 Hun 624; *S. v. Moats*, 108 Iowa 13, 78 N. W. 701.

³² Ill. Stat., Div. 1, § 99, ch. 38.

³³ *Maxwell v. P.*, 158 Ill. 253-256, 41 N. E. 995.

³⁴ *Pierce v. P.*, 81 Ill. 101.

³⁵ *Morton v. P.*, 47 Ill. 474; *Maxwell v. P.*, 158 Ill. 249, 41 N. E. 995; *S. v. McChesney*, 90 Mo. 120, 1 S. W. 841, 7 Am. C. R. 184; *Graham v. P.*, 181 Ill. 477, 486, 55 N. E. 179; *Coffin v. U. S.*, 156 U. S. 432, 15 S. Ct. 394.

of Illinois consists of three elements: First, an attempt to obtain money by means of the confidence game; second, the doing of some act toward obtaining money by means of the confidence game; third, the failure to so obtain the money. These three elements must be established beyond a reasonable doubt to make out a case of such attempt.³⁶ Evidence of the actual obtaining of money by means of the confidence game does not support a charge of an attempt to obtain money by means of such game, based on a statute making an attempt to so obtain money a distinct offense.³⁷

³⁶ *Graham v. P.*, 181 Ill. 477, 55 N. E. 179.

³⁷ *Graham v. P.*, 181 Ill. 477, 55 N. E. 179, 47 L. R. A. 731; *S. v. Smith* (Minn.), 85 N. W. 12 (evidence sufficient).

CHAPTER X.

RECEIVING STOLEN GOODS.

ART.	I. Definition and Elements,	§§ 665-667
	II. Defenses,	§§ 668-670
	III. Indictment,	§§ 671-675
	IV. Evidence; Variance,	§§ 676-688
	V. Venue; Verdict,	§§ 689-691

ARTICLE I. DEFINITION AND ELEMENTS.

§ 665. **Definition.**—"Every person who, for his own gain or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or anything the stealing of which is declared to be larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained," shall be imprisoned in the penitentiary if the value of the property exceeds fifteen dollars; but if the value of the property so obtained be fifteen dollars or less, then the punishment shall be imprisonment in the county jail and a fine not exceeding one thousand dollars.¹ Receiving stolen goods, knowing them to be stolen, is an affront to public justice and criminal.²

§ 666. **Held for reward.**—If property be taken with the intention of holding it until the rightful owner should pay a certain sum, and obliging such payment for the recovery of the property, the offense is complete.³

¹ Ill. Stat., Div. 1, § 239, ch. 38.

² 4 Bl. Com., 132.

³ Baker v. S., 58 Ark. 513, 9 Am. C. R. 455, 25 S. W. 603; S. v. Pardee,

37 Ohio St. 63; Com. v. Mason, 105 Mass. 163; Berry v. S., 31 Ohio St.

227; Rex v. O'Donnell, 7 Cox C. C. 337.

§ 667. **Receiving distinct from larceny.**—Receiving property obtained by robbery or larceny imports a distinct and subsequent transaction involving another person not connected with the larceny. The receiver receives the property from some other person who had previously obtained it by robbery or larceny.⁴

ARTICLE II. MATTERS OF DEFENSE.

§ 668. **Dealer in second-hand goods.**—A dealer in second-hand goods may show in defense to a charge of receiving stolen property that persons so engaged do not pay full price for goods, and from the character of the business they have to sell new clothing at second-hand prices. Such defense tends to rebut the presumption of guilty knowledge in purchasing goods at greatly reduced prices.⁵

§ 669. **Thief acquitted immaterial.**—On a charge of receiving stolen property criminally it is no defense that the thief who stole the property was tried and acquitted, as that is *res inter alios acta*.⁶

§ 670. **Actual receipt essential.**—Before a charge of receiving stolen goods knowingly can be sustained it must appear that the accused actually received the goods; a mere agreement to receive such goods in the future will not sustain a conviction.⁷

ARTICLE III. INDICTMENT.

§ 671. **Joining larceny.**—The offenses of larceny and receiving may be joined in the same indictment in different counts if they relate to the same property.⁸ The indictment charged that a certain person named feloniously stole the goods in question and that the defendant received the same from him knowing them to have been stolen. Held, the two charges were properly joined.⁹

⁴ *Tobin v. P.*, 104 Ill. 567; *Kotter v. P.*, 150 Ill. 441, 37 N. E. 932; *Allison v. Com.*, 83 Ky. 254; *Reg. v. Coggins*, 12 Cox C. C. 517; 1 Green C. R. 51; *Brown v. S.*, 15 Tex. App. 581; *Bieber v. S.*, 45 Ga. 569; *Smith v. S.*, 59 Ohio St. 350, 52 N. E. 826; *Anderson v. S.*, 38 Fla. 3, 20 So. 765; *S. v. Hodges*, 55 Md. 127.

⁵ *Andrews v. P.*, 60 Ill. 355, 2 Green C. R. 556.

⁶ *S. v. Sweeten*, 75 Mo. App. 127.

⁷ *Com. v. Light*, 10 Pa. Supr. Ct. 66.

⁸ *S. v. Laque*, 37 La. 853; *S. v. Hazard*, 2 R. I. 474. See "Larceny and Burglary."

⁹ *Com. v. Adams*, 7 Gray (Mass.) 43. "Receiving" and "concealing" stolen property are distinct offenses and can not be joined in the same count; *P. v. Hartwell* (N. Y.), 59 N. E. 929.

§ 672. **Allegation as to larceny, or false pretense.**—On a charge of receiving stolen goods, knowing them to have been stolen, a larceny must be proved, but the thief need not be named in the indictment, nor need it be alleged when nor where, nor from whom the goods were received or stolen.¹⁰ The allegation as to the larceny of the goods so received will be sufficient if stated in the indictment in general terms as having been feloniously stolen.¹¹ An indictment alleging that the defendant did have, receive and aid in concealing certain goods, the property of a person named, well knowing the said property to have been taken, stolen and carried away, is bad because it does not allege that the goods had been stolen.¹² In an indictment for receiving goods which have been obtained by false pretenses it is not the practice to set forth the false pretenses. Held, sufficient after verdict.¹³

§ 673. **Value, immaterial.**—Where the punishment of the offense of receiving stolen property does not depend upon the value thereof, then it is not necessary to allege or prove the value.¹⁴ Or where, by statute, the receiving of stolen property, knowing it to be stolen from some particular place, as from a railroad car, is a felony, without reference to the value, the value is immaterial.¹⁵ Where the stolen goods were received at several times in pursuance of a conspiracy regarding the particular goods, the value of different receipts may be aggregated in fixing the grade of the offense.¹⁶

§ 674. **Description of goods—Or money.**—The indictment should describe the stolen goods with accuracy, and a variance in this particular will be fatal. The description should be as accurate as in

¹⁰ *Com. v. Slate*, 11 Gray (Mass.) 60; *S. v. Feuerhaken*, 96 Iowa 299, 65 N. W. 299; *Ream v. S.*, 52 Neb. 727, 73 N. W. 227; *Com. v. Sullivan*, 136 Mass. 170; *Campbell v. S.* (Miss.), 17 So. 441; *S. v. Wright*, 2 Pen. (Del.) 228, 45 Atl. 395; *S. v. Guild*, 149 Mo. 370, 50 S. W. 909; *Shiedley v. S.*, 23 Ohio St. 130; *P. v. Smith*, 94 Mich. 644, 54 N. W. 487; *Anderson v. S.*, 38 Fla. 3, 20 So. 765; *Hester v. S.*, 103 Ala. 83, 15 So. 857; *Kirby v. U. S.*, 174 U. S. 47, 19 S. Ct. 574; *S. v. Hanna*, 35 Or. 195, 57 Pac. 629.

¹¹ *Com. v. Lakeman*, 5 Gray (Mass.) 82; *S. v. McAlvon*, 40 Me. 133.

¹² *Anderson v. S.*, 38 Fla. 3, 20 So. 765.

¹³ *Reg. v. Goldsmith*, 12 Cox C. C. 479, 1 Green C. R. 35, 40.

¹⁴ *Com. v. Johnson*, 133 Pa. St. 293, 19 Atl. 402; *P. v. Fitzpatrick*, 80 Cal. 538, 22 Pac. 215.

¹⁵ *S. v. Sutton*, 53 Kan. 318, 36 Pac. 716.

¹⁶ *Levi v. S.*, 14 Neb. 1, 14 N. W. 543. *Contra*, *Smith v. S.*, 59 Ohio St. 350, 52 N. E. 826.

larceny.¹⁷ Describing the property in the indictment as "two horses and thirty mares and twenty geldings," is sufficient.¹⁸ An indictment for criminal receiving, which describes the money alleged to have been received as consisting of two hundred dollars in United States bank notes, of the value of two hundred dollars; two hundred dollars of United States currency, of the value of two hundred dollars, and two hundred dollars of United States treasury notes, of the value of two hundred dollars, is fatally defective in the absence of an averment that a better description is to the grand jury unknown.¹⁹

§ 675. Duplicity, "buying" or "receiving"—Several owners.—The "buying, receiving or aiding in receiving" of stolen goods, as defined by statute, constitute but one offense, though it may be committed in three ways, by buying, receiving, or aiding in receiving, and the three ways may be stated in the same count in the indictment.²⁰ If different parcels of goods, owned by different persons, are received at the same time by the defendant, knowing them to have been stolen, it is but one offense, and may be alleged in the same count in the indictment without duplicity.²¹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 676. Recent possession, sufficient.—"The books agree that a recent possession of stolen property after the theft is sufficient to warrant a conviction unless the attending circumstances or other evidence so far overcomes the presumption thus raised as to create a reasonable doubt of the prisoner's guilt."²²

§ 677. Knowledge essential.—The proof must show that the defendant knew at the moment of receiving the stolen property that it had been stolen, and he must also at the time have received it with felonious intent.²³

¹⁷ Williams v. P., 101 Ill. 385; P. v. Ribolsi, 89 Cal. 492, 26 Pac. 1082; Baggett v. S., 69 Miss. 625, 13 So. 816.

¹⁸ S. v. Hanna, 35 Or. 195, 57 Pac. 629.

¹⁹ Baggett v. S., 69 Miss. 625, 13 So. 816.

²⁰ Bradley v. S., 20 Fla. 738, 5 Am. C. R. 620; Huggins v. S., 41 Ala. 393; Com. v. Nichols, 92 Mass. 199; S. v. Nelson, 29 Me. 329.

²¹ Smith v. S., 59 Ohio St. 350, 52 N. E. 826; Com. v. White, 123 Mass. 430.

²² Sahlinger v. P., 102 Ill. 244; S. v. Grebe, 17 Kan. 458; Jenkins v. S., 62 Wis. 49, 21 N. W. 232.

²³ S. v. Caveness, 78 N. C. 484; George v. S., 57 Neb. 656, 78 N. W. 259; O'Connell v. S., 55 Ga. 191; Aldrich v. P., 101 Ill. 18; P. v. Weldon, 111 N. Y. 569, 19 N. E. 279.

§ 678. Proof of larceny essential.—On a charge of receiving stolen goods knowing them to have been stolen, the prosecution must prove that the goods were, in fact, stolen.²⁴

§ 679. Circumstantial evidence.—That a person received stolen property from the thief, knowing it to be stolen, need not be proved by direct, but may be proved by circumstantial evidence.²⁵ The knowledge of the defendant that goods received by him had been stolen may be shown by his declarations and conduct, such as his attempt to escape when stolen goods are traced to his possession.²⁶

§ 680. Search for other goods.—Where it appeared from the statement of the defendant, in explaining his possession of goods alleged to have been stolen, that he got them from a policeman for doing an errand, who did not tell him where he got them, except that he stood in with clerks, it is competent to show a search of the house of the policeman, and that a large amount of goods were discovered there, not usually kept in a dwelling-house, and to show the comparison with other goods found in the defendant's house as tending to show the defendant's knowledge that he was receiving stolen goods.²⁷

§ 681. Other stolen goods.—If a person receive articles of property of a particular kind from another, knowing that they had been stolen by such other person from a particular person or place, and he is offered on a subsequent occasion similar articles by the same person and under like circumstances, it directly tends to establish that the articles thus offered were known to be stolen. It is a natural inference.²⁸ Upon the trial of an indictment for receiving certain stolen goods, knowing them to have been stolen, evidence that other goods, known to have been stolen, were previously received by the defendant from the same thief, is admissible for the purpose of show-

²⁴ *S. v. Kinder*, 22 Mont. 516, 57 Pac. 94.

²⁵ *Gunther v. P.*, 139 Ill. 531, 28 N. E. 1101; *Huggins v. P.*, 135 Ill. 246, 25 N. E. 1002; *Isaacs v. P.*, 118 Ill. 538, 8 N. E. 121; 2 Bish. Cr. L. (new), § 1138; 2 Bish. Cr. Pr., § 991; *S. v. Guild*, 149 Mo. 370, 50 S. W. 909.

²⁶ *S. v. Guild*, 149 Mo. 370, 50 S. W. 909.

²⁷ *Com. v. Billings*, 167 Mass. 283, 45 N. E. 910.

²⁸ *Copperman v. P.*, 56 N. Y. 591; *S. v. Ditton*, 48 Iowa 677; *Devoto v. Com.*, 3 Metc. (Ky.) 417; *S. v. Habib*, 18 R. I. 558, 30 Atl. 462. But see *S. v. Ward*, 49 Conn. 429, and *Coleman v. P.*, 55 N. Y. 81.

ing guilty knowledge on the part of the accused that the goods for receiving which he is charged in the indictment were stolen.²⁹

§ 682. Recording description.—As tending to prove that the defendant knew the goods received by him had been stolen, it is competent to show his failure to record a description of them in a book as required by a city ordinance.³⁰

§ 683. Proving ownership—Resemblance.—The ownership of goods alleged to have been stolen is not sufficiently proved from the fact that they resemble the goods of the person alleged to be the owner.³¹ The evidence in the following cases sustained convictions:³²

§ 684. Variance, as to description.—Where the indictment alleges, unnecessarily, the commission of the larceny or burglary or robbery by a particular person, or that the property was bought of a particular person, the allegation becomes matter of description and must be proved as laid.³³

§ 685. Variance, as to corporate name.—On a charge of receiving stolen goods alleged to be owned by a corporation, proof that they were owned by a corporation *de facto*, is sufficient.³⁴

§ 686. Receiving—Not aiding.—After another had stolen the goods, the defendant, knowing them to have been stolen, put a part of the goods in his bag and helped the thief to carry the same to a merchant to sell. Held sufficient to sustain a charge of receiving.³⁵ If the evidence shows that the accused aided and abetted another in the larceny of goods, he can not be convicted of receiving. In such case he would be guilty of larceny.³⁶

²⁹ Schriedley v. S., 23 Ohio St. 130, 2 Green C. R. 533; Kilrow v. Com., 89 Pa. St. 480; S. v. Hanna, 35 Or. 195, 57 Pac. 629; S. v. Fenerhaken, 96 Iowa 299, 65 N. W. 299; P. v. Rando, 3 Park. Cr. (N. Y.) 335; Devoto v. Com., 3 Metc. (Ky.) 417; P. v. Dowling, 84 N. Y. 478; 3 Greenl. Ev., § 15.

³⁰ P. v. Clausen, 120 Cal. 381, 52 Pac. 658.

³¹ Com. v. Billings, 167 Mass. 283, 45 N. E. 910.

³² Aldrich v. P., 101 Ill. 18; May v. P., 60 Ill. 120; Williamson v.

Com. (Va.), 23 S. E. 762; Friedberg v. P., 102 Ill. 160; P. v. Fletcher, 60 N. Y. Supp. 777, 14 N. Y. Cr. 328. But held sufficient in Huggins v. P., 135 Ill. 246, 25 N. E. 1002.

³³ Huggins v. P., 135 Ill. 245, 25 N. E. 1002; Com. v. King, 9 Cush. (Mass.) 284; 2 Bish. Cr. Proc., § 982.

³⁴ Butler v. S., 35 Fla. 246, 17 So. 551.

³⁵ S. v. Rushing, 69 N. C. 29, 1 Green C. R. 372; 2 Bish. Cr. L., § 1140. See P. v. Rivello, 57 N. Y. Supp. 420, 39 App. Div. 454.

³⁶ Reg. v. Coggins, 12 Cox C. C.

§ 687. **Unknown to grand jury.**—If an information alleges that it is unknown to the district attorney from whom the defendant received the goods alleged to have been stolen, and on the trial it appears that the district attorney did know and had been informed, before presenting the information, as to who had stolen the property, and from whom the defendant received it, this is a fatal variance.³⁷

§ 688. **Receiving jointly.**—To sustain a joint charge against two persons for one and the same offense, there must be a joint receipt at one and the same time; and a receipt of the stolen goods by one of the parties at one time and place and a subsequent receipt by the other, will not sustain a joint charge, but will authorize a conviction of the one who first received them.³⁸ The prisoners, mother and son, were jointly indicted, charged with the crime of receiving stolen pork. On this joint charge it was necessary to prove a joint receipt: and as the mother was absent when the son received it, it was a separate receipt by him.³⁹

ARTICLE V. VENUE; VERDICT.

§ 689. **Venue—County where received.**—The indictment and trial of the accused on a charge of receiving stolen property should be in the county where he received the property, and not in some other county where he may have taken it.⁴⁰

§ 690. **Verdict as to value.**—Finding the defendant “guilty of receiving stolen property in manner and form as charged in the indictment,” and fixing his punishment at two years in the penitentiary, is materially defective in not finding the value of the property. The statute provides that if the value exceeds fifteen dollars, the punishment shall be imprisonment in the penitentiary, and if it does not exceed fifteen dollars, then the punishment shall be a fine and imprisonment in the county jail.⁴¹

517, 1 Green C. R. 51; Smith v. S., 59 Ohio St. 350, 52 N. E. 826; S. v. Kinder, 22 Mont. 516, 57 Pac. 94.

³⁷ Sault v. P., 3 Colo. App. 502, 34 Pac. 263. *Contra*, Wright v. S. (Tex. Cr.), 45 S. W. 1016.

³⁸ Com. v. Slate, 11 Gray (Mass.) 60. See Wheeler v. S., 76 Miss. 265, 24 So. 310.

³⁹ Rex v. Messingham, 1 Moody 257; Wheeler v. S., 76 Miss. 265, 24 So. 310. *Contra*, Com. v. Slate, 11 Gray (Mass.) 60; S. v. Smith, 37 Mo. 58.

⁴⁰ Campbell v. P., 109 Ill. 569; S. v. Habib, 18 R. I. 558, 30 Atl. 462; Licette v. S., 23 Ga. 57.

⁴¹ Thompson v. P., 125 Ill. 259, 17

§ 691. **General verdict.**—Larceny and receiving of the same goods are well joined in the same indictment; and a general verdict of guilty in manner and form as charged in the indictment will be sustained.⁴²

N. E. 749; Tobin v. P., 104 Ill. 568; v. Speight, 69 N. C. 72. But see Sawyer v. P., 3 Gilm. (Ill.) 54; Highland v. P., 1 Scam. (Ill.) 393. Tobin v. P., 104 Ill. 567, and S. v. Larkin, 49 N. H. 39.

⁴²Sahlinger v. P., 102 Ill. 244; S.

CHAPTER XI.

BURGLARY.

ART.	I. Defination and Elements,	§§ 692-709
	II. Matters of Defense,	§§ 710-711
	III. Indictment,	§§ 712-733
	IV. Evidence; Variance,	§§ 734-762

ARTICLE I. DEFINITION AND ELEMENTS.

§ 692. **Common law definition.**—Burglary is the breaking in and entering the house of another in the night time with the intent to commit a crime such as larceny or other felony, whether the felony be actually committed or not.¹ A burglar is he that by night breaketh and entereth into a mansion-house, with intent to commit a felony.² The common law definition of burglary has been materially enlarged by statutory provisions of the different states, so that the offense may be committed in the day time as well as night time; and it is also extended to include different kinds of buildings enumerated in the various statutes defining the crime.

§ 693. **Day and night.**—As to what is reckoned night and what day, for this purpose, anciently the day was accounted to begin only at sun-rising, and to end immediately upon sun-set; but the better opinion seems to be that if there be daylight or crepusculum enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight.³

¹ Underhill Cr. Ev., § 371; Bergeron v. S., 53 Neb. 752, 74 N. W. 253.

² 4 Bl. Com. 224; 1 Hale P. C. 549; 1 Bish. Cr. L. (8th ed.), § 559; P. v. Edwards, 1 Wheeler Cr. (N. Y.) 371; Com. v. Newell, 7 Mass. 257.

³ 4 Bl. Com. 224; 1 Hale P. C. 550; Com. v. Williams, 2 Cush. 582; S. v. Morris, 47 Conn. 179; Klieforth v. S., 88 Wis. 163, 59 N. W. 507. See S. v. Seymour, 36 Me. 225; Com. v. Glover, 111 Mass. 395; Ashford v. S., 36 Neb. 38, 53 N. W. 1036; Wat-

§ 694. **Breaking and entering essential.**—To constitute the crime of burglary there must be both a breaking and entering, as well as the intent to steal or to commit a felony.⁴ Lifting the latch of a closed door and pushing it open constitutes a "breaking" within the meaning of the law relating to burglary.⁵ Opening a screen door hung on springs to keep it closed is a "breaking."⁶ The forcible removal of anything by which the door is closed, such as a post, constitutes a breaking within the meaning of the law of burglary.⁷ Removing a window screen fastened to the window with nails or removing a window fastening and lifting the window is a "breaking."⁸ Slightly raising the window in the day time to prevent the bolt fastening it in the night time when thus unfastened is burglary.⁹

§ 695. **Forcibly entering inner door.**—Forcibly entering an inner door after entering the house without force with intent to commit a felony in some part of the house constitutes burglary.¹⁰ Entering an open door or window of a house is not a "breaking and entering" within the meaning of the law.¹¹

§ 696. **Descending chimney—Entering window.**—By the common law, descending the chimney of a house is an actual breaking as much so in legal effect as would be the forcible breaking into a house by any other means.¹² The defendant entered a dwelling-house in the night

ers v. S., 53 Ga. 567; S. v. McKnight, 111 N. C. 690, 16 S. E. 319.

⁴ 3 Greenl. Ev., § 74; 2 Russell Crimes (9th ed.), 2; Miller v. S., 77 Ala. 41, 5 Am. C. R. 105; Underhill Cr. Ev., § 371.

⁵ S. v. Groning, 33 Kan. 18, 5 Pac. 446; S. v. Reid, 20 Iowa 413; S. v. O'Brien, 81 Iowa 93, 46 N. W. 861; Tickner v. P., 6 Hun (N. Y.) 657; Bass v. S., 69 Tenn. 444; S. v. Boon, 35 N. C. (13 Ired.) 244; S. v. Hecox, 83 Mo. 531; Hedrick v. S., 40 Tex. Cr. 532, 51 S. W. 252. See McCourt v. P., 64 N. Y. 583; Kent v. S., 84 Ga. 438, 11 S. E. 355, 20 Am. St. 376; Underhill Cr. Ev., § 373; Ferguson v. S., 52 Neb. 432, 72 N. W. 590.

⁶ S. v. Conners, 95 Iowa 485, 64 N. W. 295. See Webb v. Com., 18 Ky. L. 220, 35 S. W. 1038.

⁷ S. v. Powell, 61 Kan. 51, 58 Pac. 968; S. v. Woods, 137 Mo. 6, 38 S. W.

722; Matthews v. S. (Tex. Cr.), 38 S. W. 172.

⁸ Sims v. S., 136 Ind. 358, 36 N. E. 278; S. v. Moore, 117 Mo. 395, 22 S. W. 1086; Metz v. S., 46 Neb. 547, 65 N. W. 190; Underhill Cr. Ev., § 373.

⁹ P. v. Dupree, 98 Mich. 26, 56 N. W. 1046.

¹⁰ Rolland v. Com., 85 Pa. St. 66, 27 Am. R. 626; S. v. Scripture, 42 N. H. 485; S. v. Clark, 42 Vt. 629.

¹¹ S. v. Rivers, 2 Ohio Dec. R. 102; Hamilton v. S., 11 Tex. App. 116; Edwards v. S., 36 Tex. Cr. 387, 37 S. W. 438; Green v. S., 68 Ala. 539. See McGrath v. S., 25 Neb. 780, 41 N. W. 780; P. v. Barry, 94 Cal. 481, 29 Pac. 1026; Costello v. S. (Tex. Cr.), 21 S. W. 360.

¹² 4 Bl. Com. 226; Walker v. S., 52 Ala. 376, 1 Am. C. R. 362; 3 Greenl. Ev., § 76; S. v. Willis, 7 Jones (52 N. C.) 190; Olds v. S., 97 Ala. 82, 12 So. 409.

season, through a window in the second story, about fifteen feet from the ground, the window being raised about six inches and supported in this position by an oil can, with an intent to steal in the room, and he unlocked the door of the room and the outer door of the house, for the purpose of making his escape therefrom. Held to be a "breaking."¹³

§ 697. "Breaking"—Through guise of friendship.—If the accused gained entrance into the bank under the guise of friendship or on pretense of business and then robbed the bank, it was a burglarious entry; it was a breaking within the meaning of the law.^{13a} The offense of breaking into the house is also constructively committed when admission is obtained by threats or by fraud.¹⁴

§ 698. Entry, least degree—Corn crib.—As for the entry, any the least degree of it, with any part of the body, or with an instrument held in the hand, is sufficient; as, to step over the threshold, or put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries.¹⁵ The defendant, in removing the filling or obstruction which had been placed in the chinks of a corn crib, effecting an opening through which he thrust his arm and got corn from the crib, was guilty, that constituting a "breaking."¹⁶ Or digging under the wall of a log building having no floor, and thereby gaining an entrance with intent to steal therein, is a breaking.¹⁷

§ 699. Dwelling-house includes.—At common law, the dwelling-house, in which burglary might be committed, was held to include the out-houses, barns, stables, cow-houses, or dairy houses, although not under the same roof, provided they were parcel thereof—within a common inclosure.¹⁸

¹³ S. v. Ward, 43 Conn. 489, 2 Am. C. R. 31, 21 Am. R. 665; Woodward v. S., 54 Ga. 106, 1 Am. C. R. 366; Parker v. S. (Tex. Cr.), 38 S. W. 790. See Com. v. Stephenson, 8 Pick. (Mass.) 354.

^{13a} Johnston v. Com., 85 Pa. St. 54, 3 Am. C. R. 31; Rolland v. Com., 82 Pa. St. 306; Dutcher v. S., 18 Ohio 317.

¹⁴ 3 Greenl. Ev. (Redf. ed.), § 77; S. v. Mordecai, 68 N. C. 207. See

S. v. Henry, 31 N. C. (9 Ired.) 463; Nicholls v. S., 68 Wis. 416, 32 N. W. 543; 4 Bl. Com. 226.

¹⁵ 4 Bl. Com. 227; S. v. Crawford, 8 N. D. 539, 80 N. W. 193, 46 L. R. A. 312.

¹⁶ Miller v. S., 77 Ala. 44; 3 Greenl. Ev., § 76; Walker v. S., 63 Ala. 49, 35 Am. R. 1.

¹⁷ Pressley v. S., 111 Ala. 34, 20 So. 647.

¹⁸ S. v. Hecox, 83 Mo. 531, 5 Am.

§ 700. **Dwelling, owner absent.**—A building which is in fact a dwelling-house does not lose its character as such by a mere temporary absence of its inhabitants who have left with intent to return, but it does not become a dwelling-house, though used for taking meals and other purposes, unless the person occupying it or some one of his family or servants usually sleep in it at night.¹⁹ The fact that the owner of a building visited it once or twice a year and slept in it about a week, does not make it a dwelling-house, it being unoccupied during the rest of the year.²⁰

§ 701. **Boat not dwelling.**—A canal boat which has become grounded and frozen fast is not a dwelling-house within the statutory definition, though used as a dwelling-house by the captain of the boat.²¹

§ 702. **Lodgers, inmates only.**—“A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is to all other purposes, as well as this, the mansion-house of the owner. So also is a room or lodging in a private house the mansion for the time being of the owner: if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house and hath but one outward door at which he and his lodgers enter, such lodgers seem only to be inmates and all their apartments to be parcel of the one dwelling-house of the owner.”²²

§ 703. **When storehouse a dwelling.**—Where a building is partly used as a storehouse and other parts as a dwelling by the owner or his family, it is his dwelling-house; otherwise if a person sleeps there merely to protect the premises.²³

C. R. 100; 4 Bl. Com. 225; 1 Hale P. C. 553; 2 Russell Crimes (9th ed.), 15; Com. v. Barney, 10 Cush. 478; P. v. Aplin, 86 Mich. 393, 49 N. W. 148; S. v. Johnson, 45 S. C. 483, 23 S. E. 619. See Wait v. S., 99 Ala. 164, 13 So. 584; S. v. Whit, 49 N. C. (4 Jones) 349; Edwards v. Derrickson, 28 N. J. L. 39; S. v. Jake, 2 Winst. (N. C.) 80; Palmer v. S., 47 Tenn. 82.

¹⁹ Scott v. S., 62 Miss. 781, 5 Am. C. R. 98; Schwabacher v. P., 165 Ill. 625, 46 N. E. 809; S. v. Williams, 40 W. Va. 268, 21 S. E. 721; Buchanan v. S., 24 Tex. App. 195, 5 S. W. 847; Harrison v. S., 74 Ga. 801; S. v.

Warren, 33 Me. 30; Bish. Stat. Crimes, § 279; 3 Greenl. Ev., § 79; S. v. Weber, 156 Mo. 257, 56 S. W. 893.

²⁰ Scott v. S., 62 Miss. 781. See S. v. Jenkins, 50 N. C. (5 Jones) 430.

²¹ S. v. Green, 6 N. J. L. J. 123. See Williamson v. S., 39 Tex. Cr. 60, 44 S. W. 1107.

²² 4 Bl. Com. 225.

²³ S. v. Potts, 75 N. C. 129, 1 Am. C. R. 365; P. v. Dupree, 98 Mich. 26, 56 N. W. 1046; Ashton v. S., 68 Ga. 25; S. v. Williams, 90 N. C. 724, 47 Am. R. 541; 1 McClain Cr. L., § 494.

§ 704. "Any other building" includes.—The words "any other building" in which the crime of larceny may be committed is of the same kind with the particular class mentioned, and will include "chicken-houses," though the term chicken-house is not specifically mentioned in the statute.²⁴ The term "other building" of the statute will include a court house, though the property so occupied belongs to a private person.²⁵ The statutory words "other erection or inclosure," relating to burglary, will not include a vault or inclosure for the interment of the dead, built entirely above the ground on a stone foundation.²⁶

§ 705. Warehouse, storehouse—Store.—"Warehouse" will include a covered structure used for storing cotton bales, one side and end of which are planked up and the other end and side left open; the structure being inclosed by a plank fence nine feet high with gates kept locked.²⁷ And "warehouse or storehouse" includes a livery stable in which harness, buggies and farming implements are kept.²⁸ And a structure erected within which to store husked corn comes within the meaning of "storehouse" or "warehouse."²⁹ And a "meat-house" is a "storehouse."³⁰ A "storeroom" is not a "storehouse," nor is a "store" a "shop," within the meaning of the law.³¹ A "store," within the meaning of the statute, is a place in which merchandise is kept for sale. Any building where goods are kept for sale is a store.³² A statute punishing the offense of breaking into a "storehouse, warehouse or other outhouse" will be construed, on conviction, to include a retail liquor and cigar store or saloon.³³

§ 706. Attempt—Agreement to commit.—Any act done with the design of committing burglary without accomplishing it, is an attempt

²⁴ *Gillock v. P.*, 171 Ill. 308, 312, 49 N. E. 712. See *Price v. Com.*, 15 Ky. L. 837, 25 S. W. 1062, citing *contra*, *S. v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842.

²⁵ *S. v. Rogers*, 54 Kan. 683, 39 Pac. 219. See *P. v. Young*, 65 Cal. 225, 3 Pac. 813; *S. v. Edwards*, 109 Mo. 315, 19 S. W. 91; *Kincaid v. P.*, 139 Ill. 217, 28 N. E. 1060; *P. v. McCloskey*, 5 Park. Cr. (N. Y.) 57; *S. v. Garrison*, 52 Kan. 180, 34 Pac. 751.

²⁶ *P. v. Richards*, 108 N. Y. 141, 15 N. E. 371; *Wood v. S.*, 18 Fla. 967 (crib).

²⁷ *Hagan v. S.*, 52 Ala. 373. See

Ratekin v. S., 26 Ohio St. 420. But see *S. v. Wilson*, 47 N. H. 181; *S. v. Dolson*, 22 Wash. 259, 60 Pac. 653.

²⁸ *Webb v. Com.*, 18 Ky. L. 220, 35 S. W. 1038.

²⁹ *Metz v. S.*, 46 Neb. 547, 65 N. W. 190. See *S. v. Gibson*, 97 Iowa 416, 66 N. W. 742.

³⁰ *Benton v. Com.*, 91 Va. 782, 21 S. E. 495.

³¹ *Hagar v. S.*, 35 Ohio St. 268; *S. v. Canney*, 19 N. H. 135.

³² *Com. v. Whalen*, 131 Mass. 419; *S. v. Canney*, 19 N. H. 135.

³³ *S. v. Curran* (Md.), 4 Cr. L. Mag. 226. See *S. v. Comstock*, 20 Kan. 650.

to commit the crime; such as taking the impression of a key which locks the door of a storehouse with the intention of making a false key.³⁴ The mere agreement with another to commit a burglary and meeting him at an appointed time and place with a weapon, such as a revolver, and the purchase of some chloroform to be used in committing the offense, is not sufficient to constitute an attempt.³⁵

§ 707. **Attempt to steal by burglary.**—Breaking and entering a building with intent to steal money from a safe therein, is burglary, although the safe contained no money and was not used for keeping money in at the time.³⁶

§ 708. **"Felony" includes petit larceny.**—The breaking and entering of a building with intent to commit "murder, rape, robbery, larceny or other felony" includes petit as well as grand larceny.³⁷

§ 709. **Servant stealing.**—If a servant or employe having charge of a house enters one of its rooms which he is not permitted to enter, and steals goods therein, he is guilty of burglary.³⁸ And so also a domestic servant having charge of a house, conspiring with others who are not servants, to enter the rooms of the house and steal, may be guilty of burglary, though such act committed by the servant alone would not be burglary.³⁹

ARTICLE II. MATTERS OF DEFENSE.

§ 710. **Intent essential.**—On a charge of burglary the accused may show that he entered the house for a different purpose than that charged in the indictment; as, for example, to meet a lewd woman with whom he had had improper relations, and for no other purpose.⁴⁰

³⁴ Griffin v. S., 26 Ga. 493; S. v. Colvin, 90 N. C. 717; S. v. Jordan, 75 N. C. 27. See Donaldson v. S., 10 Ohio C. C. 613.

³⁵ P. v. Youngs, 122 Mich. 292, 81 N. W. 114, 47 L. R. A. 108.

³⁶ S. v. Beal, 37 Ohio St. 108, 41 Am. R. 490. See Clark v. S., 86 Tenn. 511, 8 S. W. 145; Harvick v. S., 49 Ark. 514, 6 S. W. 19. *Contra*, Lee v. S., 56 Ga. 477.

³⁷ S. v. Keyser, 56 Vt. 622; Pooler v. S., 97 Wis. 627, 73 N. W. 336; P. v. Stapleton, 2 Idaho 49, 3 Pac. 6.

But see Shaeffer v. S., 61 Ark. 241, 32 S. W. 679; Wood v. S., 18 Fla. 967.

³⁸ Hild v. S., 67 Ala. 39; Lowder v. S., 63 Ala. 143, 35 Am. R. 9. See Van Walker v. S., 33 Tex. Cr. 359, 26 S. W. 507.

³⁹ Neiderluck v. S., 23 Tex. App. 38, 3 S. W. 573.

⁴⁰ Robinson v. S., 53 Md. 151, 36 Am. R. 399; S. v. Meche, 42 La. 273, 7 So. 573; S. v. Worthen (Iowa), 82 N. W. 910.

§ 711. **Owner consents to burglary.**—Where the owner of a building arranges with a detective and consents to have his building entered and a larceny committed, it is not a crime.⁴¹ But where the owner or proprietor is informed of an intended burglary, and he takes no steps to prevent it, but puts a force in the building to capture the burglars, this does not amount to giving his consent to having a burglary committed, and his act does not affect the defendant's guilt.⁴²

ARTICLE III. INDICTMENT.

§ 712. **"Burglariously," "feloniously," essential.**—The word "burglariously" is not essential to be alleged in the indictment, for burglary under the statute of Illinois—but it is undoubtedly true that this word was and is indispensable to a count in burglary at common law.⁴³ "Feloniously" is an essential word in an indictment for burglary under a statute where the entry into the building is for the purpose and with the intent to commit a felony.⁴⁴

§ 713. **Tenant is owner—Room—Renter—Bailee.**—In burglary the ownership of the premises may be laid in the occupant whose possession is rightful as against the burglar. The rooms rented to a person constitute his dwelling-house in the sense of the law.⁴⁵ A tenant occupying premises is the owner thereof within the meaning of the law relating to burglary.⁴⁶ One who rents a room in a hotel

⁴¹ Love v. P., 160 Ill. 508, 43 N. E. 710; Lyons v. P., 68 Ill. 280; Roberts v. Ter., 8 Okla. 326, 57 Pac. 840; P. v. McCord, 76 Mich. 200, 8 Am. C. R. 117, 42 N. W. 1106; Speiden v. S., 3 Tex. App. 156; Allen v. S., 40 Ala. 334, 91 Am. R. 476; Turner v. S., 24 Tex. App. 12, 5 S. W. 511; P. v. Collins, 53 Cal. 185. But see S. v. Rowe, 98 N. C. 629, 4 S. E. 506. See also S. v. Abley, 109 Iowa 61, 80 N. W. 225.

⁴² S. v. Sneff, 22 Neb. 481, 35 N. W. 219; Thompson v. S., 18 Ind. 386, 81 Am. Dec. 364; S. v. Stickney, 53 Kan. 308, 36 Pac. 714, 42 Am. St. 284; P. v. Morton, 4 Utah 407, 11 Pac. 512; Lyons v. S., 68 Ill. 281. See S. v. Abley, 109 Iowa 61, 80 N. W. 225, 46 L. R. A. 864.

⁴³ Lyons v. P., 68 Ill. 271; S. v. McDonald, 9 W. Va. 456; S. v. Short, 54 Iowa 392, 6 N. W. 584; S.

v. Jordan, 39 La. 340, 1 So. 655; Reed v. S., 14 Tex. App. 662. But see S. v. McClung, 35 W. Va. 280, 13 S. E. 654; Jones v. S. (Tex. Cr., 1900), 55 S. W. 491; S. v. Lewis, 13 S. Dak. 166, 82 N. W. 406.

⁴⁴ Smith v. S., 93 Ind. 67, 5 Cr. L. Mag. 564; Scudder v. S., 62 Ind. 13; 1 McClain Cr. L., § 510.

⁴⁵ Smith v. P., 115 Ill. 20, 3 N. E. 733; Hale v. S., 122 Ala. 85, 26 So. 236; Leslie v. S., 35 Fla. 171, 17 So. 555; S. v. Rivers, 68 Iowa 611, 27 N. W. 781; Kennedy v. S., 81 Ind. 379.

⁴⁶ Winslow v. S., 26 Neb. 308, 41 N. W. 1116; Thomas v. S., 97 Ala. 3, 12 So. 409; S. v. Golden, 49 Iowa 48; S. v. Rand, 33 N. H. 216; S. v. Lee, 95 Iowa 427, 64 N. W. 284. See P. v. Smith, 1 Park. Cr. (N. Y.) 329.

for which he pays by the week and in which he keeps his personal effects, is the owner of the room and not a guest, under the law of burglary.⁴⁷ The janitor of a school-house is the owner of the building and the school books therein, within the meaning of the law of burglary, where he has possession and control of such house.⁴⁸ A bailee who had possession of the goods taken by burglary or larceny is the owner thereof, though he were a gratuitous bailee.⁴⁹

§ 714. **Husband or wife, owner.**—In an indictment for burglary, the husband, if living with his wife, may be alleged as the owner, though the house belongs to his wife.⁵⁰ The ownership of the house entered may be laid in the wife if she has possession of it, though owned by her husband who is not living with her.⁵¹

§ 715. **Statement of ownership—Owner dead.**—An indictment for burglary failing to state the owner of the house is fatally defective.⁵² The indictment charged the defendant with breaking and entering the dwelling-house of the late John Tate. Held defective in not alleging ownership of the house. The late John Tate means a dead man, and the dead can own no property.⁵³

§ 716. **Ownership and "occupied."**—An indictment alleging that the defendant broke and entered the storehouse of "The Walker Iron and Coal Company" sufficiently states the ownership without stating whether such company was a corporation or firm.⁵⁴ And all the individual members composing a firm need not be alleged: it is suffi-

⁴⁷ S. v. Johnson, 4 Wash. 593, 9 Am. C. R. 145, 30 Pac. 672; P. v. St. Clair, 38 Cal. 137. See Rodgers v. P., 86 N. Y. 360, 40 Am. R. 548; P. v. Bush, 3 Park. Cr. (N. Y.) 552.

⁴⁸ Lamater v. S., 38 Tex. Cr. 249, 42 S. W. 304.

⁴⁹ Wimbish v. S., 89 Ga. 294, 15 S. E. 325.

⁵⁰ S. v. Short, 54 Iowa 392, 6 N. W. 584; Yarborough v. S., 86 Ga. 396, 12 S. E. 650. See S. v. Trapp, 17 S. C. 467, 43 Am. R. 614; Young v. S., 100 Ala. 126, 14 So. 872; Jackson v. S., 102 Ala. 167, 15 So. 344; S. v. Peach, 70 Vt. 283, 40 Atl. 732.

⁵¹ Tilly v. S., 21 Fla. 242; S. v. Perkins, 1 Ohio Dec. R. 55.

⁵² S. v. Reece, 27 W. Va. 375; Com. v. Perris, 108 Mass. 1; S. v. Fockler, 22 Kan. 542; S. v. Morrissey, 22 Iowa 158; Jackson v. S., 55 Wis. 589, 13 N. W. 448; P. v. Parker, 91 Cal. 91, 27 Pac. 537; Pells v. S., 20 Fla. 774, 5 Am. C. R. 97. But *contra*, where not required by statute: S. v. Wright, 19 Or. 258, 24 Pac. 229. See S. v. Clifton, 30 La. 951.

⁵³ Beall v. S., 53 Ala. 460, 2 Am. C. R. 463; 2 Hale P. C. 181. See S. v. Franks, 64 Iowa 39, 19 N. W. 832. Compare Anderson v. S., 48 Ala. 665, 2 Green C. R. 620.

⁵⁴ Hatfield v. S., 76 Ga. 499; P. v. Henry, 77 Cal. 445, 19 Pac. 830; Fisher v. S., 40 N. J. L. 162.

cient to lay the ownership in any one partner.⁵⁵ An indictment for burglary in alleging the ownership of the building entered need not contain an averment that the building was occupied or controlled by the owner.⁵⁶

§ 717. **Duplicity, joining burglary and larceny.**—An information charging that the defendant feloniously entered the “house, room, apartment, tenement, shop, warehouse, store and building” of the owner named, with intent then and there and therein to commit larceny, charges but one offense.⁵⁷ An indictment alleging that the defendant broke and entered the house with intent to commit two separate offenses, is not bad, the intent being only an ingredient of the crime.⁵⁸ Burglary and larceny can be joined in the same count or indictment where the offenses grow out of the same transaction, and there may be a conviction of either charge.⁵⁹

§ 718. **“Store” is not “building”—“Stable.”**—Under a statute making it burglary by breaking and entering “any warehouse, barn, stable, outhouse, or any public building or other building whatever,” an indictment charging the breaking and entering “a store” is defective unless it alleges that the “store” is a “building.”⁶⁰ The indictment averring that the defendant “broke and entered a stable” without averring that the “stable” was a building is sufficient.⁶¹

§ 719. **Engine-room, not engine-house.**—An indictment charging that the defendant entered the “engine-room of,” etc., instead of the “engine-house,” is defective, and the general clause of the statute, “or

⁵⁵ *Coates v. S.*, 31 Tex. Cr. 257, 20 S. W. 585; *White v. S.*, 72 Ala. 195. See *S. v. Rivers*, 68 Iowa 611, 27 N. W. 781; *P. v. Edwards*, 59 Cal. 359.

⁵⁶ *Wilson v. S.* (Tex. Cr., 1897), 42 S. W. 290.

⁵⁷ *P. v. Henry*, 77 Cal. 445, 19 Pac. 330. See *P. v. Hall*, 94 Cal. 595, 30 Pac. 7.

⁵⁸ *S. v. Fox*, 80 Iowa 312, 45 N. W. 374. See *S. v. Conway*, 35 La. 350; *S. v. Christmas*, 101 N. C. 749, 8 S. E. 361.

⁵⁹ *Lyons v. P.*, 68 Ill. 271; *Whar. Cr. Pl. & Pr.*, § 244; *Love v. P.*, 160 Ill. 502, 43 N. E. 710; *S. v. Shaffer*,

59 Iowa 290, 4 Am. C. R. 83, 13 N. W. 306; *Hays v. Com.*, 17 Ky. L. 1147, 33 S. W. 1104; *S. v. Dooly*, 64 Mo. 146; *Cunningham v. S.*, 56 Neb. 691, 77 N. W. 60; *Breese v. S.*, 12 Ohio St. 146; *Borum v. S.*, 66 Ala. 468; *S. v. Flanagan* (W. Va.), 35 S. E. 862.

⁶⁰ *Com. v. McMonagle*, 1 Mass. 517. *Contra S. v. Smith*, 5 La. An. 340; *S. v. Haney*, 110 Iowa 26, 81 N. W. 151.

⁶¹ *Orrell v. P.*, 94 Ill. 456; *Kincaid v. P.*, 139 Ill. 217, 28 N. E. 1060. See also, *Gillock v. P.*, 171 Ill. 309, 49 N. E. 712.

other building," will not cure the defect.⁶² But a railroad depot is included under the general clause, "other building."⁶³

§ 720. Indictment sufficient after verdict.—The statute of Illinois is: "Whoever willfully and maliciously, without force (the doors and windows being open), enters into any freight or passenger railroad car with intent to commit larceny, shall be deemed guilty of burglary." The indictment failed to allege that the doors and windows were open—it simply alleged the car was open. Held sufficient after verdict.⁶⁴

§ 721. "Granary" surplusage.—An indictment which charges the accused with committing burglary in the "granary, warehouse and building" of the owner, "a building in which divers goods, merchandise, and valuable things were then and there kept for sale and deposited," sufficiently states the burglary in a warehouse, the word "granary" being mere surplusage.⁶⁵

§ 722. Railroad corporation.—In charging the burglary of a railroad car it is not necessary to allege that the railroad company is a corporation, partnership or stock company. The corporate existence will be implied.⁶⁶ But if the indictment alleges that the railroad company is a corporation, such allegation must be proved.⁶⁷

§ 723. Negative averments.—An indictment alleging the burglary of a building "not adjoining or occupied with any dwelling-house," need not negative the statutory words, "not adjoining or occupied with any dwelling-house."⁶⁸ An information or indictment for burglary based upon a statute for breaking and entering "in the night time any office, shop or warehouse or any other building not adjoining or occupied with any dwelling-house, with intent to commit the crime of murder, rape, robbery, larceny or other felony," need not allege that

⁶² Kincaid v. P., 139 Ill. 217, 28 N. E. 1060.

⁶³ S. v. Edwards, 109 Mo. 315, 19 S. W. 91. See also, S. v. Bishop, 51 Vt. 287, 31 Am. R. 690.

⁶⁴ Brennan v. P., 110 Ill. 537.

⁶⁵ S. v. Watson, 141 Mo. 338, 42 S. W. 726.

⁶⁶ Norton v. S., 74 Ind. 337; S. v. Watson, 102 Iowa 651, 72 N. W. 283; S. v. Shields, 89 Mo. 259, 1 S. W. 336.

⁶⁷ Johnson v. S., 73 Ala. 483. *Contra*, Crawford v. S., 44 Ala. 382.

⁶⁸ Gundy v. S., 72 Wis. 1, 38 N. W. 328; S. v. Kane, 63 Wis. 260, 23 N. W. 488; Devoe v. Com., 3 Metc. (Mass.) 316; Phillips v. Com., 3 Metc. (Mass.) 588; Larned v. Com., 12 Metc. (Mass.) 240. *Contra*, Byrnes v. P., 37 Mich. 515; Koster v. P., 8 Mich. 431; Bickford v. P., 39 Mich. 209. See Com. v. Tuck, 37 Mass. 356.

the building entered was "not adjoining or occupied with any dwelling-house."⁶⁹

§ 724. Descriptive words—Surplusage.—An indictment alleging the breaking and entry of a "lodging-house" with intent to steal, the same being then and there the dwelling-house of a person named, is sufficient; the descriptive words "lodging-house" may be rejected as surplusage.⁷⁰

§ 725. Possession of burglar's tools.—An information alleging the possession of burglar's tools with intent to use them in breaking open places of deposit for the purpose of stealing money or property, sufficiently states the offense without specifying any particular place or property.⁷¹

§ 726. Value, description, ownership.—Ordinarily, in charging burglary with intent to steal, it is not necessary to describe the goods or state their value, unless such description or value becomes material by statutory definition or description of the offense.⁷² An indictment charging the burglary of a store or storehouse in which "goods, wares and merchandise and other valuable things were kept for use, sale or deposit," is fatally defective in not describing the valuable things and stating them to be of value.⁷³ But the value in dollars and cents need not be stated.⁷⁴ Where the value of the goods stolen is an essential ingredient of burglary, it must be alleged.⁷⁵ Unless required by statutory definition or description, it is not necessary to

⁶⁹ *Gundy v. S.*, 72 Wis. 1, 38 N. W. 328, citing *Ex parte Vincent*, 26 Ala. 145; *S. v. Kane*, 63 Wis. 260, 23 N. W. 488, 6 Am. C. R. 99. Compare *S. v. Bouknight*, 55 S. C. 353, 33 S. E. 451.

⁷⁰ *S. v. Miller*, 3 Wash. 131, 28 Pac. 375.

⁷¹ *Scott v. S.*, 91 Wis. 552, 65 N. W. 61; *P. v. Edwards*, 93 Mich. 636, 53 N. W. 778; *Com. v. Tivnon*, 74 Mass. 375. See *Ryan v. Com.*, 5 Ky. L. 177. See *P. v. Reilly*, 63 N. Y. 18, 14 N. Y. Cr. 458; *P. v. Jones* (Mich.), 82 N. W. 806.

⁷² *S. v. Jennings*, 79 Iowa 513, 44 N. W. 799; *S. v. Ray*, 79 Iowa 765, 44 N. W. 800; *Farley v. S.*, 127 Ind. 419, 26 N. E. 898; *S. v. Kane*, 63 Wis. 260, 23 N. W. 488; *P. v. Stapleton*, 2 Idaho 49, 3 Pac. 6; *Lanier v.*

S., 76 Ga. 304; *Reinhold v. S.*, 130 Ind. 467, 30 N. E. 306; *Duncan v. Com.*, 85 Ky. 614, 4 S. W. 321; *Kelly v. S.*, 72 Ala. 244; *P. v. Ah Ye*, 31 Cal. 451; *S. v. Beckworth*, 68 Mo. 82; *Hamilton v. S.* (Tex Cr.), 24 S. W. 32.

⁷³ *Neal v. S.*, 53 Ala. 465; *Danner v. S.*, 54 Ala. 127, 25 Am. R. 662; *Robinson v. S.*, 52 Ala. 587. See *Henderson v. S.*, 70 Ala. 23, 45 Am. R. 72; *S. v. Sangford*, 55 S. C. 322, 33 S. E. 370.

⁷⁴ *Matthews v. S.*, 55 Ala. 65; *Pickett v. S.*, 60 Ala. 77; *Hurt v. S.*, 55 Ala. 214; *Kelly v. S.*, 72 Ala. 244. See *Boose v. S.*, 10 Ohio St. 575; *McCrary v. S.*, 96 Ga. 348, 23 S. E. 409; *Miller v. S.*, 77 Ala. 41.

⁷⁵ *P. v. Murray*, 8 Cal. 519.

allege in the indictment the ownership of the goods alleged to have been stolen at the time of the burglary.⁷⁶

§ 727. **Attempt, sufficiency.**—An indictment which alleged that the defendant “in the night time, feloniously did attempt to break and enter with intent, the goods and chattels in said building then and there being found then and there feloniously to steal, take and carry away, and in such attempt did certain acts, but was then and there intercepted and prevented in the execution of said offense,” was held sufficient.⁷⁷

§ 728. **Allegation, “without consent.”**—An indictment for the burglary of partnership premises, alleging the want of consent to the entry of each member of the firm composing the partnership, is sufficient.⁷⁸

§ 729. **Intent, essential.**—An indictment failing to allege the intent with which the burglary was committed is fatally defective.⁷⁹ But if the indictment, though it does not allege a felonious intent, charges that a felony was actually committed, it is sufficient.⁸⁰

§ 730. **Statutory element, essential.**—The breaking and entering “any shop, store, warehouse or other building, where goods, merchandise or other valuable thing is kept for use, sale or deposit, with intent to steal,” is burglary as defined by statute. An indictment charging the burglary of a shop under such statute, failing to allege that any goods, merchandise or other valuable thing was there kept for use, sale or deposit, is defective.⁸¹

⁷⁶ *P. v. Shaber*, 32 Cal. 36; *S. v. Morrissey*, 22 Iowa 158; *Bowen v. S.*, 106 Ala. 178, 17 So. 335; *S. v. Tyrrell*, 98 Mo. 354, 11 S. W. 734; *Jones v. S.*, 18 Fla. 889. *Contra*, *Barnhart v. S.*, 154 Ind. 177, 56 N. E. 212.

⁷⁷ *Com. v. Shedd*, 140 Mass. 451, 5 Am. C. R. 61, 5 N. E. 254; *White v. P.*, 179 Ill. 358, 53 N. E. 570.

⁷⁸ *Mixon v. S.* (Tex. Cr.), 31 S. W. 408. See *Jones v. S.* (Tex. Cr.), 20 S. W. 395; *Smith v. S.* (Tex. Cr.), 44 S. W. 521.

⁷⁹ *Reed v. S.*, 14 Tex. App. 662; *P. v. Stewart*, 44 Mich. 484, 7 N. W.

71; *Bell v. S.*, 48 Ala. 684, 17 Am. R. 40.

⁸⁰ *Olive v. Com.*, 5 Bush (Ky.) 376; *Davis v. S.*, 43 Tenn. 77; *Barber v. S.*, 78 Ala. 19; *Com. v. Hersey*, 84 Mass. 173; *S. v. Shelton*, 90 Tenn. 539, 18 S. W. 253.

⁸¹ *Crawford v. S.*, 44 Ala. 382; *Williams v. S.*, 67 Ala. 183; *Winslow v. S.*, 26 Neb. 308, 41 N. W. 1116; *Lee v. S.*, 56 Ga. 477; *S. v. Johns*, 15 Or. 27, 13 Pac. 647. *Contra*, *S. v. Sufferin*, 6 Wash. 107, 32 Pac. 1021; *S. v. Emmons*, 72 Iowa 265, 33 N. W. 672. See *Hale v. Com.*, 98 Ky. 353, 33 S. W. 91; *S. v. Burns*, 109 Iowa 436, 80 N. W. 545.

§ 731. **Intended felony essential.**—An indictment for burglary with intent to commit a felony, which fails to state what particular felony was intended, is fatally defective.⁸² But it is not necessary to allege in the indictment the facts constituting the felony or offense intended.⁸³

§ 732. **Breaking and entry.**—Under the statutory description of burglary, "breaking into" the house mentioned is an essential element and must be alleged in the indictment; and so must the indictment allege an entry. To charge that the defendant "broke into the house" is not sufficient.⁸⁴

§ 733. **"Within curtilage" essential.**—Under a statute making it burglary to break and enter any building "within the curtilage of a dwelling-house," the indictment failing to allege the statutory words, to wit: "within the curtilage of a dwelling-house," will be fatally defective.⁸⁵

ARTICLE IV. EVIDENCE; VARIANCE.

§ 734. **Possession of stolen goods.**—The fact that a person is found in possession of recently stolen property without giving any reasonable explanation as to how he came in possession of it, is *prima facie* proof that he is guilty of burglary, where it is shown that the burglary and larceny were committed at the same time, constituting but one transaction.⁸⁶ But it has been held that such recent unexplained possession

⁸² S. v. Williamson, 3 Heisk. (Tenn.) 483; S. v. Lockhart, 24 Ga. 420; Mason v. P., 26 N. Y. 200; P. v. Nelson, 58 Cal. 104; S. v. Buchanan, 75 Miss. 349, 22 So. 875; Portwood v. S., 29 Tex. 47, 94 Am. Dec. 258; White v. S., 1 Tex. App. 211; Wilburn v. S., 41 Tex. 237. But see S. v. Powell, 61 Kan. 81, 58 Pac. 968. *Contra*, Slaughter v. Com., 15 Ky. L. 569, 24 S. W. 622; Linbeck v. S., 1 Wash. 336, 25 Pac. 452.

⁸³ S. v. Mecum, 95 Iowa 433, 64 N. W. 286; Com. v. Doherty, 64 Mass. 52; S. v. Watson, 102 Iowa 651, 72 N. W. 283; S. v. Gay, 25 La. 472; P. v. Burns, 63 Cal. 614. *Contra*, Allen v. S., 18 Tex. App. 120; S. v. Williams, 41 Tex. 98; Bigham v. S., 31 Tex. Cr. 244, 20 S. W. 577.

⁸⁴ Pines v. S., 50 Ala. 153; Winston v. Com., 9 Ky. L. 1004, 7 S. W. 900; Webb v. Com., 87 Ky. 129, 7 S. W. 899; S. v. Whitby, 15 Kan. 402; Fellingner v. P., 15 Abb. Pr. (N. Y.) 128.

⁸⁵ S. v. Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842. See Bryant v. S., 60 Ga. 358. *Contra*, Pressley v. S., 111 Ala. 34, 20 So. 647.

⁸⁶ Magee v. P., 139 Ill. 140, 28 N. E. 1077; Longford v. P., 134 Ill. 444, 25 N. E. 1009; Smith v. P., 115 Ill. 17, 3 N. E. 733; S. v. Frahm, 73 Iowa 355, 35 N. W. 451, 7 Am. C. R. 134; S. v. Wilson, 137 Mo. 592, 39 S. W. 80; S. v. Rivers, 68 Iowa 611, 27 N. W. 781; S. v. Owsley, 111 Mo. 450, 20 S. W. 194; S. v. Moore, 117 Mo. 395, 22 S. W. 1086; S. v.

is only *prima facie* proof of the larceny, and not of the burglary.⁸⁷

§ 735. **Mere possession, not sufficient.**—The failure of the accused to account for property found in his possession, soon after the burglary, is not sufficient to support a conviction without proof that the property was taken from the house broken and entered.⁸⁸

§ 736. **Possession of defendant and wife or others.**—Evidence that the goods stolen by burglary were found in possession of the defendant's wife, is competent on a charge of burglary, if the wife was living with him at the time of the burglary.⁸⁹ Or if the stolen goods were found in possession of a person with whom the defendant had frequently associated both before and after the crime, it is competent to show that fact.⁹⁰ And on the trial of one defendant jointly indicted with others it is competent to show that part of the goods stolen were found in possession of his co-defendants where it appears they were together during the night of the burglary.⁹¹

§ 737. **Possession of defendant, and others.**—The only evidence tending to connect the defendant with the burglary charged was that some of the stolen goods were found in a trunk used jointly by him

La Grange, 94 Iowa 60, 62 N. W. 664; Davis v. S., 76 Ga. 16; Brown v. S., 61 Ga. 311; Harris v. S., 61 Miss. 304; Branson v. Com., 92 Ky. 330, 13 Ky. L. 614, 17 S. W. 1019; Morgan v. S., 25 Tex. App. 513, 8 S. W. 488; Com. v. Frew, 3 Pa. Co. Ct. R. 492; S. v. Ham, 98 Iowa 60, 66 N. W. 1038; Com. v. Millard, 1 Mass. 6; P. v. Wood, 99 Mich. 620, 58 N. W. 638; Mangham v. S., 87 Ga. 549, 13 S. E. 558; S. v. Ray, 79 Iowa 765, 44 N. W. 800; Anderson v. Com., 18 Ky. L. 99, 35 S. W. 542; McKinney v. S. (Tex. Cr.), 29 S. W. 271; Christian v. S. (Tex. Cr.), 21 S. W. 252; Trent v. S., 31 Tex. Cr. 251, 20 S. W. 547; Cox v. Com., 10 Ky. L. 597, 9 S. W. 804; Brooks v. S., 96 Ga. 353, 23 S. E. 413, 10 Am. C. R. 136. *Contra*, Ryan v. S., 83 Wis. 486, 53 N. W. 836; Stuart v. P., 42 Mich. 255, 3 N. W. 863; P. v. Gordon, 40 Mich. 716; P. v. Flynn, 73 Cal. 511, 15 Pac. 102; Gravely v. Com., 86 Va. 396, 10 S. E. 431; Taliaferro v. Com., 77 Va. 411;

Falvey v. S., 85 Ga. 157, 11 S. E. 607; Davis v. P., 1 Park. Cr. (N. Y.) 447; Metz v. S., 46 Neb. 547, 65 N. W. 190; P. v. Hart, 10 Utah 204, 37 Pac. 330; S. v. Hodge, 50 N. H. 510; S. v. Graves, 72 N. C. 482; S. v. Ryan (Iowa), 85 N. W. 813; Underhill Cr. Ev., § 378.

⁸⁷ Porterfield v. Com., 91 Va. 801, 22 S. E. 352; P. v. Frazier, 2 Wheeler Cr. C. (N. Y.) 55; S. v. Shaffer, 59 Iowa 290, 13 N. W. 306.

⁸⁸ King v. S., 99 Ga. 686, 26 S. E. 480; P. v. Gordon, 40 Mich. 716, 3 Am. C. R. 29; S. v. Powell, 61 Kan. 81, 58 Pac. 968; S. v. Dashman, 153 Mo. 454, 55 S. W. 69. See Johnson v. Ter., 5 Okla. 695, 50 Pac. 90.

⁸⁹ Medicus v. S. (Tex. Cr.), 22 S. W. 878.

⁹⁰ Frazier v. S., 135 Ind. 38, 34 N. E. 817.

⁹¹ Branson v. Com., 92 Ky. 330, 13 Ky. L. 614, 17 S. W. 1019; Riding v. S., 40 Tex. Cr. 452, 50 S. W. 698.

and another person, five months after the burglary. Held not sufficient to sustain a conviction.⁹² Property recently stolen by means of burglary, found in the possession of a person jointly with another, without other evidence is not proof of the guilt of such person.⁹³ Or if the stolen goods were found in a room occupied by the defendant and another person, it is not conclusive that the goods were in possession of either of them.⁹⁴ Evidence that some of the goods stolen by burglary were found in the house of a third person is not competent against the defendant, unless it be further shown that the two acted together and that such third person had exclusive possession of the goods so found.⁹⁵

§ 738. Stolen goods admissible.—Goods stolen at the time of a burglary, found in possession of the defendant and identified by the owner, may be admitted in evidence as tending to prove the defendant guilty of the burglary.⁹⁶

§ 739. Possession—Burden on defendant.—If the defendant, soon after the commission of the burglary, was found in possession of the stolen goods, this would cast on him the burden of explaining his possession.⁹⁷

§ 740. Implements, competent.—Tools and implements adapted to the purpose of the burglary or larceny charged, found in possession of the defendant soon after the burglary, may be introduced in evidence.⁹⁸ And where several defendants were together at the time of their arrest shortly after the burglary with which they were charged, evidence that one of them had burglar's tools in his possession when arrested is competent.⁹⁹

⁹² *S. v. Tilton*, 63 Iowa 117, 18 N. W. 716.

⁹³ *S. v. Warford*, 106 Mo. 55, 16 S. W. 886, 27 Am. St. 322.

⁹⁴ *Shropshire v. S.*, 69 Ga. 273. See *Randolph v. S.*, 100 Ala. 139, 14 So. 792; *Sparks v. S.*, 111 Ga. 836, 35 S. E. 684.

⁹⁵ *Jackson v. S.*, 28 Tex. App. 143, 12 S. W. 701; *Jackson v. S.*, 28 Tex. App. 370, 13 S. W. 451.

⁹⁶ *Walker v. S.*, 97 Ala. 85, 12 So. 83; *Cornwall v. S.*, 91 Ga. 277, 18 S. E. 154; *Walker v. Com.*, 28 Gratt. (Va.) 969; *S. v. Harrison*, 66 Vt. 523, 29 Atl. 807, 44 Am. St. 864.

⁹⁷ *Cooper v. S.*, 87 Ala. 135, 6 So. 303; *P. v. Abbott*, 101 Cal. 645, 36 Pac. 129; *P. v. Barry*, 94 Cal. 481, 29 Pac. 1026; *Neal v. S.*, 53 Ala. 465. But see *Cornwall v. S.*, 91 Ga. 277, 18 S. E. 154; *Falvey v. S.*, 85 Ga. 157, 11 S. E. 607.

⁹⁸ *P. v. Hope*, 62 Cal. 291; *S. v. Dubois*, 49 Mo. 573; *Com. v. Williams*, 2 Cush. (Mass.) 582; *P. v. Larned*, 7 N. Y. 445; *Cornwall v. S.*, 91 Ga. 277, 18 S. E. 154. See *Foster v. P.*, 63 N. Y. 619; *Underhill Cr. Ev.*, § 375.

⁹⁹ *S. v. Franks*, 64 Iowa 39, 19 N. W. 832. In the following cases the

§ 741. **Footprints competent.**—Any footprints of man or animal or wagon tracks recently made on or near the premises where the burglary was committed, may be considered as evidence; and the measurements of such tracks as compared with tracks made by the person accused may also be shown in evidence.¹⁰⁰

§ 742. **Value of articles immaterial.**—The ownership of the building entered, the property stolen, the number of articles taken or the value thereof are not essential elements of burglary, and need not be strictly proved as alleged in the indictment.¹

§ 743. **Other offense.**—On a charge of having possession of tools and implements designed and intended by the accused to commit burglary, it is proper to show that he on previous occasions had committed burglary by the use of similar tools, as tending to prove the knowledge and intent alleged in the indictment.²

explanations given by the defendants as to how they came in possession of goods recently stolen by burglary, proved unsatisfactory: *Mooney v. S.*, 2 Wash. 487, 28 Pac. 363; *Lightfoot v. S.* (Tex. Cr.), 24 S. W. 650; *Magee v. P.*, 139 Ill. 138, 28 N. E. 1077; *Thomas v. S.* (Tex. Cr.), 22 S. W. 144; *Fletcher v. S.*, 93 Ga. 180, 18 S. E. 555; *Wynn v. S.*, 81 Ga. 744, 7 S. E. 689; *Payne v. S.*, 21 Tex. App. 184, 17 S. W. 463. *Contra*, *Morgan v. S.*, 25 Tex. App. 498, 8 S. W. 488; *Field v. S.*, 24 Tex. App. 422, 6 S. W. 200. See the following cases where the fruits of the burglary were traced to the defendants by circumstantial evidence of sufficient weight to sustain convictions: *Murks v. S.*, 92 Ga. 449, 17 S. E. 266; *Wright v. S.*, 91 Ga. 80, 16 S. E. 259; *Wilerson v. S.*, 73 Ga. 799; *Wilson v. S.*, 55 Ga. 324; *Boswell v. S.*, 92 Ga. 581, 17 S. E. 805; *Gaines v. S.*, 89 Ga. 366, 15 S. E. 477; *S. v. Harrison*, 66 Vt. 523, 29 Atl. 807; *S. v. Bryant*, 134 Mo. 246, 35 S. W. 597; *P. v. Hagan*, 60 Hun 577, 14 N. Y. Supp. 233; *P. v. Burns*, 67 Mich. 537, 35 N. W. 154; *Cummins v. P.*, 42 Mich. 142, 3 N. W. 305; *S. v. Jones*, 19 Nev. 365, 11 Pac. 317; *Wright v. Com.*, 82 Va. 183; *Johnson v. Com.*, 12 Ky. L. 873, 15 S. W. 671; *Eubanks v. S.*,

82 Ga. 62, 9 S. E. 424; *P. v. Jochinsky*, 106 Cal. 638, 39 Pac. 1077; *Dawson v. S.*, 65 Ind. 442; *P. v. Wood*, 99 Mich. 620, 58 N. W. 638; *Murphy v. S.*, 86 Wis. 626, 57 N. W. 361 (conspiracy); *Jackson v. S.*, 28 Tex. App. 370, 13 S. W. 451 (conspiracy); *Knickerbocker v. P.*, 43 N. Y. 177; *S. v. Babb*, 76 Mo. 501; *Langford v. S.*, 17 Tex. App. 445; *P. v. Arthur*, 93 Cal. 536, 29 Pac. 126; *Dodd v. S.*, 33 Ark. 517; *Miller v. S.*, 91 Ga. 186, 16 S. E. 985; *Harris v. S.*, 84 Ga. 269, 10 S. E. 742; *P. v. Getty*, 49 Cal. 581; *Matthews v. S.*, 86 Ga. 782, 804, 13 S. E. 16; *Frank v. S.*, 39 Miss. 705.

¹⁰⁰ *Miller v. S.*, 91 Ga. 186, 16 S. E. 985; *Harris v. S.*, 84 Ga. 269, 10 S. E. 742; *Cooper v. S.*, 88 Ala. 107, 7 So. 47; *Bryan v. S.*, 74 Ga. 393; *Collins v. Com.*, 15 Ky. L. 691, 25 S. W. 743.

¹ *Underhill Cr. Ev.*, § 373, citing *S. v. Porter*, 97 Iowa 450, 66 N. W. 745; *S. v. Lee*, 95 Iowa 427, 64 N. W. 284; *S. v. Hutchinson*, 111 Mo. 257, 20 S. W. 34; *S. v. Tyrrell*, 98 Mo. 354, 11 S. W. 734; *Johnson v. Com.*, 87 Ky. 189, 10 Ky. L. 100, 7 S. W. 927; *Farley v. S.*, 127 Ind. 419, 26 N. E. 898.

² *Com. v. Day*, 138 Mass. 186. See *P. v. Howard*, 73 Mich. 10, 40 N. W. 789; *Underhill Cr. Ev.*, § 376, citing

§ 744. **Proof of intent.**—On a charge of breaking and entering a dwelling-house with intent to commit larceny, such intent must be proved.³ And such intent may be proved by showing that the defendant at the same time committed a felony in an adjoining building.⁴ The particular intent alleged in the indictment on a burglary charge must be proved as alleged: as, if the intent alleged be to steal the goods of a person named, the proof must show that such person was the owner of the goods.⁵

§ 745. **Value, as description.**—The value of the property stolen from the premises entered by burglars may be shown, though not alleged in the indictment, as being material description of the property.⁶ And where the value of the property is unnecessarily alleged, it must be proven.⁷

§ 746. **Other goods, competent.**—Other goods than those alleged in the indictment may be shown to have been taken at the time of the

Dawson v. S., 32 Tex. Cr. 535, 25 S. W. 21; *Marshall v. S.* (Tex. Cr.), 22 S. W. 878; *Frazier v. S.*, 135 Ind. 38, 34 N. E. 817; *S. v. Robinson*, 35 S. C. 340, 14 S. E. 766; *S. v. Weldon*, 39 S. C. 318, 17 S. E. 688.

³ *Ashford v. S.*, 36 Neb. 38, 53 N. W. 1036. See *S. v. Cowell*, 12 Nev. 337; *Underhill Cr. Ev.*, § 377; *S. v. Crawford*, 8 N. Dak. 539, 80 N. W. 193.

⁴ *Osborne v. P.*, 2 Park. Cr. (N. Y.) 583; *Underhill Cr. Ev.*, § 376.

⁵ *Neubrandt v. S.*, 53 Wis. 89, 9 N. W. 824; *S. v. Carroll*, 13 Mont. 246, 33 Pac. 688; *Allen v. S.*, 18 Tex. App. 120. See *Berry v. S.*, 92 Ga. 47, 17 S. E. 1006; *S. v. Meche*, 42 La. 273, 7 So. 573. *Contra*, *Mulrooney v. S.*, 26 Ohio St. 326. The evidence in the following cases sufficiently proves the intent to sustain convictions: 1—Intent to commit larceny: *S. v. Anderson*, 5 Wash. 350, 31 Pac. 969; *Clifton v. S.*, 26 Fla. 523, 7 So. 863; *P. v. Soto*, 53 Cal. 415; *S. v. McBryde*, 97 N. C. 393, 1 S. E. 925; *P. v. Curley*, 99 Mich. 238, 58 N. W. 68; *Hill v. Com.*, 12 Ky. L. 914, 15 S. W. 870; *Mullens v. S.*, 35 Tex. Cr. 149, 32 S. W. 691; *P. v. Calvert*, 67 Hun 649, 22 N. Y. Supp. 220; *P. v. Morton*, 4 Utah 407,

11 Pac. 512. 2—Intent to commit rape: *Ford v. S.* (Tex. Cr. App., 1899), 54 S. W. 761; *S. v. Powell*, 94 N. C. 965; *Harvey v. S.*, 53 Ark. 425, 14 S. W. 645. 3—Intent sufficiently inferred; *Alexander v. S.*, 31 Tex. Cr. 359, 20 S. W. 756; *Steadman v. S.*, 81 Ga. 736, 8 S. E. 420; *Franco v. S.*, 42 Tex. 276; *S. v. Fox*, 80 Iowa 312, 45 N. W. 874, 20 Am. St. 425; *Burrows v. S.*, 84 Ind. 529. The evidence in the following cases held not sufficient to prove the intent alleged: 1—Intent to commit larceny: *Price v. P.*, 109 Ill. 109; *S. v. Shores*, 31 W. Va. 491, 7 S. E. 413, 13 Am. St. 875. 2—Intent to commit rape: *Mitchell v. S.*, 32 Tex. Cr. 479, 24 S. W. 280; *Mitchell v. S.*, 33 Tex. Cr. 575, 28 S. W. 475; *Hamilton v. S.*, 11 Tex. App. 116; *Coleman v. S.*, 26 Tex. App. 252, 9 S. W. 609; *Davis v. S.*, 22 Fla. 633.

⁶ *Tarver v. S.*, 95 Ga. 222, 21 S. E. 381; *Franks v. S.* (Tex. Cr., 1898), 45 S. W. 1013.

⁷ *Gilmore v. S.*, 99 Ala. 154, 13 So. 536. *Contra*, *Duncan v. Com.*, 85 Ky. 614, 4 S. W. 321; *Brown v. S.*, 72 Miss. 990, 18 So. 431. See *Bergeron v. S.*, 53 Neb. 752, 74 N. W. 253.

burglary, though belonging to different persons.⁸ And it may be shown that such other goods were found in possession of the defendant, on the trial of a burglary charge.⁹

§ 747. Identifying goods.—Goods alleged to have been stolen by burglary may be identified by means of labels or tabs attached to them, and by evidence that the goods found in possession of the defendant were of the same quality as the goods which were stolen from the owner.¹⁰ And articles of property brought from the store in which larceny was committed, similar to the goods found in the defendant's house, are competent evidence as tending to identify the goods alleged to have been stolen.¹¹

§ 748. Testimony incredible.—The jury were fully justified in disbelieving the evidence of both the defendant and his witness, as to

⁸ *Lega v. S.*, 36 Tex. Cr. 38, 34 S. W. 926, 35 S. W. 381; *Foster v. P.*, 63 N. Y. 619, 3 Hun 6; *S. v. Wrand*, 108 Iowa 73, 78 N. W. 788.

⁹ *Neubrandt v. S.*, 53 Wis. 89, 9 N. W. 824. See *In re Hall*, 3 Gratt. (Va.) 593. The evidence in the following cases was held sufficient as identifying the defendants: *Seling v. S.*, 18 Neb. 548, 26 N. W. 254; *Spahn v. P.*, 137 Ill. 538, 27 N. E. 688; *S. v. Turner*, 110 Mo. 196, 19 S. W. 645; *Matthews v. S.*, 86 Ga. 782, 804, 13 S. E. 16; *Steadman v. S.*, 81 Ga. 736, 8 S. E. 420. See *P. v. Noonan*, 60 Hun 578, 14 N. Y. Supp. 519. But not sufficient in the following: *Kelly v. S.* (Tex. Cr.), 22 S. W. 588; *Coleman v. S.*, 26 Tex. App. 252, 9 S. W. 609.

¹⁰ *P. v. Wood*, 99 Mich. 620, 58 N. W. 638; *Cole v. P.*, 37 Mich. 544; *Woodruff v. S.* (Tex. Cr.), 20 S. W. 573.

¹¹ *P. v. Van Dam*, 107 Mich. 425, 65 N. W. 277. But see *Crane v. S.*, 111 Ala. 45, 20 So. 590. The evidence in the following cases sufficiently proved the identity of the stolen goods: *Gravely v. Com.*, 86 Va. 396, 10 S. E. 431; *Langford v. P.*, 134 Ill. 444, 25 N. E. 1009; *Branson v. Com.*, 92 Ky. 330, 17 S. W. 1019, 13 Ky. L. 614. But not sufficient in the following: *Green v. S.* (Tex. Cr.), 31

S. W. 386. The evidence in the following cases sufficiently proves a "breaking and entering": *Williams v. S.* (Tex. App.), 13 S. W. 609; *P. v. Curley*, 99 Mich. 238, 58 N. W. 68; *Painter v. S.*, 26 Tex. App. 454, 9 S. W. 774; *Prescott v. S.* (Miss.), 18 So. 683; *P. v. Robinson*, 86 Mich. 415, 49 N. W. 260; *P. v. Block*, 60 Hun 583, 15 N. Y. Supp. 229; *Foster v. P.*, 63 N. Y. 619; *S. v. Kenney*, 101 Mo. 160, 14 S. W. 187; *Seling v. S.*, 18 Neb. 548, 26 N. W. 254; *S. v. Warford*, 106 Mo. 55, 16 S. W. 886, 27 Am. St. 322; *S. v. Johnson*, 33 Minn. 34, 21 N. W. 843; *Com. v. Merrill*, 1 Thatcher Cr. Cas. (Mass.) 1. But not sufficient in the following cases: *Jones v. S.*, 25 Tex. App. 226, 7 S. W. 669; *Fisher v. S.*, 93 Ga. 309, 20 S. E. 329; *Williams v. S.*, 52 Ga. 580. The evidence in the following cases sustains night-time burglary: *S. v. McKnight*, 111 N. C. 690, 16 S. E. 319; *P. v. Getty*, 49 Cal. 581; *Williams v. S.*, 60 Ga. 445; *P. v. Griffin*, 19 Cal. 578; *Brown v. S.*, 59 Ga. 456; *Houser v. S.*, 58 Ga. 78; *P. v. Tracy*, 121 Mich. 318, 80 N. W. 21. But not sustained in the following: *Ashford v. S.*, 36 Neb. 38, 53 N. W. 1036. Held day-time burglary in the following: *P. v. Taylor*, 93 Mich. 638, 53 N. W. 777.

the purchase of the watch. They contradict each other as to the amount paid for it. Neither of them pretends to give a description of the person from whom it was purchased. The evidence of the defendant that he bought a watch of the description of the one in question for the insignificant price of one dollar is unreasonable.¹²

§ 749. Evidence insufficient.—The defendant had visited a saloon on one Sunday about ten o'clock, in the month of May, to get whisky, the entrance being by the back door. He went back about half an hour afterwards and was seen leaning through the top of the window, his body being half way over. He was asked what he was doing. He said he wanted whisky. He said further he thought there were persons in the saloon, but they did not want to let him in: Held not sufficient to establish attempt to commit burglary.¹³

§ 750. Waybills, as to shipping.—Waybills and entries of receiving clerks made in checking up the contents of a car are competent as original evidence on the trial of a burglary charge.¹⁴

§ 751. Variance, as to description.—A variance between the description of the property alleged to have been taken at the time of the burglary, and that shown by the evidence, is not material on a conviction of the charge of burglary.¹⁵

¹² Magee v. P., 139 Ill. 140, 28 N. E. 1077; Wynn v. S., 81 Ga. 744, 7 S. E. 689; Gravely v. Com., 86 Va. 396, 10 S. E. 431.

¹³ Feister v. P., 125 Ill. 349, 17 N. E. 748. The evidence in the following cases was held sufficient to sustain convictions: S. v. Munson, 7 Wash. 239, 34 Pac. 932; P. v. Winters, 93 Cal. 277, 28 Pac. 946; Ter. v. Booth (Ariz.), 36 Pac. 38; S. v. Cash, 38 Kan. 50, 16 Pac. 144; S. v. Christmas, 101 N. C. 749, 8 S. E. 361; Hackett v. S., 89 Ga. 418, 15 S. E. 532; Burks v. S., 92 Ga. 461, 17 S. E. 619; S. v. Turner, 106 Mo. 272, 17 S. W. 304; Boyer v. Com., 14 Ky. L. 167, 19 S. W. 845; Gregory v. S., 80 Ga. 269, 7 S. E. 222; S. v. Fox, 80 Iowa 312, 45 N. W. 874, 20 Am. St. 425; P. v. Hogan (Mich., 1900), 81 N. W. 1096; Hunt v. S., 103 Wis. 559, 79 N. W. 751; Glover v. S. (Tex. Cr., 1898), 46 S. W. 824; S. v. Marshall, 105 Iowa 38, 74 N. W. 763; P. v. Lyons, 51 N. Y. Supp. 811, 29 App.

Div. 174; P. v. Sears, 119 Cal. 267, 51 Pac. 325; Richardson v. S. (Tex. Cr.), 42 S. W. 996; Favro v. S., 39 Tex. Cr. 452, 46 S. W. 932; Grimshaw v. S., 98 Wis. 612, 74 N. W. 375; S. v. Coates, 22 Wash. 601, 61 Pac. 726. But not sufficient in the following cases: Hite v. Com., 88 Va. 882, 14 S. E. 696; Tarpe v. S., 95 Ga. 457, 20 S. E. 217; Munson v. S., 34 Tex. Cr. 498, 31 S. W. 387; Wright v. S., 21 Neb. 496, 32 N. W. 576; Prather v. Com., 85 Va. 122, 7 S. E. 178; Johnson v. Com., 29 Gratt. (Va.) 796; Swan v. Com., 104 Pa. St. 218; James v. S., 77 Miss. 370, 26 So. 929 (corporation); Bundick v. Com., 97 Va. 783, 34 S. E. 454; Porter v. S. (Tex. Cr., 1899), 50 S. W. 380; P. v. Cronk, 58 N. Y. Supp. 13, 40 App. Div. 206.

¹⁴ Dawson v. S., 32 Tex. Cr. 535, 25 S. W. 21, 40 Am. St. 791.

¹⁵ S. v. Dale, 141 Mo. 284, 42 S. W. 722.

§ 752. **Variance—Force or fraud.**—An allegation of burglary by force will not be supported by evidence of threats or fraud. If force be alleged, the evidence must show entry by force.¹⁶

§ 753. **Variance—Larceny or robbery.**—A charge of burglary with intent to commit larceny will be sustained though the proof shows the intent was to commit robbery.¹⁷ On an indictment alleging burglary with intent to commit grand and petit larceny, the intent to commit both grand and petit larceny need not be proved.¹⁸

§ 754. **Variance—Location, “ginhouse” or “storehouse.”**—Proof of a three-story building will support an allegation of a two-story building.¹⁹ Proof of the location of the house at one place in the county will not support an indictment alleging the house to be at a different place in the county.²⁰ Proof of the burglary of a ginhouse will not sustain an allegation of breaking and entering a storehouse, the ginhouse being located some distance from the storehouse.²¹

§ 755. **Variance—Ownership.**—An indictment alleging the ownership of the goods in question to be in two persons jointly will not be supported by proof that part of the goods were owned by one person and part by another.²² Where the property stolen was owned by two persons jointly, proof that it was taken without the consent of one of the owners will sustain a conviction in the absence of any evidence that the defendant procured the consent of the other. The burden is on the defendant to show this fact.²³

§ 756. **Variance—Day or night.**—Proof of a burglary in the day time will not support the allegation of burglary in the night time—they being different offenses under the statute.²⁴ And it seems that

¹⁶ *Buntain v. S.*, 15 Tex. App. 484; *Finlan v. S.* (Tex. App.), 13 S. W. 866; *Ross v. S.*, 16 Tex. App. 554. See *S. v. Huntley*, 25 Or. 349, 35 Pac. 1065.

¹⁷ *S. v. Halford*, 104 N. C. 874, 10 S. E. 524; *P. v. Crowley*, 100 Cal. 478, 35 Pac. 84. See *S. v. Kepper*, 65 Iowa 745, 23 N. W. 304. *Contra*, *Miller v. S.*, 28 Tex. App. 445, 13 S. W. 646.

¹⁸ *P. v. Hall*, 94 Cal. 595, 30 Pac. 7.

¹⁹ *S. v. Porter*, 97 Iowa 450, 66 N. W. 745.

²⁰ *S. v. Kelley*, 66 N. H. 577, 29 Atl. 843. Compare *S. v. Buechler*, 57 Ohio St. 95, 48 N. E. 507.

²¹ *Givens v. S.*, 40 Fla. 200, 23 So. 850.

²² *S. v. Ellison*, 58 N. H. 325. See *Henderson v. Com.* (Va., 1900), 34 S. E. 881. Compare *Kidd v. S.*, 101 Ga. 528, 28 S. E. 990.

²³ *Payne v. S.*, 40 Tex. Cr. 290, 50 S. W. 363.

²⁴ *Bromley v. P.*, 150 Ill. 297, 37 N. E. 209; 10 Am. & Eng. Ency. L., p. 562; *Guynes v. S.*, 25 Tex. App. 584,

an indictment charging burglary without alleging that it was committed either in the day time or night time will support the proof of a day time burglary, but not night time.²⁶

§ 757. **Day or night uncertain.**—Where the evidence leaves the time in which the offense was committed exactly balanced between day and night, that is, that it was committed within the period of about forty or forty-five minutes, one-half of which was day and one-half was night, the defendant should have the benefit of the doubt necessarily arising, and the conviction should not be for the highest grade.²⁷

§ 758. **Variance—Breaking into or out.**—A statute provides that “if any person shall enter the dwelling-house of another with intent to commit a felony, or being in such house, shall commit any felony, and shall in either case break out of the said house in the night time, such person shall be deemed guilty of burglary.”^{27a} It is clear under this statute that an allegation that defendant did “break out” will not support evidence of “breaking into” the house.²⁸

§ 759. **Variance as to name.**—The information charged the burglary of the house of William Drake “and the proof was the Drake House,” a “house kept by Mr. Drake” and “Mr. Drake lives there.” Held a variance.²⁹

§ 760. **Verdict, included offense.**—If the indictment fails to allege all of the essential elements warranting the severer penalty, then the

8 S. W. 667; *Waters v. S.*, 53 Ga. 567. See *Com. v. Glover*, 111 Mass. 395; *Hall v. P.*, 43 Mich. 417, 5 N. W. 449; *S. v. Anselm*, 43 La. 195, 8 So. 583.

²⁶ *Schwabacher v. P.*, 165 Ill. 624, 46 N. E. 809; *Bromley v. P.*, 150 Ill. 297, 37 N. E. 209. See *P. v. Barnhart*, 59 Cal. 381; *Summers v. S.*, 9 Tex. App. 396; *Bravo v. S.*, 20 Tex. App. 188; *Nicholls v. S.*, 68 Wis. 416, 32 N. W. 543, 7 Am. C. R. 108; *Com. v. Reynolds*, 122 Mass. 454; *Butler v. P.*, 4 Denio 68; *S. v. Robertson*, 32 Tex. 159; *Com. v. Carson*, 166 Pa. St. 179, 30 Atl. 985; *S. v. Miller*,

3 Wash. 131, 28 Pac. 375; *S. v. Hutchinson*, 111 Mo. 257, 20 S. W. 34; *Hall v. P.*, 43 Mich. 417, 5 N. W. 449. See also *Wilks v. S.* (Tex. Cr., 1899), 51 S. W. 902.

²⁷ *Waters v. S.*, 53 Ga. 567, 1 Am. C. R. 367. See *Jones v. S.*, 63 Ga. 141; *S. v. Frahm*, 73 Iowa 355, 35 N. W. 451; *S. v. Jordan*, 87 Iowa 86, 54 N. W. 63.

^{27a} Stat. 8 Geo. IV.

²⁸ *S. v. McPherson*, 70 N. C. 239, 2 Green C. R. 738.

²⁹ *Jackson v. S.*, 55 Wis. 589, 13 N. W. 448.

lesser penalty may be inflicted if the indictment sufficiently charges the lesser offense.³⁰

§ 761. **Burglary and larceny—Penalty.**—On a charge of burglary and larceny in the same count of the indictment, there can not be a conviction of both followed by a separate penalty for each; but if there is a general verdict of guilty on such count, it is deemed a conviction of the burglary only, and not for the larceny.³¹

§ 762. **Jeopardy—Burglary or larceny.**—An acquittal on a charge of burglary is a bar to another indictment for larceny committed at the same time of the burglary, constituting but one transaction.³² But it has been held that a conviction for larceny committed at the same time a burglary was committed is not a bar to a subsequent prosecution for the burglary.³³

³⁰ *Bromley v. P.*, 150 Ill. 297, 37 N. E. 209; *Harris v. P.*, 44 Mich. 305, 6 N. W. 677.

³¹ *S. v. McClung*, 35 W. Va. 284, 13 S. E. 654; 1 *Hale P. C.* 559; *Yarborough v. S.*, 86 Ga. 396, 12 S. E. 450.

³² *Triplett v. Com.*, 84 Ky. 193, 8 Ky. L. 67, 1 S. W. 84; *Miller v. S.*, 16 Tex. App. 417, 5 Am. C. R. 94.

³³ *S. v. Martin*, 76 Mo. 337, 4 Am. C. R. 87; *Wilson v. S.*, 24 Conn. 57; *Com. v. Roby*, 12 Pick. (Mass.) 496.

CHAPTER XII.

ROBBERY.

ART.	I. Definition and Elements,	§§ 763-769
	II. Matters of Defense,	§§ 770-773
	III. Indictment,	§§ 774-782
	IV. Evidence,	§§ 783-793

ARTICLE I. DEFINITION AND ELEMENTS.

§ 763. **Definition.**—Robbery is the felonious and forcible taking from the person of another his goods or money, to any value, by violence or putting him in fear.¹ The gist of the offense is the force or intimidation, and taking from the person, against his will, a thing of value belonging to the person assaulted, and such force or violence must be immediate to the person.²

§ 764. **Defendant's possession essential.**—The crime is not complete unless the goods were actually in the possession of the accused. To illustrate: Where the accused, while in a struggle with the prosecutor, cut from his girdle his purse, which fell to the ground without

¹ 4 Bl. Com. 242; 1 Hale P. C. 532; 3 Greenl. Ev., § 223; 2 Bish. Cr. L., § 1156; 2 East P. C. 707; P. v. Anderson, 80 Cal. 205, 22 Pac. 139; Underhill Cr. Ev., § 358, citing Routt v. S., 61 Ark. 594, 34 S. W. 262; P. v. Church, 116 Cal. 300, 48 Pac. 125; Pickrel v. Com., 17 Ky. L. 120, 30 S. W. 617; P. v. McGinty, 24 Hun (N. Y.) 62; Johnson v. S., 35 Tex. Cr. 140, 32 S. W. 537; Doyle v. S., 77 Ga. 513. See Snyder v. Com., 21 Ky. L. 1538, 55 S. W. 679.

² Burke v. P., 148 Ill. 74, 35 N. E. 376; S. v. Jenkins, 36 Mo. 372; Craw-

ford v. S., 90 Ga. 701, 9 Am. C. R. 589, 17 S. E. 628; Hanson v. S., 43 Ohio St. 376, 1 N. E. 136, 5 Am. C. R. 626; Fanning v. S., 66 Ga. 167, 4 Am. C. R. 561; Shinn v. S., 64 Ind. 13, 3 Am. C. R. 398, 31 Am. R. 110; Hall v. P., 171 Ill. 542, 49 N. E. 495; Collins v. P., 39 Ill. 233; S. v. Nicholson, 124 N. C. 820, 32 S. E. 813; Young v. S., 50 Ark. 501, 8 S. W. 828; Brennon v. S., 25 Ind. 403; S. v. Miller, 83 Iowa 291, 49 N. W. 90; Thomas v. S., 91 Ala. 34, 9 So. 81. See 4 Bl. Com. 243.

coming into custody of the accused, it is not robbery.³ Where the property taken was attached to one's person or clothing, requiring force to detach it, such taking is robbery.⁴

§ 765. Taken without violence.—Where it appeared that the property was taken without any sensible or material violence to the person, it is merely larceny from the person, and not robbery.⁵ If a thief by the use of any means puts a man in fear, causing a reasonable apprehension of danger to his person or property, and while such fear exists takes his property, it is robbery, though no force or violence be used.⁶

§ 766. Taken in presence of owner.—It is not necessary in a case of robbery to prove that the property was actually taken from the person of the owner: it is sufficient if it is taken in his presence.⁷

§ 767. Ownership immaterial.—It is not necessary that the property should belong to the person from whose possession it was forcibly taken. But it must belong to some person other than the defendant.⁸

§ 768. Larceny included.—Larceny is included in the charge of robbery, and if the defendant be convicted of the larceny, the value

³ 3 Greenl. Ev., § 225; 1 McClain Cr. L., § 471, citing *Rex v. Farrel*, 2 East P. C. 557. See 1 Hale P. C. 533; *James v. S.*, 53 Ala. 380.

⁴ *S. v. Carr*, 43 Iowa 418; *S. v. Broderick*, 59 Mo. 318; *S. v. McCune*, 5 R. I. 60; *Evans v. S.*, 80 Ala. 4; *Rex v. Lapier*, 1 Leach 360. See *P. v. Church*, 116 Cal. 300, 48 Pac. 125; *McDow v. S.*, 110 Ga. 293, 34 S. E. 1019. The gist of the offense is not an assault but an assault made willfully: *Axhelm v. U. S.*, 9 Okla. 321, 60 Pac. 98.

⁵ 3 Greenl. Ev., § 229; *Hall v. P.*, 171 Ill. 542, 49 N. E. 495; *Spencer v. S.*, 106 Ga. 692, 32 S. E. 849; *Fanning v. S.*, 66 Ga. 167; *Johnson v. S.*, 35 Tex. Cr. 140, 32 S. W. 537; *Davis v. Com.*, 21 Ky. L. 1295, 54 S. W. 959. See *Duffy v. S.*, 154 Ind. 250, 56 N. E. 209; *Simmons v. S.* (Fla., 1899), 25 So. 881.

⁶ *S. v. Carr*, 43 Iowa 418. See *S. v. Kennedy*, 154 Mo. 268, 55 S. W. 293; *McCormick v. S.*, 26 Tex. App.

678, 9 S. W. 277; *Williams v. S.* (Tex. Cr., 1900), 55 S. W. 500; *Long v. S.*, 12 Ga. 293; *S. v. Nicholson*, 124 N. C. 820, 32 S. E. 813; *Britt v. S.*, 7 Humph. (Tenn.) 45; 1 Hale P. C. 532; *Reg. v. Cracknell*, 10 Cox C. C. 408. Threatening to accuse of crime: See *Long v. S.*, 12 Ga. 293; 2 East P. C. 715; *Rex v. Hickman*, 1 Leach 310; *Britt v. S.*, 7 Humph. (Tenn.) 45.

⁷ *S. v. Jenkins*, 36 Mo. 372; *Hill v. S.*, 42 Neb. 503, 60 N. W. 916; *S. v. Calhoun*, 72 Iowa 432, 34 N. W. 194; 3 Greenl. Ev., § 228; *Crawford v. S.*, 90 Ga. 701, 17 S. E. 628; *Clements v. S.*, 84 Ga. 660, 11 S. E. 505, 8 Am. C. R. 692; 2 Bish. Cr. L. (8th ed.), § 1178; *Turner v. S.*, 1 Ohio St. 422; 1 McClain Cr. L., § 474; *Clary v. S.*, 33 Ark. 561; 1 Hale P. C. 533; *Rex v. Selway*, 8 Cox C. C. 235.

⁸ *P. v. Vice*, 21 Cal. 344; *S. v. Gorham*, 55 N. H. 152; *Smedly v. S.*, 30 Tex. 215.

of the property must be stated in the verdict to determine whether it is grand or petit larceny.⁹ The defendant was indicted and tried for robbery in the first degree, and was convicted of robbery in the second degree, and the jury was discharged. As there was no degree in the crime charged in the indictment, the verdict was erroneous and not responsive to any issue presented, and was therefore set aside by the court, of its own motion. Grand larceny is included in robbery; and the defendant having been acquitted of robbery in the first degree, was also acquitted of grand larceny.¹⁰

§ 769. **Assault and battery included.**—An indictment for assault with intent to rob will support a conviction for an assault and battery, and it is error to refuse to so charge the jury by instructions.¹¹

ARTICLE II. MATTERS OF DEFENSE.

§ 770. **Taking by trick not robbery.**—The taking of property fraudulently by means of some trick, without the use of any force or violence, is not robbery. There must be some force used to make the taking robbery.¹²

§ 771. **Taking one's own forcibly.**—Where the defendant lost his money at unlawful gaming and he compels the winner to return it by pointing a pistol at him, he will not be guilty of robbery.¹³

§ 772. **Obtaining by threats.**—Threatening to prosecute an innocent man for any crime whatever (except only the *crimen innotatum*), and by the fear arising from such threat to compel the surrender of money or property, does not amount to robbery.¹⁴

⁹ *Burke v. P.*, 148 Ill. 74, 35 N. E. 376; *S. v. Halford*, 104 N. C. 874, 10 S. E. 524; *S. v. Brown*, 113 N. C. 645, 18 S. E. 51; *Haley v. S.*, 49 Ark. 147, 7 Am. C. R. 330, 4 S. W. 746; *P. v. Nelson*, 56 Cal. 77; *Matthews v. S.*, 4 Ohio St. 539; *S. v. Graff*, 66 Iowa 482, 24 N. W. 6; *P. v. Kennedy*, 57 Hun (N. Y.) 532, 11 N. Y. Supp. 244. See *Com. v. Shutte*, 130 Pa. St. 272, 18 Atl. 635; *S. v. Stanley*, 109 Iowa 142, 80 N. W. 228.

¹⁰ *S. v. Brannon*, 55 Mo. 63, 2 Green C. R. 608; *P. v. McGowan*, 17 Wend. (N. Y.) 386.

¹¹ *Hanson v. S.*, 43 Ohio St. 376, 1 N. E. 136, 5 Am. C. R. 626.

¹² *Shinn v. S.*, 64 Ind. 13, 31 Am. R. 110; *S. v. Deal*, 64 N. C. 270; *Bussey v. S.*, 71 Ga. 100; *Bonsall v. S.*, 35 Ind. 460; 2 East P. C. 792.

¹³ *Sikes v. Com.*, 17 Ky. L. 1353, 34 S. W. 902; *S. v. Hollyway*, 41 Iowa 200; *Brown v. S.*, 28 Ark. 126. *Contra*, *Carroll v. S.* (Tex. Cr.), 57 S. W. 99.

¹⁴ *Britt v. S.*, 7 Humph. (Tenn.) 45; *P. v. McDaniels*, 1 Park. Cr. (N. Y.) 198; *Long v. S.*, 12 Ga. 293; *Houston v. Com.*, 87 Va. 257, 12 S. E. 385. See 3 Greenl. Ev., § 235.

§ 773. **Wife—When guilty.**—If the wife voluntarily assists her husband in committing a robbery, she will be guilty with him. But if she acts under his coercion, and not voluntarily, she will not be guilty.¹⁵

ARTICLE III. INDICTMENT.

§ 774. **"Force or intimidation" essential.**—"By force or intimidation" is an essential element of the crime of robbery, as defined by the statute of Illinois, and must be averred in the indictment.¹⁶ An indictment alleged that the defendant "did make an assault" and put in bodily fear and danger of his life, and did then and there feloniously and violently seize, take and carry away ten dollars from the prosecuting witness. Held sufficient allegation of force.¹⁷

§ 775. **Description of property.**—The indictment should describe the property taken by robbery substantially the same as in larceny.¹⁸ An information describing the money as "twenty-five dollars in money, the property of John Bond," without any excuse for not giving a better description, is fatally defective.¹⁹ An indictment describing the property taken as "certain money and one silver watch and watch chain," is sufficient.²⁰

§ 776. **Allegation of ownership—Value.**—The indictment must allege that the property taken belonged to some person other than the defendant.²¹ The indictment for robbery need not contain an averment of the value of the property taken from the person of the owner.²²

¹⁵ *P. v. Wright*, 38 Mich. 744, 31 Am. R. 331; *Miller v. S.*, 25 Wis. 384.

¹⁶ *Collins v. P.*, 39 Ill. 238; *Houston v. Com.*, 87 Va. 257, 12 S. E. 385. See *Clary v. S.*, 33 Ark. 561; *S. v. Brewer*, 53 Iowa 735, 6 N. W. 62; *Kimble v. S.*, 12 Tex. App. 420. ¹⁷ *S. v. Brown*, 113 N. C. 645, 18 S. E. 51.

¹⁸ *McEntee v. S.*, 24 Wis. 43; *Brennon v. S.*, 25 Ind. 403; *P. v. Riley*, 75 Cal. 98, 16 Pac. 544.

¹⁹ *S. v. Segermond*, 40 Kan. 107, 19 Pac. 370. See *S. v. Stewart*, 1 Pen. (Del.) 433, 42 Atl. 624; *Colter v. S.* (Tex. Cr.), 39 S. W. 576; *Owens v. S.*, 104 Ala. 18, 16 So. 575; *S. v.*

Ready, 44 Kan. 697, 700, 26 Pac. 58.

²⁰ *S. v. Perley*, 86 Me. 427, 30 Atl. 74, 9 Am. C. R. 504; *Brown v. S.* (Ala., 1899), 25 So. 182; *Colter v. S.*, 37 Tex. Cr. 284, 39 S. W. 576.

²¹ *P. v. Vice*, 21 Cal. 344; *Brooks v. P.*, 49 N. Y. 436, 10 Am. R. 398; *Com. v. Clifford*, 8 Cush. (Mass.) 215; *Higgins v. S.* (Tex. App.), 19 S. W. 503; *P. v. Ammerman*, 118 Cal. 23, 50 Pac. 15; *Boles v. S.*, 58 Ark. 35, 22 S. W. 887. But see *S. v. Swafford*, 3 Lea (Tenn.) 162.

²² *S. v. Perley*, 86 Me. 427, 9 Am. C. R. 508, 30 Atl. 74; *S. v. Howerton*, 58 Mo. 581; *S. v. Burke*, 73 N. C. 83; *Williams v. S.*, 10 Tex. App. 8; 1 McClain Cr. Law, § 481.

§ 777. **Allegation of possession.**—An information alleging the taking of money “from the person and immediate presence of” the person alleged to have been robbed, sufficiently states that the money was in his possession when taken by the accused.²³

§ 778. **“Against will,” immaterial.**—The indictment need not allege that the property was taken “against the will” of the person from whom it was taken, if it is otherwise correct.²⁴

§ 779. **Indictment sufficient.**—An indictment alleging that the defendant made an assault upon the prosecuting witness, and with force and violence unlawfully and feloniously did steal, take and carry away from the person named, four twenty-dollar bills, etc., is sufficient.²⁵ Robbery is defined as the “taking of the property of another from his person or in his presence against his will, by force or by putting him in bodily fear.” An indictment alleging that a robbery was committed by force and violence, without charging that the person robbed was put in fear of bodily injury, is sufficient.²⁶

§ 780. **Allegation as to weapons.**—The indictment need not allege that the pistol was loaded, nor that an assault was made with it, under a charge of robbery. It is sufficient to state that the defendant was armed “with a dangerous weapon with intent if resisted to kill or maim” the person robbed.²⁷

§ 781. **Indictment sufficient—Second degree.**—An indictment alleging that the defendant “did then and there unlawfully take from the person of the prosecutor against his will, by means of force and violence, one dollar and fifty cents, the property of the person named,” is sufficient averment of robbery in the second degree.²⁸

²³ P. v. Walbridge, 123 Cal. 273, 55 Pac. 902. See Breckinridge v. Com., 97 Ky. 267, 17 Ky. L. 163, 30 S. W. 634.

²⁴ S. v. Patterson, 42 La. 934, 8 So. 529; P. v. Riley, 75 Cal. 98, 16 Pac. 544. *Contra*, Kit v. S., 11 Humph. (Tenn.) 167.

²⁵ S. v. Kegan, 62 Iowa 106, 17 N. W. 179; Anderson v. S., 28 Ind. 22; S. v. Wilson, 67 N. C. 456; Houston v. Com., 87 Va. 257, 12 S. E. 385; Taylor v. Com., 3 Bush (Ky.) 508.

See Wiley v. S. (Tex. Cr.), 43 S. W. 995.

²⁶ S. v. Lawler, 130 Mo. 366, 32 S. W. 979; S. v. Stinson, 124 Mo. 447, 27 S. W. 1098. See S. v. Kennedy, 154 Mo. 268, 55 S. W. 293 (train robbery).

²⁷ Com. v. Cody, 165 Mass. 133, 42 N. E. 575. See S. v. Callahan, 96 Iowa 304, 65 N. W. 150.

²⁸ S. v. O'Neil, 71 Minn. 399, 73 N. W. 1091. See S. v. Devine, 51 La. 1296, 26 So. 105.

§ 782. **Taking from person essential.**—An indictment alleging that the defendant, with force and violence, did steal, take and carry away from another his property, is defective in not charging that it was taken from his person.²⁹

ARTICLE IV. EVIDENCE.

§ 783. **Undisputed possession is prima facie ownership.**—The fact of taking the money from the person by robbery is *prima facie* evidence of ownership; that is, the person from whom it was taken is the owner.³⁰

§ 784. **Taken with force.**—“The hand-bag was taken with such force that it bruised my arm, and it was lame for several days.” This statement being true, it was held sufficient to establish the element of force in the crime of robbery.³¹

§ 785. **Intent inferred.**—That the accused took the property from the owner without his consent, intending to deprive the owner of it and convert it to his own use, may be inferred from the facts and circumstances, the same as in larceny.³² On a charge of an assault with intent to commit robbery, proof of a wanton assault, without any evidence from which an intent to rob can be inferred, will not warrant a conviction.³³

§ 786. **Value immaterial.**—“But as to robbery the value of the property taken is immaterial. It is sufficient if the property be of the smallest value.”³⁴

²⁹ S. v. Leighton, 56 Iowa 595, 9 N. W. 896; Kit v. S., 11 Humph. (Tenn.) 167. See Acker v. Com., 94 Pa. St. 284.

³⁰ Bow v. P., 160 Ill. 443, 43 N. E. 593; P. v. Hicks, 66 Cal. 105, 4 Pac. 1093; Durand v. P., 47 Mich. 332, 11 N. W. 184; Brooks v. P., 49 N. Y. 436; P. v. Oldham, 111 Cal. 648, 44 Pac. 312; P. v. Nelson, 56 Cal. 77; Morris v. S., 84 Ala. 446, 4 So. 912; P. v. Davis, 97 Cal. 194, 31 Pac. 1109; S. v. Adams, 58 Kan. 365, 49 Pac. 81; Underhill Cr. Ev., § 358.

³¹ Klein v. P., 113 Ill. 600; Williams v. Com., 20 Ky. L. 1850, 50 S. W. 240. See Fanning v. S., 66 Ga. 167, 4 Am. C. R. 561; S. v.

Broderick, 59 Mo. 318; S. v. Gorham, 55 N. H. 152; Com. v. Snelling, 4 Binn. (Pa.) 379.

³² P. v. Hughes, 11 Utah 100, 39 Pac. 492; Crawford v. S., 90 Ga. 701, 17 S. W. 628; S. v. Woodward, 131 Mo. 369, 33 S. W. 14.

³³ Garrity v. P., 70 Ill. 83; Turley v. P., 188 Ill. 628, 59 N. E. 506; S. v. Tate, 145 Mo. 667, 47 S. W. 792; Long v. S., 12 Ga. 293; Matthews v. S., 4 Ohio St. 539; Jordan v. Com., 25 Gratt. (Va.) 943; Denman v. S. (Tex. Cr. App.), 47 S. W. 366. See Latimer v. S., 55 Neb. 609, 76 N. W. 207.

³⁴ 4 Bl. Com. 242; Reg. v. Morris, 9 C. & P. 349; 1 Hale P. C. 532; Jack-

§ 787. **Other property taken.**—It is competent to show in evidence that the defendant had in his possession other property besides that of the prosecutor, taken under similar circumstances from another person.³⁵

§ 788. **Tools for burglary—Competent.**—Burglar's tools, dynamite and the like, found on the accused when arrested, are competent in evidence on a charge of robbery committed on the person of a conductor after an attempt to rob a train and break open the express safe, though not used in robbing the conductor.³⁶

§ 789. **Articles, when incompetent.**—A revolver, blank checks and other articles suggestive of confidence operations were found in the room of the defendants several blocks away from the place of robbery. Held not competent evidence on a charge of robbery by putting the prosecutor in fear.³⁷

§ 790. **Variance—"From person"—"In presence."**—An allegation in the indictment charging robbery "from the person" will be supported by evidence of robbery "in the presence" of the person robbed.³⁸

son v. S., 69 Ala. 249; Com. v. White, 133 Pa. St. 182, 19 Atl. 350; S. v. Perley, 86 Me. 427, 30 Atl. 74. See McCarty v. S., 127 Ind. 223, 26 N. E. 665.

³⁵ S. v. Balch, 136 Mo. 103, 37 S. W. 808.

³⁶ S. v. Minot, 79 Minn. 118, 81 N. W. 753.

³⁷ Williams v. S., 51 Neb. 711, 71 N. W. 729. The evidence in the following cases was held sufficient to sustain convictions: S. v. Shields, 13 S. Dak. 464, 83 N. W. 559 (assault); S. v. Tate, 156 Mo. 119, 56 S. W. 1099 (assault); S. v. Minot, 79 Minn. 118, 81 N. W. 753; P. v. Gonzales (Cal., 1899), 56 Pac. 804; Ogden v. P., 134 Ill. 600, 25 N. E. 755; Higgins v. P., 98 Ill. 521; Rippeoe v. P., 172 Ill. 173, 50 N. E. 166; Hall v. P., 171 Ill. 540, 49 N. E. 495; McCarty v. S., 127 Ind. 223, 26 N. E. 665; P. v. Glynn, 54 Hun (N. Y.) 332, 7 N. Y. Supp. 555; S. v. Bradburn, 104 N. C. 881, 10 S. E. 526; P. v. Lum Yit, 83 Cal. 130, 23 Pac. 228; P. v. McElroy, 60 Hun (N. Y.) 577, 14 N. Y. Supp. 203;

P. v. Flanagan, 48 N. Y. Supp. 241, 22 App. Div. 516; Wheeler v. Com., 86 Va. 658, 10 S. E. 924; P. v. O'Hara, 51 Hun (N. Y.) 640, 4 N. Y. Supp. 20; P. v. Cappola (Cal.), 56 Pac. 248 (identity); S. v. Moore, 106 Mo. 480, 17 S. W. 658; P. v. McDonald (Cal.), 45 Pac. 1005; P. v. Barry, 90 Cal. 41, 27 Pac. 62; P. v. Patterson, 124 Cal. 102, 56 Pac. 882; S. v. Roach, 11 Mont. 227, 28 Pac. 260; S. v. Reasby, 100 Iowa 231, 69 N. W. 451; Williams v. S., 51 Neb. 711, 71 N. W. 729; Usom v. S., 97 Ga. 194, 22 S. E. 399; S. v. Leach, 119 N. C. 828, 25 S. E. 858; S. v. Callahan, 96 Iowa 304, 65 N. W. 150; S. v. Lawler, 130 Mo. 366, 32 S. W. 979; S. v. Kennedy, 154 Mo. 268, 55 S. W. 293. See P. v. Stack, 58 N. Y. Supp. 691, 41 App. Div. 548. But not sufficient in the following: Garity v. P., 70 Ill. 83; S. v. Tate, 145 Mo. 667, 47 S. W. 792 (assault); Denman v. S. (Tex. Cr.), 47 S. W. 366; Turley v. P., 188 Ill. 628, 59 N. E. 506.

³⁸ S. v. Lamb, 141 Mo. 298, 42 S. W. 827. See McNamara v. P., 24 Colo.

§ 791. "In a building" varies from "near a highway."—Robbery committed in a building used as a place of business, does not support a charge of robbery "on or near a highway."³⁹

§ 792. "Putting in fear" varies from "force."—An allegation in the indictment charging robbery from a person by putting him in fear is not supported by evidence of robbery by "force and violence" to the person.⁴⁰

§ 793. Proof of any one of several sufficient.—Where the indictment alleges several different articles as having been taken by robbery, as, for example, treasury notes and silver coins, proof of either is sufficient.⁴¹

61, 48 Pac. 541; P. v. Gonzales (Cal., 1899), 56 Pac. 804 (ownership).

³⁹ S. v. Stewart, 1 Pen. (Del.) 433, 42 Atl. 624.

⁴⁰ S. v. Crowell, 149 Mo. 391, 50 S. W. 893.

⁴¹ Brown v. S., 120 Ala. 342, 25 So. 182.

CHAPTER XIII.

MALICIOUS MISCHIEF.

ART. I. Definition and Elements,	§§ 794-804
II. Matters of Defense,	§§ 805-811
III. Indictment,	§§ 812-824
IV. Evidence; Variance,	§§ 825-830

ARTICLE I. DEFINITION AND ELEMENTS.

§ 794. **Killing or wounding animals.**—It is a violation of the common law, as well as of the statute, for a person to shoot, wound or kill domestic animals found trespassing upon his premises. He may expel them from his premises, and may use the necessary force for that purpose, doing them no unnecessary damage, but the law forbids him to inflict an unnecessary injury upon the animals.¹ One who kills trespassing animals injuring his crops is himself a trespasser for such killing, and liable to a criminal prosecution.² But it has been held that one who kills or wounds trespassing animals to preserve his own property is not liable criminally.³

§ 795. **"Cattle" includes goats.**—The word "goats" is included in the term "cattle" within the meaning of a statute against abusing or killing any "horse, mule, hog, sheep or other cattle," as well as all domestic quadrupeds.⁴

¹ Snap v. P., 19 Ill. 80; S. v. Godfrey, 97 N. C. 507, 1 S. E. 779; S. v. Igo, 108 Mo. 568, 18 S. W. 923.
² Thompson v. S., 67 Ala. 106; Snap v. P., 19 Ill. 80; S. v. Brigman, 94 N. C. 888; S. v. Neal, 120 N. C. 613, 27 S. E. 81.

³ Hodge v. S., 11 Lea (Tenn.) 528, 47 Am. R. 307; Hunt v. S., 3 Ind. App. 383, 29 N. E. 933; Stephens v. S., 65 Miss. 329, 3 So. 458; Grise v. S., 37 Ark. 456.

⁴ S. v. Groves, 119 N. C. 822, 25 S. E. 819.

§ 796. **Torturing animals—Cock-fighting.**—Inflicting suffering, cruelty or death to any useful beast, fowl or animal for amusement and sport is a violation of the statute prohibiting torture, torment and cruelty.⁵ To engage in the sport of dog-fighting and cock-fighting, whereby one animal is cruelly injured by another, is a violation of the statute prohibiting cruelty to animals.⁶

§ 797. **One's own included.**—The statute provides that "if any person shall willfully and maliciously kill, maim, beat or wound any horse, cattle, sheep or swine," he shall be punished. This statute applies to the defendant's own animals as well as any others.⁷

§ 798. **Birds, domestic animals.**—The statute of England defines animals as meaning "any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal." The statute includes pet birds, such as parrots, canary or linnet, kept in captivity.⁸ "Domestic animals" includes geese, chickens or other domestic fowls.⁹ "Animals" includes wild animals, such as a fox.¹⁰ A mule is a domestic animal within the meaning of the statute.^{10a} Tame lions, tame sea gulls or rabbits reduced to confinement do not come within the protection of the statute.¹¹

§ 799. **Killing dogs.**—A dog is regarded as an animal of pecuniary value; and one who unlawfully and willfully kills a dog is guilty of a criminal offense.¹² It is an offense by statute to willfully and wan-

⁵ S. v. Porter, 112 N. C. 887, 16 S. E. 915; S. v. Neal, 120 N. C. 613, 27 S. E. 81. But see Com. v. Lewis, 140 Pa. St. 261, 21 Atl. 396; and also S. v. Bogardus, 4 Mo. App. 215.

⁶ Com. v. Thornton, 113 Mass. 457; Finnem v. S., 115 Ala. 106, 22 So. 593; Morley v. Greenhalgh, 113 E. C. L. 374.

⁷ S. v. Avery, 44 N. H. 392; Com. v. Lufkin, 7 Allen 579; S. v. Hambleton, 22 Mo. 452; Ex parte Phillips, 33 Tex. Cr. 126, 25 S. W. 629; Com. v. Whitman, 118 Mass. 458; S. v. Bruner, 111 Ind. 98, 12 N. E. 103; S. v. Broucker, 32 Tex. 611. See S. v. Phipps, 95 Iowa 491, 64 N. W. 411; S. v. Gould, 26 W. Va. 258; Stephens v. S., 65 Miss. 329, 3 So.

458; Hodge v. S., 11 Lea (Tenn.) 528, 47 Am. R. 307.

⁸ Colam v. Pagett, L. R. 12 Q. B. D. 67.

⁹ S. v. Bruner, 111 Ind. 98, 12 N. E. 103; S. v. Neal, 120 N. C. 613, 27 S. E. 81; P. v. Klock, 48 Hun (N. Y.) 275.

¹⁰ Com. v. Turner, 145 Mass. 296, 14 N. E. 130.

^{10a} S. v. Gould, 26 W. Va. 258.

¹¹ Gates v. Higgins, L. R. (1896) 1 Q. B. 166 (sea gull); Harper v. Marcks, L. R. (1894) 2 Q. B. 319 (lions); Aplin v. Porritt, L. R. (1893) 2 Q. B. D. 57, 17 Cox C. C. 662.

¹² Nehr v. S., 35 Neb. 638, 53 N. W. 589. See Heiligmann v. Rose, 81 Tex. 222, 16 S. W. 931.

tonly kill a dog. Dogs come within the term "dumb animals."¹³ But setting a trap to protect one's premises from depredating dogs, and catching the dog of another in the trap, do not make him liable criminally who set the trap.¹⁴

§ 800. **Malice is essence of offense.**—Under the statute as well as the common law, the real essence of the offense is malice toward the owner of the animal injured or killed.¹⁵

§ 801. **Intent, when immaterial.**—The unnecessary failure to supply domestic animals with food, water and shelter is made criminal by statute without reference to a criminal intent. Intention is not an element of the offense.¹⁶ But see the following cases, where intent is held to be an essential element of the offense.¹⁷

§ 802. **Malicious intent essential.**—On a charge of willfully and maliciously destroying the personal property of another, it must appear that the injury was done out of a spirit of cruelty, hostility or revenge. The willful doing of an unlawful act without excuse, which is ordinarily sufficient to establish criminal malice, is not alone sufficient under these statutes.¹⁸

§ 803. **Neglecting animals.**—By act of congress, railroad and steam or sailing vessel companies, carrying cattle, sheep, swine or other animals from one state to another, are forbidden, under a penalty, from confining such animals in cars or boats longer than twenty-eight consecutive hours without unloading them for rest, water and

¹³ *McDaniel v. S.*, 5 Tex. App. 479; *S. v. Giles*, 125 Ind. 124, 25 N. E. 159. See *Patton v. S.*, 93 Ga. 111, 19 S. E. 734; *Walker v. Special Session*, 4 Hun (N. Y.) 441; *Wilcox v. S.*, 101 Ga. 563, 28 S. E. 981. *Contra, S. v. Mease*, 69 Mo. App. 581.

¹⁴ *Hodge v. S.*, 79 Tenn. 528, 47 Am. R. 307; *Nehr v. S.*, 35 Neb. 638, 53 N. W. 589 (vicious dog).

¹⁵ *Hobson v. S.*, 44 Ala. 381; *P. v. Olsen*, 6 Utah 284, 22 Pac. 163; *S. v. Newby*, 64 N. C. 23; *Rex v. Pearce*, 2 East P. C. 1072; 4 Bl. Com. 243. See *Ter. v. Crozier*, 6 Dak. 8, 50 N. W. 124; *Brown v. S.*, 26 Ohio St. 176; *S. v. Wilcox*, 3

Yerg. (Tenn.) 278, 24 Am. D. 569; *Northcot v. S.*, 43 Ala. 330.

¹⁶ *Com. v. Edmands*, 162 Mass. 517, 39 N. E. 183; *Com. v. Curry*, 150 Mass. 509, 23 N. E. 212; *S. v. Hackfath*, 20 Mo. App. 615.

¹⁷ *S. v. Avery*, 44 N. H. 392; *Warner v. Perry*, 16 Hun (N. Y.) 337; *Stephens v. S.*, 65 Miss. 329, 3 So. 458; *Jones v. S.*, 9 Tex. App. 178.

¹⁸ *Com. v. Williams*, 110 Mass. 401, 2 Green C. R. 266; *Peppin v. S.*, 77 Ala. 81; *Duncan v. S.*, 49 Miss. 331; *Branch v. S.*, 41 Tex. 622; *S. v. Foote*, 71 Conn. 737, 43 Atl. 488. But see *Stone v. S.*, 3 Heisk. (Tenn.) 457, 1 Green C. R. 520.

food, unless prevented by accident or storm: Held, that congress is vested with power to so legislate.¹⁹

§ 804. Defacing or misusing building.—Under a statute making it a criminal offense to injure, deface or destroy any public building or to use the same “for indecent purposes,” going into a court-house and urinating against the door is using the building for such purposes.²⁰ A prisoner in a county jail, by defacing the walls of his cage, commits the offense of “wantonly defacing or disfiguring any building belonging to the county.”²¹

ARTICLE II. MATTERS OF DEFENSE.

§ 805. Malice against owner.—The fact that the defendant had no malice toward the owner of the house which he injured, but that his mischief was bent toward another person who had taken refuge in the house, is no defense to a charge of malicious mischief.²²

§ 806. Tearing down fence.—On a charge of maliciously tearing down and removing a fence, it is no defense that there is a dispute between the accused and the prosecutor, and that the accused claims the fence is on his premises and he therefore had the right to remove it.²³

§ 807. Driving horse fast.—Driving a horse at a rate of speed most distressing to the animal is no offense when the object is to save human life, or to attain some other object of equal importance.²⁴

§ 808. Marksmen shooting pigeons.—Marksmen, by turning loose and shooting pigeons, where the object is to kill and not wound the

¹⁹ U. S. v. Boston & A. R. Co., 15 Fed. 209. See Com. v. Curry, 150 Mass. 509, 23 N. E. 212. A pound-keeper is not guilty in neglecting to provide food and water for impounded animals: Dargan v. Davies, L. R. 2 Q. B. D. 118.

²⁰ Smith v. S., 110 Ga. 292, 35 S. E. 166. A church is not a public building within the meaning of the statute. Collum v. S., 109 Ga. 531, 35 S. E. 121.

²¹ Allgood v. S., 95 Tenn. 471, 32 S. W. 308.

²² Funderburk v. S., 75 Miss. 20, 21 So. 658. The offense of malicious mischief is not complete unless

some actual damage or injury resulted from the act charged. Hampton v. S., 10 Lea (Tenn.) 639.

²³ S. v. Marsh, 91 N. C. 633; S. v. Gurnee, 14 Kan. 111; Carter v. S., 18 Tex. App. 573; Lawson v. S., 100 Ala. 7, 14 So. 879. See S. v. Pike, 33 Me. 361. *Contra*. Sattler v. P., 59 Ill. 69; P. v. Stevens, 109 N. Y. 159, 16 N. E. 53; S. v. Flynn, 28 Iowa 26; Lossen v. S., 62 Ind. 437; Com. v. Drass, 146 Pa. St. 55, 23 Atl. 233.

²⁴ Com. v. Lufkin, 7 Allen (Mass.) 579. See S. v. Isley, 119 N. C. 862, 26 S. E. 35.

birds, are not guilty of "cruelty to animals" within the meaning of the statute.²⁵

§ 809. Removing trespasser's property.—The owner of a row-boat placed it upon the waters of a mill-pond of the defendant. The owner had been more than once notified to remove the boat, but he refused to do so. The defendant then removed it, and the owner put it back again. The defendant again removed it and put it on the owner's land. But the owner put it back again and chained it to a tree, and persisted in using it on the pond of the defendant. The defendant then openly destroyed the boat: Held not guilty of any offense.²⁶

§ 810. Realty—Trees, growing crops.—The statute, under a penalty, forbids the cutting down or removing from any land belonging to another, any tree, stone, timber, or other valuable article, such as a pipe used as an aqueduct: Held, the property must be a part of the realty.²⁷ The destruction of a growing crop of wheat is a mere trespass, and not indictable under the statute for the "destruction of any barrack, cock, crib, rick or stack of wheat" and the like.²⁸

§ 811. Owner taking abandoned property.—A tenant who occupied premises under a lease from the owner vacated the same before the termination of his lease, and the owner, desiring to take possession of the premises, offered back to the tenant the unearned rent paid by the tenant, but the tenant refused to accept it. The owner of the premises therefore forced open the door of the premises, doing some damage, which he repaired the same day: Held not a willful or malicious breaking or injuring "of the door of any building, the property of another."²⁹

ARTICLE III. INDICTMENT.

§ 812. Overdriving animal.—Under the statute against overdriving an animal, the complaint charging that the defendant did cruelly

²⁵ *Com. v. Lewis*, 140 Pa. St. 261, 21 Atl. 396; *S. v. Bogardus*, 4 Mo. App. 215. *Contra*, *Waters v. P.*, 23 Colo. 33, 46 Pac. 112; *Paine v. Bergh*, 1 N. Y. City Ct. 160; *S. v. Porter*, 112 N. C. 887, 16 N. E. 915; *Com. v. Turner*, 145 Mass. 296, 14 N. E. 130 (fox chase).

²⁶ *P. v. Kane*, 131 N. Y. 113, 29 N.

E. 1015; *Wright v. S.*, 30 Ga. 325; *P. v. Kane*, 142 N. Y. 366, 37 N. E. 104.

²⁷ *Bates v. S.*, 31 Ind. 72; *S. v. Jones*, 33 Vt. 443.

²⁸ *Parris v. P.*, 76 Ill. 277.

²⁹ *S. v. McBeth*, 49 Kan. 584, 31 Pac. 145.

overdrive a certain horse, is sufficient without further description of the offense.³¹

§ 813. **Driving unfit horse.**—Under a statute making it a criminal offense for cruelly driving a horse when unfit for labor, an indictment charging that the defendant “did cruelly drive said horse” sufficiently states the offense, and need not allege that the defendant knew the horse was unfit for labor.³²

§ 814. **Extent of injury essential.**—Where the measure of the punishment depends upon the extent and character of the injury done to the property injured, the indictment should allege the extent and character of the injury. To allege that the defendant “did maliciously injure and cause to be injured” is not sufficient.³³

§ 815. **Ownership or control.**—By statute, an act of cruelty committed to animals is a criminal offense without regard to ownership or custody of the animal. And if a complaint or information alleges custody or control of the animal, such averment may be regarded as surplusage.³⁴ On a charge of maliciously injuring mortgaged property, the ownership thereof should be laid in the mortgage.³⁵

§ 816. **Domestic animals includes.**—The term “domestic beasts” will include hogs, and in drawing an indictment, it is not necessary to allege the hog was a domestic beast.³⁶

³¹ *Com. v. Flannigan*, 137 Mass. 560; *S. v. Comfort*, 22 Minn. 271; *S. v. Haley*, 52 Mo. App. 520. See *S. v. Bruner*, 111 Ind. 98, 12 N. E. 103; *S. v. Bosworth*, 54 Conn. 1. If a person knowingly and intentionally overdrive a horse he is guilty of cruelty to the animal. *Com. v. Wood*, 111 Mass. 411; *S. v. Bosworth*, 54 Conn. 1, 4 Atl. 248. See *S. v. Roche*, 37 Mo. App. 480; *S. v. Avery*, 44 N. H. 392. See also *Stage Horse Cases*, 15 Abb. Prac. (N. S.) 51.

³² *Com. v. Porter*, 164 Mass. 576, 42 N. E. 97.

³³ *S. v. Costello*, 62 Conn. 130, 25 Atl. 477; *Brown v. S.*, 76 Ind. 85; *S. v. Sparks*, 60 Ind. 298; *Todd v. S.*, 39 Tex. Cr. 232, 45 S. W. 596. See *Owens v. S.*, 52 Ala. 400; *Sam-*

ple v. S., 104 Ind. 289, 4 N. E. 40; *Nicholson v. S.*, 3 Tex. App. 31; *McKinney v. P.*, 32 Mich. 284; *S. v. Peden*, 2 Blackf. (Ind.) 371; *Reg. v. Thoman*, 12 Cox C. C. 54; *Beaufire v. S.*, 37 Tex. Cr. 50, 38 S. W. 608; *Walker v. S.*, 89 Ala. 74, 8 So. 144; *Funderburk v. S.*, 75 Miss. 20, 21 So. 658; *Heron v. S.*, 22 Fla. 86.

³⁴ *Com. v. Whitman*, 118 Mass. 459. *Contra*, *S. v. Deal*, 92 N. C. 802. See *Bass v. S.*, 63 Ala. 108.

³⁵ *Walker v. S.*, 89 Ala. 74, 8 So. 144.

³⁶ *S. v. Enslow*, 10 Iowa 115. And “cattle” will include pigs: *Rex v. Chapple* (Mich. T., 1804), 2 East P. C. 1076; *S. v. Pruett*, 61 Mo. App. 156; *Swartzbaugh v. P.*, 85 Ill. 458.

§ 817. **Poisonous article.**—An indictment charging the defendant with exposing and depositing “paris green” with intent that a certain animal should eat it, is sufficient without alleging that the paris green was poisonous.³⁷

§ 818. **Manner of wounding.**—Charging in the indictment that the defendant did “cruelly beat and torture” a certain cow, the property of the defendant, being in the language of the statute, sufficiently states the offense, without averring the manner of the beating or wounding.³⁸

§ 819. **Not duplicity.**—An information containing three counts, the first charging cruelty to oxen by overworking them, the second failure to provide them with proper food and drink, and the third by depriving them of proper sustenance, states but a single offense. The gist of the offense is cruelty to animals.³⁹ The indictment alleging that the defendant “did cruelly torture, maim, beat and wound his horse and deprive said horse of necessary sustenance,” states but one offense.⁴⁰

§ 820. **“Unlawfully” immaterial.**—The statute provides that whoever “wantonly and willfully injures” the property of another shall be guilty of an offense. An indictment alleging that the defendant “wantonly and willfully did injure” the property in question is sufficient without using the word “unlawfully.”⁴¹

§ 821. **Setting fire.**—An indictment charging that the defendant did “unlawfully, willfully and maliciously enter upon the lands of” a certain person named, there situate, and did then and there set fire to the woods on said land, sufficiently states the offense.⁴²

§ 822. **Cruelty to fowls.**—An indictment which charges that the defendant “unlawfully, willfully and needlessly did act in a cruel

³⁷ S. v. Labounty, 63 Vt. 374, 21 Atl. 730.

³⁸ S. v. Goss, 74 Mo. 593; S. v. Greenlees, 41 Ark. 353. See Com. v. McClellan, 101 Mass. 34; S. v. Watkins, 101 N. C. 702, 8 S. E. 346.

³⁹ S. v. Bosworth, 54 Conn. 1, 4 Atl. 248; S. v. Gould, 26 W. Va. 258; S. v. Harris, 11 Iowa 414.

⁴⁰ S. v. Haskell, 76 Me. 399; Com. v. Lufkin, 89 Mass. 579; S. v. Bosworth, 54 Conn. 1, 4 Atl. 248. See S. v. Gould, 26 W. Va. 258.

⁴¹ S. v. Martin, 107 N. C. 904, 12 S. E. 194.

⁴² S. v. Purdie, 67 N. C. 326. See S. v. Williams, 21 Ind. 206.

manner towards a certain fowl, to wit, a chicken, by killing the said chicken," sufficiently states the offense of cruelty.⁴³

§ 823. **Failure to feed—"Unnecessarily."**—Under a statute providing that any one who, having the "charge or custody of any animal," shall unnecessarily fail to provide it with food, an information charging that the defendant is the owner of the animal is not sufficient; it should allege that he had "charge and custody" of the animal.⁴⁴ Where, by statute, it is made a criminal offense to unnecessarily fail to provide an animal with food, etc., an indictment failing to charge that the act was "unnecessarily" done is defective.⁴⁵

§ 824. **Indorsing prosecutor's name.**—The objection that the prosecutor's name was not indorsed on the indictment can not be raised for the first time on error. It should have been made by a motion to quash the indictment before plea.⁴⁶

ARTICLE IV. EVIDENCE; VARIANCE.

§ 825. **Other like acts.**—On a charge of giving poison to a certain horse, evidence that the same kind of poisonous preparation was found in the boxes of another horse of the same owner, in the same barn, is competent as tending to prove the charge in the indictment.⁴⁷

§ 826. **Defendant's declarations.**—On the trial of a charge of malicious mischief for injuring a fence belonging to a church society, evidence of declarations of the defendant tending to prove enmity towards the society or its officers is competent.⁴⁸

§ 827. **Evidence of mitigation.**—Evidence that the animal (mule) which the defendant is charged with maliciously killing was breachy

⁴³ S. v. Neal, 120 N. C. 613, 27 S. E. 81.

⁴⁴ S. v. Spink, 19 R. I. 353, 36 Atl. 91.

⁴⁵ Ferrias v. P., 71 Ill. App. 559. See S. v. Clark, 86 Me. 194, 29 Atl. 984; Hunt v. S., 3 Ind. App. 383, 29 N. E. 933 ("needlessly"); Com. v. Edmands, 162 Mass. 517, 39 N. E. 183 ("cruelly").

⁴⁶ Veain v. P., 40 Ill. 397. Indictment held not sufficient in the fol-

lowing cases: S. v. Lightfoot, 107 Iowa 344, 78 N. W. 41; S. v. Wilson, 3 Mo. 125; Ex parte Phillips, 33 Tex. Cr. 126, 25 S. W. 629; S. v. Towle, 62 N. H. 373. Indictment sufficient: Hewitt v. S., 121 Ind. 245, 23 N. E. 83.

⁴⁷ S. v. Lightfoot, 107 Iowa 344, 78 N. W. 41; Rex v. Mogg, 4 C. & P. 363.

⁴⁸ P. v. Ferguson, 119 Mich. 373, 78 N. W. 334.

and had previously trespassed on the defendant's premises, is competent in mitigation of punishment, though the defendant had not a lawful fence inclosing his premises.⁴⁹

§ 828. **Variance—Husband or wife—Title.**—Evidence that the title to the injured property was in the wife supports an allegation in the indictment that the husband was the owner where he and his wife are residing together on the premises and on which he paid the taxes.⁵⁰

§ 829. **Variance—"In car," "out doors."**—Willfully burning and destroying cotton stored in a car standing on a railroad track is not embraced in a statute making it an offense to "willfully burn or destroy the corn, cotton, shucks, or other provender in a stack, hill, pen, or secured in any other way, out of doors."⁵¹

§ 830. **Variance—Different offense.**—Tearing down and removing a fence on the land of another constitutes willful or malicious trespass on the real and personal property of the owner, in violation of a certain section of the statute, differing from that section relating to malicious mischief.⁵²

⁴⁹ Bennefield v. S., 62 Ark. 365, 35 S. W. 790. See McMahan v. S. (Tex.), 16 S. W. 171. Evidence held not sufficient: Miller v. S. (Tex. Cr.), 42 S. W. 298; Woodward v. S., 33 Tex. Cr. 555, 28 S. W. 204; Brady v. S. (Tex. Cr.), 26 S. W. 621 (willful); Hoak v. S. (Tex. Cr.), 26 S. W. 508 (malice). Evidence sufficient: Shirley v. S. (Tex. Cr.),

22 S. W. 42; S. v. Grimes, 101 Mo. 188, 13 S. W. 956.

⁵⁰ P. v. Coyne, 116 Cal. 295, 48 Pac. 218.

⁵¹ S. v. Avery, 109 N. C. 798, 13 S. E. 931. See S. v. Walsh, 43 Minn. 444, 45 N. W. 721.

⁵² Barkley v. S. (Miss.), 23 So. 185. See Cryer v. S., 36 Tex. Cr. 621, 38 S. W. 203.

CHAPTER XIV.

ARSON.

ART.	I. Definition and Elements,	§§ 831-844
	II. Matters of Defense,	§§ 845-850
	III. Indictment,	§§ 851-876
	IV. Evidence; Variance,	§§ 877-894

ARTICLE I. DEFINITION AND ELEMENTS.

§ 831. **Definition, what constitutes arson.**—Arson is the malicious burning of the house of another. The term "house" imports a dwelling-house at common law.¹ By statutory provisions of the different states, the common law definition of arson has been materially enlarged so as to include other different kinds of buildings and property besides dwelling-house. If any part of a dwelling-house, however small, is consumed, the offense of arson is complete.² But if the building is merely scorched or smoked the offense is not complete.³ But whether or not the building was "burned" within the meaning of the law is a question of fact for the jury to determine.⁴ It is the burning of the house or building and not personal property within the house which constitutes the crime of arson, within the meaning of the statute.⁵

¹ 1 Hale P. C. 566; 4 Bl. Com. 220; 2 East P. C. 1015; 3 Inst. 66; Com. v. Barney, 10 Cush. 478; 1 McClain Cr. L., §§ 517, 518; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; Underhill Cr. Ev., § 366.

² S. v. Mitchell, 5 Ired. 350; Com. v. Van Schaack, 16 Mass. 105, 8 Am. C. R. 51 (note); Delaney v. S., 41 Tex. 601, 1 Am. C. R. 88; Com. v. Tucker, 110 Mass. 403, 2 Green C. R. 267; P. v. Haggerty, 46 Cal. 354, 2 Green C. R. 431; S. v. Taylor, 45 Me. 322; 3 Greenl. Ev., § 55; 4 Bl.

Com., 222; Underhill Cr. Ev., § 367; Woodford v. P., 62 N. Y. 117, 20 Am. R. 464; S. v. Sandy, 3 Ired. 576; Smith v. S., 23 Tex. App. 357, 5 S. W. 219; 59 Am. R. 773; Blanchette v. S. (Tex. Cr.), 24 S. W. 507; S. v. Babcock, 51 Vt. 570.

³ Woolsey v. S., 30 Tex. App. 346, 17 S. W. 546; Underhill Cr. Ev., § 367.

⁴ Com. v. Betton, 5 Cush. (Mass.) 427.

⁵ Graham v. S., 40 Ala. 659; Reg. v. Nattrass, 15 Cox C. C. 73; P. v.

§ 832. **Dwelling-house defined.**—To constitute arson it is necessary that the building burned be a dwelling-house in the same sense as in a charge of burglary. It must be a place of residence of the party named.⁶ A house built for and once occupied as a dwelling-house, but unoccupied at the time of the burning, is not a dwelling-house under the statute.⁷ But if the occupant be only temporarily absent, it is a dwelling-house.⁸

§ 833. **Dwelling, curtilage, outhouse.**—The curtilage of a dwelling-house is a space necessary and convenient and habitually used for the family purposes in carrying on the domestic employments. It need not be separated from other lands by a fence.⁹ An outhouse is one that belongs to a dwelling-house and is in some respects parcel of such dwelling-house, and situated within the curtilage.¹⁰

§ 834. **Barn, shed.**—A building constructed of logs, in one part of which horses were kept and in another part fodder, hay and oats, with sheds adjoining where farming utensils were kept, is a barn within the meaning of the statute prescribing the death penalty as a punishment for the burning of barns having grain in them.¹¹

§ 835. **Endangering other building.**—The burning of a building so situated as to endanger a dwelling-house was arson at common law. It must be parcel of such dwelling or belonging or adjoining thereto.¹²

Simpson, 50 Cal. 304; *Rex v. Taylor*, 2 East P. C. 1020. See *P. v. Jones*, 24 Mich. 215.

⁶ *P. v. Handley*, 93 Mich. 46, 52 N. W. 1032; *S. v. Warren*, 33 Me. 30; *Com. v. Barney*, 10 Cush. (Mass.) 478; *Reg. v. Edgell*, 11 Cox C. C. 132. See *P. v. Fisher*, 51 Cal. 319; *Henderson v. S.*, 105 Ala. 82, 16 So. 931; *S. v. McGowan*, 20 Conn. 245, 52 Am. Dec. 336; *S. v. Wolfenberger*, 20 Ind. 242.

⁷ *Hooker v. Com.*, 13 Gratt. (Va.) 763; *S. v. Clark*, 7 Jones (N. C.) 167.

⁸ *Meeks v. S.*, 102 Ga. 572, 27 S. E. 679; *S. v. McGowan*, 20 Conn. 245, 52 Am. Dec. 336; *Johnson v. S.*, 48 Ga. 116.

⁹ *S. v. Shaw*, 31 Me. 523; *Com. v. Barney*, 10 Cush. (Mass.) 480;

Washington v. S., 82 Ala. 31, 2 So. 356; *P. v. Taylor*, 2 Mich. 251; *Curkendall v. P.*, 36 Mich. 309. Defined 3 Greenl. Ev., § 55. See *Page v. Com.*, 26 Gratt. (Va.) 943; 4 Bl. Com. 221.

¹⁰ *S. v. Roper*, 88 N. C. 656; *S. v. Stewart*, 6 Conn. 47; *Hester v. S.*, 17 Ga. 130. See *S. v. Carter*, 49 S. C. 265, 27 S. E. 106; *Whiteside v. S.*, 44 Tenn. 175.

¹¹ *S. v. Cherry*, 63 N. C. 493; *Smith v. S.*, 28 Iowa 565. But see *S. v. Jim*, 8 Jones (N. C.) 459, and *S. v. Laughlin*, 8 Jones (N. C.) 455.

¹² *Hill v. Com.*, 98 Pa. St. 192; 1 McClain Cr. L., § 519; *Gage v. Shelton*, 3 Rich. L. (S. C.) 242. See *P. v. De Winton*, 113 Cal. 405, 45 Pac. 708.

§ 836. **School-house.**—A school-house is embraced in the term “any other outhouse not parcel of any dwelling-house.”¹³ A school-house is included in the term “dwelling-house.”¹⁴

§ 837. **Jail, inhabited building.**—A jail containing prisoners is regarded as an inhabited building within the meaning of the law defining arson.¹⁵

§ 838. **Warehouse.**—A building in which the owner stores his tools and materials used in his business is included in the term “warehouse” within the meaning of the statute relating to arson.¹⁶

§ 839. **Corn-crib.**—Under a statute defining arson, a corn-crib is not included in the statutory words “barn, stable, coach-house, gin-house, storehouse or warehouse.”¹⁷

§ 840. **Shop—Store.**—A “shop” within the meaning of the statute includes a house in which small quantities of goods of any kind are sold or in which mechanics work, or sometimes keep their manufactured goods or wares.¹⁸

§ 841. **Intent, burning another house.**—If one kindles a fire in a stack of straw situated so that it is likely to communicate, and in fact communicates, to any adjacent building, he is chargeable with burning the building; or if he sets fire to his own house intending to and does burn his neighbor's, he commits the crime of arson.¹⁹ The feloniously setting fire to one building, which actually communicates to and burns another, is sufficient to convict the person of arson in burning the latter, irrespective of an intent to do so. He shall be

¹³ Jones v. Hungerford, 4 Gill & J. (Md.) 402; Wallace v. Young, 21 Ky. 155.

¹⁴ S. v. O'Brien, 2 Root (Conn.) 516.

¹⁵ S. v. Collins, 2 Idaho 1182, 31 Pac. 1048; Com. v. Posey, 4 Call (Va.) 109, 2 Am. D. 560; P. v. Cotteral, 18 Johns. (N. Y.) 115.

¹⁶ Com. v. Uhrig, 167 Mass. 420, 45 N. E. 1047. See Allen v. S., 10 Ohio St. 287; Carter v. S., 106 Ga. 372, 32 S. E. 345.

¹⁷ S. v. Jeter, 47 S. C. 2, 24 S. E. 889. A “corn-crib” is a “corn-pen.” Cook v. S., 83 Ala. 62, 3 So. 849.

See S. v. Frank, 41 La. 596, 7 So. 131.

¹⁸ S. v. Morgan, 98 N. C. 641, 3 S. E. 927; McLane v. S., 4 Ga. 335.

¹⁹ Combs v. Com., 93 Ky. 313, 20 S. W. 221; S. v. Watson, 63 Me. 128. See also Woodford v. P., 62 N. Y. 117; 3 Greenl. Ev., § 56; Com. v. Bradford, 126 Mass. 42. See Meister v. P., 31 Mich. 99, 1 Am. C. R. 91; 4 Bl. Com. 221; P. v. Orcutt, 1 Park. Cr. (N. Y.) 252; Hennessey v. P., 21 How. Prac. (N. Y.) 239; Grimes v. S., 63 Ala. 166; S. v. Laughlin, 8 Jones (N. C.) 354.

responsible for all the probable consequences of his act.²⁰ And the burden is on the defendant to show that he did not intend the consequences of his act.²¹

§ 842. **Intent, burning one's own house.**—On a charge of burning one's own house with intent to defraud any insurance company, the intent being the controlling element of the crime, the offense is complete, although the policy held by the accused may be invalid; if he believed it legal and valid, it is sufficient.²²

§ 843. **Means used.**—Where a person acts willfully, it is not material by what means the burning is done, whether directly by his own hand or by any other means: he is guilty of arson.²³

§ 844. **Soliciting another to commit arson.**—Soliciting another to commit arson and furnishing him materials for that purpose, is an attempt to commit the crime, no matter whether the person solicited takes any steps or not toward committing the offense.²⁴ But a bare solicitation of another to commit the crime is not an attempt.²⁵ An unsuccessful effort to set fire to the building is an attempt.²⁶

ARTICLE II. MATTERS OF DEFENSE.

§ 845. **Owner burning or procuring.**—A person does not commit arson by burning his own house or the house occupied by him as his

²⁰ Woodford v. P., 62 N. Y. 117-132; Lusk v. S., 64 Miss. 845, 2 So. 256; Overstreet v. S., 46 Ala. 30. See P. v. Fanshawe, 137 N. Y. 68, 32 N. E. 1102; Com. v. Harney, 51 Mass. 422; S. v. Byrne, 45 Conn. 273.

²¹ S. v. Phifer, 90 N. C. 721.

²² McDonald v. P., 47 Ill. 536; Martin v. S., 28 Ala. 71; Staaden v. P., 82 Ill. 433, 25 Am. R. 333; S. v. Byrne, 45 Conn. 273. See Johns v. P., 25 Mich. 499. *Contra*, Meister v. P., 31 Mich. 99.

²³ Smith v. S., 23 Tex. App. 357, 5 S. W. 219, 59 Am. R. 773; Overstreet v. S., 46 Ala. 30; S. v. Squaires, 2 Nev. 226; McDade v. P., 29 Mich. 50; P. v. Trim, 39 Cal. 75.

²⁴ S. v. Bowers, 35 S. C. 262, 14

S. E. 488; P. v. Bush, 4 Hill (N. Y.) 133; S. v. Hayes, 78 Mo. 307; McDermott v. P., 5 Park. Cr. (N. Y.) 102.

²⁵ McDade v. P., 29 Mich. 50.

²⁶ S. v. Dennin, 32 Vt. 158; S. v. Johnson, 19 Iowa 230. See Kinningham v. S., 120 Ind. 322, 22 N. E. 313. On the degrees of arson as defined by statute, see the following cases: Lacy v. S., 15 Wis. 15; Brown v. S., 52 Ala. 345; Woodford v. P., 62 N. Y. 117, 3 Hun 310; Granison v. S., 117 Ala. 22, 23 So. 146; Washington v. S., 68 Ala. 85; Henderson v. S., 105 Ala. 82, 16 So. 931; S. v. Grimes, 50 Minn. 123, 52 N. W. 275; S. v. Young, 153 Mo. 445, 55 S. W. 82 (evidence).

dwelling.²⁷ If the owner of a house procures another to burn it, neither the owner nor the person who burned it is guilty of arson.²⁸

§ 846. **Tenant burning.**—A tenant is not guilty of arson in burning the building occupied by him as such tenant.²⁹

§ 847. **Prisoner burning prison.**—If it appear from the evidence that a person confined in prison set fire to the door to burn off the lock so as to make his escape, or that he burned a hole in the floor or in the wall for the same purpose, it would not be arson.³⁰

§ 848. **Stack of straw.**—The prisoner was indicted for setting fire to a "stack of straw." The proof was that he set fire to a quantity of straw loaded on a lorry (wagon) to convey to market and brought several miles on the way. The horses had been removed and the lorry with the straw on it left in the yard of an inn ready to be taken on to market next morning: Held, that a conviction could not be sustained and was quashed.³¹

§ 849. **Husband or wife burning.**—The wife, because of the legal identity with the husband, can not be guilty of the offense of burning the husband's dwelling, even though living separate from him at the time. Nor can the husband be guilty of arson by the common law

²⁷ *S. v. Keena*, 63 Conn. 329, 28 Atl. 522; *S. v. Sarvis*, 45 S. C. 668, 24 S. E. 53; *Com. v. Mahar*, 16 Pick. 120; *P. v. De Winton*, 113 Cal. 403, 45 Pac. 708; *Bloss v. Tobey*, 2 Pick. (Mass.) 325. See *S. v. Elder*, 21 La. 157; *S. v. Rohfrisch*, 12 La. 332; *Erskine v. Com.*, 8 Gratt. (Va.) 624; *Com. v. Makely*, 131 Mass. 421. ²⁸ *Com. v. Makely*, 131 Mass. 421; *S. v. Sarvis*, 45 S. C. 668, 24 S. E. 53; *Heard v. S.*, 81 Ala. 55, 1 So. 640; *Roberts v. S.*, 47 Tenn. (7 Cold.) 359; *S. v. Haynes*, 66 Me. 307, 22 Am. R. 569.

²⁹ *Garrett v. S.*, 109 Ind. 527, 10 N. E. 570; *S. v. Lyon*, 12 Conn. 487; *McNeal v. Woods*, 3 Blackf. (Ind.) 485; *Sullivan v. S.*, 5 Stew. & P. (Ala.) 175; *S. v. Hannett*, 54 Vt. 83; *Allen v. S.*, 10 Ohio St. 287; *S. v. Fish*, 3 Dutch. (N. J. L.) 323; 2 East P. C. 1029; 3 Greenl. Ev., § 55.

Contra, by statute: *S. v. Moore*, 61 Mo. 276; *Allen v. S.*, 10 Ohio St. 287; *Mulligan v. S.*, 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. 435. See *Lip-schitz v. P.*, 25 Colo. 261, 53 Pac. 1111.

³⁰ *Delany v. S.*, 41 Tex. 601, 1 Am. C. R. 88, citing *P. v. Cotterall*, 18 Johns. (N. Y.) 115; *S. v. Mitchell*, 5 Ired. (N. C.) 350; *Washington v. S.*, 87 Ga. 12, 13 S. E. 131; *Jenkins v. S.*, 53 Ga. 33, 21 Am. R. 255. *Contra*, *Lockett v. S.*, 63 Ala. 5; *Luke v. S.*, 49 Ala. 30, 20 Am. R. 269; *Willis v. S.*, 32 Tex. Cr. 534, 25 S. W. 123.

³¹ *Reg. v. Satchwell*, 12 Cox C. C. 449, 1 Green C. R. 199. A "stack of hay" is included in "goods, wares or merchandise, or other chattels," the burning of which is defined by statute as arson: *S. v. Harvey*, 141 Mo. 343, 42 S. W. 938.

rules, in burning the dwelling-house which his wife owns, if he lives with her and has rightful possession jointly with her at the time.³²

§ 850. **Jeopardy, splitting offenses.**—Where a grist mill and all its contents, including the books of account of the owners of the mill, were destroyed by one and the same fire, and the defendant was prosecuted for setting fire to and burning the mill and acquitted on such charge, this is a bar to another prosecution for setting fire to and burning the books of account.³³

ARTICLE III. INDICTMENT.

§ 851. **Who is owner.**—The dwelling-house must not be described as the house of the owner of the fee, if in fact at the time another has the actual occupancy, but it must be described as the dwelling-house of him whose dwelling it then is.³⁴

§ 852. **Building owned by firm.**—An indictment for arson alleging the ownership of the building in question as belonging to a firm, naming the firm, and then naming the persons composing the firm, is sufficient allegation of ownership.³⁵

§ 853. **Owner, indictment, sufficiency.**—It is not necessary to aver in the indictment that the building alleged to have been burned was in the possession of any person named, under a statute which makes it arson to set fire to a building, "whether such building shall then be in the possession of the offender or in the possession of any other person."³⁶

³² Snyder v. P., 26 Mich. 106, 1 Green C. R. 549, 12 Am. R. 302; Roberts v. S., 7 Coldw. 359; S. v. Haynes, 66 Me. 307; Com. v. Makeley, 131 Mass. 421; Heard v. S., 81 Ala. 55, 1 So. 640; P. v. De Winton, 113 Cal. 403, 45 Pac. 708; Rex v. March, 1 Moody 182. *Contra*, Garrett v. S., 109 Ind. 527, 10 N. E. 570; Emig v. Daum, 1 Ind. App. 146, 27 N. E. 322.

³³ S. v. Colgate, 31 Kan. 511, 47 Am. R. 507, 5 Am. C. R. 71, 3 Pac. 346. See Com. v. Goldstein, 114 Mass. 272. *Contra*, P. v. Jones, 24 Mich. 215.

³⁴ Snyder v. P., 26 Mich. 106, 1 Green C. R. 547; S. v. Toole, 29

Conn. 342, 76 Am. Dec. 602; Davis v. S., 52 Ala. 357; P. v. Fairchild, 48 Mich. 31, 11 N. W. 773; Adams v. S., 62 Ala. 177; May v. S., 85 Ala. 14, 5 So. 14; Burger v. S., 34 Neb. 397, 51 N. W. 1027; Ritchey v. S., 7 Blackf. (Ind.) 168; Gutzessell v. S. (Tex. Cr., 1898), 43 S. W. 1016; Lipschitz v. P., 25 Colo. 261, 53 Pac. 1111. But see Garrett v. S., 109 Ind. 527, 10 N. E. 570; S. v. Carter, 49 S. C. 265, 27 S. E. 106; Com. v. Elder, 172 Mass. 187, 51 N. E. 975; 4 Bl. Com. 221.

³⁵ P. v. Greening, 102 Cal. 384, 36 Pac. 665.

³⁶ S. v. Daniel, 121 N. C. 574, 28 S. E. 255.

§ 853a. **Owner of public building.**—The ownership of jails, court-houses and other public buildings need not be averred in an indictment. It is sufficient to say the jail of the county.³⁷

§ 854. **Stating ownership of house.**—An indictment, in alleging the building burned to be the house “of” a person named, sufficiently alleges the ownership of the house.³⁸

§ 855. **Owner of house.**—An indictment alleging that the defendant willfully set fire to and burned a cotton-house containing the cotton of a person named, is defective in not also alleging the ownership of the house.³⁹

§ 856. **House of another.**—An information failing to allege that the house burned was the house of another than the accused is bad. A person does not commit arson by burning the house occupied by himself.⁴⁰

§ 857. **Stating owner of house.**—An indictment, in charging that the defendant set fire to and burned the dwelling-house of a person named, is sufficient although such person did not occupy the whole of it. The accused had some of the rooms, and others other rooms, but all the rooms were under the same roof, and were of the same building: Held sufficient.⁴¹

§ 858. **Dwelling-house.**—An indictment charging the burning of a “house used as a dwelling-house,” sufficiently alleges a dwelling-house.⁴²

³⁷ *Sands v. S.*, 80 Ala. 201; *S. v. Johnson*, 93 Mo. 73, 5 S. W. 699; *Mott v. S.*, 29 Ark. 147; *S. v. Temple*, 12 Me. 214; *Lockett v. S.*, 63 Ala. 5; *Stevens v. Com.*, 4 Leigh (Va.) 683; *S. v. Roe*, 12 Vt. 93. See *S. v. Whitmore*, 147 Mo. 78, 47 S. W. 1068.

³⁸ *Jordan v. S.*, 142 Ind. 422, 41 N. E. 817.

³⁹ *Smoke v. S.*, 87 Ala. 143, 6 So. 376. See also the following cases: *Martin v. S.*, 28 Ala. 71; *Tuller v. S.*, 8 Tex. App. 501; *P. v. Myers*, 20 Cal. 76; *P. v. Handley*, 100 Cal. 370,

34 Pac. 853; *S. v. Tennehom*, 92 Iowa 551, 61 N. W. 193. See *Hester v. S.* (Tex. Cr., 1899), 51 S. W. 932 (school-house).

⁴⁰ *S. v. Keena*, 63 Conn. 329, 28 Atl. 522; *Martha v. S.*, 26 Ala. 72; 3 Greenl. Ev., § 53; *Com. v. Mahar*, 16 Pick. 120; *Rex v. Rickman*, 2 East P. C. 1034.

⁴¹ *Levy v. P.*, 80 N. Y. 327; *S. v. Toole*, 29 Conn. 342.

⁴² *McLane v. S.*, 4 Ga. 335; *S. v. Morgan*, 98 N. C. 641, 3 S. E. 927. See *S. v. Frank*, 41 La. 596, 7 So. 131.

§ 859. **Allegation of residence.**—Charging in an indictment that the defendant burned a certain dwelling, describing it, and that the same was occupied by a certain person, naming him, sufficiently alleges that the house was the residence of such occupant.⁴³

§ 860. **Burning dwelling-house.**—An indictment alleging the burning of a certain building, that is, a house, does not charge the burning of a dwelling-house under the statute of Massachusetts, but the "house" is included under a different section for burning "a banking-house, outhouse or other building" of another.⁴⁴

§ 861. **Allegation of burning.**—An indictment charging the defendant with the felonious burning of a certain "flouring, grist, and corn mill-house" is sufficient allegation of a "burning."⁴⁵

§ 862. **"Stable" is building.**—A stable is presumed to be a building, and the indictment is sufficient by charging the burning of a stable, and need not allege the stable to be a building.⁴⁶

§ 863. **School-house.**—Under a statute for burning "a townhouse, school-house or other building erected for public use," an indictment alleging the burning of a "school-house," without alleging it was erected for public use, was held sufficient on a motion in arrest of judgment.⁴⁷

§ 864. **Duplicity—Two offenses.**—The indictment charges that the defendant, on the 6th day of September, 1871, set fire to and burned a stack of hay of the value of three hundred dollars, and on the same day did burn a building used as a stable and granary. The indictment is bad as charging two distinct offenses.⁴⁸

⁴³ Com. v. Ellison, 14 Ky. L. 216, 20 S. W. 214; S. v. Johnson, 93 Mo. 73, 5 S. W. 699; Childress v. S., 86 Ala. 77, 5 So. 775; Lewis v. S., 49 Miss. 354; McClaine v. Ter., 1 Wash. St. 345, 25 Pac. 453; S. v. Toole, 29 Conn. 342, 76 Am. Dec. 602; Woodford v. P., 62 N. Y. 117, 20 Am. R. 464.

⁴⁴ Com. v. Smith, 151 Mass. 491, 24 N. E. 677.

⁴⁵ Jordan v. S., 142 Ind. 422, 41 N. E. 817, 10 Am. C. R. 32.

⁴⁶ Orrell v. P., 94 Ill. 456. See Dugle v. S., 100 Ind. 259.

⁴⁷ S. v. Bedell, 65 Vt. 541, 27 Atl. 208.

⁴⁸ S. v. Fidment, 35 Iowa 541, 2 Green C. R. 633. See Conley v. S., 5 W. Va. 522, 2 Green C. R. 675. Held not bad for duplicity: S. v. Grimes, 50 Minn. 123, 52 N. W. 275; Com. v. Allen, 128 Mass. 46, 35 Am. R. 356; Com. v. Harney, 51 Mass. 422; Early v. Com., 86 Va. 921, 11 S. E. 795; Beaumont v. S., 1 Tex.

§ 865. **Several burnings, one offense.**—The unlawful burning of different dwelling-houses of different owners or different buildings of the same owner at the same time and by the same act, is but a single offense, and may be joined in one indictment, in the same or different counts.⁴⁹

§ 866. **Malice essential.**—If malice is an element of the crime of arson as defined by statute, the indictment will be fatally defective in failing to allege that the burning was maliciously done; and the same rule governs if intent be an element of the crime.⁵⁰ But malice or intent need not be alleged in the indictment if not an essential element of the offense.⁵¹

§ 867. **Intent essential.**—Where it is made arson to set on fire or burn a building with intent to defraud an insurance company, the indictment must allege the intent to defraud, and that the building was insured against loss by fire.⁵² It is necessary to aver the guilty intent, that is, that the building was insured against loss by fire, and that the accused set it on fire with the intent to injure the insurer, the intent being an element of the offense.⁵³

§ 868. **Value essential.**—The penalty being a fine equal in value to the property burned, the indictment should allege the value of the property burned.⁵⁴

§ 869. **Day or night.**—Where by statute time becomes material in defining the crime of arson, as “in the night time,” the indictment will be fatally defective in omitting to allege “in the night time,”

App. 533, 28 Am. R. 424; S. v. Green, 92 N. C. 779; S. v. Jones, 106 Mo. 302, 17 S. W. 366. See S. v. Hull, 83 Iowa 112, 48 N. W. 917; Washington v. S., 68 Ala. 85; Hoyt v. P., 140 Ill. 588, 30 N. E. 315.

⁴⁹ P. v. Fanshawe, 137 N. Y. 68, 32 N. E. 1102; Woodford v. P., 62 N. Y. 117, 20 Am. R. 464; Miller v. S., 45 Ala. 24; Com. v. Allen, 128 Mass. 46, 35 Am. R. 356; Com. v. Lamb, 67 Mass. 493; S. v. Ward, 61 Vt. 153, 17 Atl. 483.

⁵⁰ Maxwell v. S., 68 Miss. 339, 8 So. 546; Kellenbeck v. S., 10 Md. 431, 69 Am. Dec. 166; Mott v. S., 29 Ark. 147; S. v. Hill, 55 Me. 365.

⁵¹ P. v. Fanshawe, 137 N. Y. 68, 32 N. E. 1102.

⁵² S. v. Porter, 90 N. C. 719; Staaden v. P., 82 Ill. 432, 25 Am. R. 333; S. v. England, 78 N. C. 552. See also S. v. McCarter, 98 N. C. 637, 4 S. E. 553; S. v. Rogers, 94 N. C. 860; S. v. Phifer, 90 N. C. 721; P. v. Mooney, 127 Cal. 339, 59 Pac. 761.

⁵³ Staaden v. P., 82 Ill. 434; Heard v. S., 81 Ala. 55, 1 So. 640, 7 Am. C. R. 76; 1 McClain Cr. L., § 522. See P. v. Henderson, 1 Park. Cr. (N. Y.) 560.

⁵⁴ Clark v. P., 1 Scam. (Ill.) 120.

otherwise not defective.⁵⁵ An indictment pursuing the common law form of indictments for arson, omitting to state whether the burning was in the night time or in the day time, merely alleging that the act was committed on a certain date, is sufficient to sustain a conviction for arson committed in the day time, but not the night time.⁵⁶

§ 870. **Stating venue.**—The indictment alleging that the accused “in the county of Spokane, state of Washington, did then and there burn a certain building,” is sufficient statement of the location of the building.⁵⁷

§ 871. **First and third degrees.**—Under a statute dividing arson into three degrees and defining each, an indictment charging that the defendant “willfully set fire to or burned, in the night time, a jail in a county named, which was occupied at the time by persons lodged therein,” sufficiently charges arson in the first degree under the statute of Alabama.⁵⁸ In drawing an indictment for arson in the third degree, it is not necessary to negative the aggravating circumstances essential to constitute arson in the first or second degree, as defined by statute.⁵⁹

§ 872. **Barn containing grain.**—Under a statute making it arson “to willfully and unlawfully burn any stable, barn or any house or place where wheat, corn or other grain is usually kept,” an indictment charging the burning of “a barn” the property of the owner, is sufficient without alleging that wheat, corn or other grain were usually kept in it.⁶⁰

⁵⁵ S. v. England, 78 N. C. 552; S. v. Tennehom, 92 Iowa 551, 61 N. W. 193. See Brightwell v. S., 41 Ga. 482.

⁵⁶ Curran's Case, 7 Gratt. (Va.) 619; Dick v. S., 53 Miss. 384; Cheat-ham v. S., 59 Ala. 40.

⁵⁷ S. v. Meyers, 9 Wash. 8, 36 Pac. 1051; P. v. Wooley, 44 Cal. 494; Com. v. Barney, 64 Mass. 480; Baker v. S., 25 Tex. App. 1, 8 S. W. 23, 8 Am. St. 427; S. v. Gwinn, 24 S. C. 146; S. v. Moore, 24 S. C. 150, 58 Am. R. 241. See S. v. Wacker, 16 Mo. App. 417.

⁵⁸ Sands v. S., 80 Ala. 201; Cheat-ham v. S., 59 Ala. 40; S. v. Whitmore, 147 Mo. 78, 47 S. W. 1068.

⁵⁹ S. v. Kroscher, 24 Wis. 64; P. v. Haynes, 55 Barb. (N. Y.) 450; P. v. Durkin, 5 Park. Cr. (N. Y.) 243. See also the following cases: S. v. Gregory, 33 La. 737; Hester v. S., 17 Ga. 130; Com. v. Squire, 42 Mass. 258; Leonard v. S., 96 Ala. 108, 11 So. 307. See also Com. v. Hamilton, 81 Mass. 480.

⁶⁰ Evans v. Com., 11 Ky. L. 573, 12 S. W. 768, 769. *Contra*, Mulligan v. S., 25 Tex. App. 199, 7 S. W. 664, 8 Am. St. 435; Chapman v. Com., 5 Whart. (Pa.) 427, 34 Am. Dec. 565. *Contra*, Under the common law: S. v. Porter, 90 N. C. 719.

§ 873. **Indictment sufficient.**—The indictment, after stating the time and place, alleged that the defendant, “a certain barn of one B—, there situate, did feloniously, willfully and maliciously burn.” Held sufficient.⁶¹

§ 874. **Attempt to burn.**—An indictment alleging that the defendant “did unlawfully, feloniously and willfully attempt to set fire to and burn and destroy a certain frame building commonly called a barn,” is bad because it fails to allege any act done.⁶²

§ 875. **“Wantonly and willfully.”**—Under a statute making it a felony to “wantonly and willfully” set fire to certain buildings enumerated, an indictment alleging that the defendant “feloniously, willfully, maliciously and unlawfully” set fire to the building, is defective.⁶³

§ 876. **Allegation of burning.**—An indictment charging arson with proper averments stating that the defendant “did set fire to” the house in question, is not sufficient. It must allege that he burned the house.⁶⁴ But where the indictment alleges, “did set fire to and burned and destroyed,” it is sufficient.⁶⁵

ARTICLE IV. EVIDENCE; VARIANCE.

§ 877. **Proving ownership.**—The ownership of the property maliciously burned may be shown by parol evidence on the trial.⁶⁶

§ 878. **Insurance policy—Secondary evidence.**—On a charge of burning a building to obtain the insurance, the defendant having the

⁶¹ Grubb v. S., 14 Wis. 470. See P. v. Duford, 66 Mich. 90, 33 N. W. 28; Harbin v. S., 133 Ind. 699, 33 N. E. 635; Ledgerwood v. S., 134 Ind. 81, 33 N. E. 631; Com. v. Elliston, 14 Ky. L. 216, 20 S. W. 214; Howard v. S., 109 Ga. 137, 34 S. E. 330 (jail).

⁶² Com. v. Peaslee (Mass., 1901), 59 N. E. 55; Kinningham v. S., 119 Ind. 332, 21 N. E. 911. See S. v. Johnson, 19 Iowa 230. But see *contra*, P. v. Giacamella, 71 Cal. 48, 12 Pac. 302.

⁶³ S. v. Morgan, 98 N. C. 641, 3 S. E. 927; S. v. Pierce, 123 N. C. 745,

31 S. E. 847. But see the following cases: S. v. Thorne, 81 N. C. 555; S. v. Price, 37 La. 215; S. v. Philbin, 38 La. 964; Chapman v. Com., 5 Whar. (Pa.) 427, 34 Am. Dec. 565.

⁶⁴ Howel v. Com., 5 Gratt. (Va.) 664; Mary v. S., 24 Ark. 44, 31 Am. D. 60; Cochrane v. S., 6 Md. 400. *Contra*, S. v. Taylor, 45 Me. 322.

⁶⁵ Lavelle v. S., 136 Ind. 233, 36 N. E. 135. See also P. v. Myers, 20 Cal. 76.

⁶⁶ Rogers v. S., 26 Tex. App. 404, 9 S. W. 762; S. v. Jaynes, 78 N. C. 504; S. v. Elder, 21 La. 157; Com. v. Wesley, 166 Mass. 248, 44 N. E. 228.

insurance policy and refusing to produce it, secondary evidence is competent, and an agent of the insurer may testify to the execution and delivery of the policy and the contents of it.⁶⁷

§ 879. **Proof of insurance company.**—Proof of the legal existence of an insurance company is not required on a charge of arson with intent to defraud the company.⁶⁸

§ 880. **Evidence of corpus delicti.**—When the general fact of burning has been shown by circumstances excluding accident or natural causes as the origin of the fire, then the foundation is laid for the introduction of any legal and sufficient evidence that the act was committed by the accused with criminal intent.⁶⁹ In arson the *corpus delicti* consists not only of the fact that a building has been burned, but also of the fact that it has been willfully fired by some responsible person.⁷⁰

§ 881. **Endangering other building.**—On a charge of burning a building not inhabited, adjoining one inhabited, whereby the latter was endangered, evidence that the fire actually burned the inhabited building is competent to prove that it was “endangered.”⁷¹

§ 882. **Motive, not indispensable.**—Motive is not an indispensable element of the crime of arson, where the offense sufficiently appears in all other respects; whether the motive be gain or revenge is not material.⁷²

§ 883. **Motive pecuniary.**—Where the motive for burning the building is pecuniary, as profitable collection of insurance, see the following cases in the margin.⁷³ The intent to defraud the insurer

⁶⁷ *Knights v. S.*, 58 Neb. 225, 78 N. W. 508.

⁶⁸ *S. v. Tucker*, 84 Mo. 23; *P. v. Hughes*, 29 Cal. 257; *P. v. Schwartz*, 32 Cal. 160; *Evans v. S.*, 24 Ohio St. 458; *S. v. Byrne*, 45 Conn. 273.

⁶⁹ *Carlton v. P.*, 150 Ill. 181, 37 N. E. 244; *Sam v. S.*, 33 Miss. 347; *Phillips v. S.*, 29 Ga. 105.

⁷⁰ *Carlton v. P.*, 150 Ill. 181, 37 N. E. 244, 9 Am. C. R. 62; *Winslow v. S.*, 76 Ala. 42; *S. v. Millmeier*, 102 Iowa 692, 72 N. W. 275. See *Brown v. Com.*, 89 Va. 379, 16 S. E. 250, holding that the evidence was not sufficient to establish the *corpus delicti*: *Jenkins v. S.*, 53 Ga. 33.

⁷¹ *S. v. Grimes*, 50 Minn. 123, 52 N. W. 275.

⁷² *P. v. Fong Hong*, 120 Cal. 685, 53 Pac. 265. See *Gillett Indirect & Col. Ev.*, § 59.

⁷³ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483; *P. v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *P. v. O'Neill*, 112 N. Y. 355, 19 N. E. 796; *Com. v. Bradford*, 126 Mass. 42; *S. v. Watson*, 63 Me. 128; *Freund v. P.*, 5 Park. Cr. (N. Y.) 198; *Stitz v. S.*, 104 Ind. 359, 4 N. E. 145; *P. v. Scott*, 10 Utah 217, 37 Pac. 335; *S. v. Cohn*, 9 Nev. 179; *Com. v. Hudson*, 97 Mass. 565.

may be inferred from the fact that the owner of an insured building burned it.⁷⁴

§ 884. Intent—Shown by circumstantial evidence.—The criminal intent in arson, the same as in other criminal offenses, may be established by circumstantial evidence; as, if a person is charged with burning his own house, the fact that the house was heavily insured, or that on some previous occasion the same house had been burned, may be shown in evidence as tending to prove motive.⁷⁵

§ 885. Threats—Ill feeling.—Previous threats and ill feeling of the defendant toward the owner of the property burned, and his declaration that “no man should prosper on the place,” are competent as tending to show malice and intent.⁷⁶ For cases illustrating the rule that ill feeling of the defendant toward the owner of the building burned and his desire for revenge are competent in evidence, see the following cases in the margin.⁷⁷ Evidence of ill feeling toward the owner and of opportunity to commit the crime of arson, alone, will not warrant a conviction of the accused.⁷⁸

§ 886. Defendant's previous threats.—Evidence of previous attempts or threats by the defendant to burn the building in question, though remote, are competent as tending to prove his guilt.⁷⁹ It may be shown in evidence that the accused had threatened the owner of a

⁷⁴ *P. v. Vasalo*, 120 Cal. 168, 52 Pac. 305.

⁷⁵ *Stitz v. S.*, 104 Ind. 359, 4 N. E. 145; *P. v. Levine*, 85 Cal. 39, 22 Pac. 969; *Com. v. Bradford*, 126 Mass. 42; *S. v. Cohn*, 9 Nev. 179; *Meister v. P.*, 31 Mich. 99; *S. v. Vatter*, 71 Iowa 557, 32 N. W. 506. See also *Halleck v. S.*, 65 Wis. 147, 26 N. W. 572; *S. v. Kingsbury*, 58 Me. 238; *S. v. Crawford*, 99 Mo. 74, 12 S. W. 354; *S. v. Roberts*, 15 Or. 187, 13 Pac. 896; *Underhill Cr. Ev.*, § 370.

⁷⁶ *P. v. Eaton*, 59 Mich. 559, 26 N. W. 702; *Morris v. S.*, 124 Ala. 44, 27 So. 336; *Underhill Cr. Ev.*, § 368, citing *S. v. Lytle*, 117 N. C. 799, 23 S. E. 476; *Prater v. S.*, 107 Ala. 26, 18 So. 238; *Ford v. S.*, 112 Ind. 373, 383, 14 N. E. 241; *S. v. Crawford*, 99 Mo. 74, 79, 12 S. W. 354; *Com. v. Wesley*, 166 Mass. 248, 44 N. E. 228; *Johnson v. S.*, 89 Ga. 107, 14 S. E.

889; *S. v. Millmeier*, 102 Iowa 692, 72 N. W. 275; *S. v. Hallock*, 70 Vt. 159, 40 Atl. 51.

⁷⁷ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483; *Com. v. Quinn*, 150 Mass. 401, 23 N. E. 54; *S. v. Emery*, 59 Vt. 84, 7 Atl. 129; *Oliver v. S.*, 33 Tex. Cr. 541, 28 S. W. 202; *Prater v. S.*, 107 Ala. 26, 18 So. 238; *S. v. Thompson*, 97 N. C. 496, 1 S. E. 921.

⁷⁸ *Garner v. Com. (Va.)*, 26 S. E. 507.

⁷⁹ *Hinds v. S.*, 55 Ala. 145; *P. v. Lattimore*, 86 Cal. 403, 24 Pac. 1091; *Com. v. Crowe*, 165 Mass. 139, 42 N. E. 563; *S. v. Ward*, 61 Vt. 153, 17 Atl. 483; *S. v. Rhodes*, 111 N. C. 647, 15 S. E. 1038; *S. v. Crawford*, 99 Mo. 74, 12 S. W. 354; *Winslow v. S.*, 76 Ala. 42; *Underhill Cr. Ev.*, § 368, citing *Com. v. Quinn*, 150 Mass. 401, 23 N. E. 54; *S. v. Fenlason*, 78 Me. 495, 7 Atl. 385.

house adjacent to that which was burned, or that a person, though not the owner of the house, had goods stored in it.⁸⁰

§ 887. Burning other buildings.—Evidence of the burning of other buildings about the same time in the same locality, is competent as tending to prove the burning charged in the indictment where the different acts appear to have been connected as one transaction; as, for example, on a charge of “setting fire to an outhouse used as a kitchen,” evidence of an attempt to burn a dwelling-house about the same hour about fifteen yards off; that both houses were saturated with kerosene; that fagots of wood tied with a rope belonging to the defendant had been used in the attempt. Held competent as tending to prove the charge in the indictment.⁸¹ But the general rule is, such evidence is not competent unless some connection can be shown tending to make all one transaction.⁸²

§ 888. Burning other buildings—Incompetent.—Evidence of the burning of other buildings in the vicinity at or about the same time as the one charged in the indictment, is not competent unless there is evidence connecting the defendant with such other burning.⁸³

§ 889. Incompetent evidence.—On the trial of a charge for burning a “barn,” evidence of the burning of the contents of the barn is incompetent and erroneous where there is no dispute that the barn was a “building.”⁸⁴

§ 890. Origin of fire.—On the trial on a charge of arson the evidence tended to show that the fire started in a shed in which was kept a gasoline stove. It is competent for the accused to show that the stove leaked and had previously caught fire.⁸⁵

⁸⁰ Underhill Cr. Ev., § 368, citing *Bond v. Com.*, 83 Va. 581, 3 S. E. 149; *S. v. Emery*, 59 Vt. 84, 7 Atl. 129.

⁸¹ *S. v. Thompson*, 97 N. C. 496, 1 S. E. 921; *Wright v. P.*, 1 N. Y. Cr. 462. See *Com. v. Choate*, 105 Mass. 451; *P. v. Smith*, 55 N. Y. Supp. 932, 37 App. Div. 280; *P. v. Hittel* (Cal., 1901), 63 Pac. 919.

⁸² *Com. v. Gauvin*, 143 Mass. 134, 8 N. E. 895; *S. v. Dukes*, 40 S. C.

481, 19 S. E. 134; *P. v. Cassidy*, 60 Hun 579, 14 N. Y. Supp. 349; *S. v. Raymond*, 53 N. J. L. 260, 21 Atl. 328.

⁸³ *Com. v. Gauvin*, 143 Mass. 134, 8 N. E. 895.

⁸⁴ *Simpson v. S.*, 111 Ala. 6, 20 So. 572. See also *Hamilton v. P.*, 29 Mich. 173.

⁸⁵ *S. v. Delaney*, 92 Iowa 467, 61 N. W. 189.

§ 891. **Identifying accused.**—Evidence was introduced tending to show that the defendant, with a jug in her hand, approached the building alleged to have been burned by her; that she poured oil out of the jug and set it on fire. Other evidence was introduced showing that the jug had formerly been in possession of her husband. Held competent as tending to identify the defendant.⁸⁶

§ 892. **Sufficiency of facts.**—The facts and circumstances in the following arson cases sustain convictions beyond a reasonable doubt.⁸⁷ But in the following cases the facts and circumstances were held not sufficient to warrant convictions.⁸⁸

§ 893. **Variance.**—Proof of burning a “crib with corn in it” will not support an allegation of burning a “barn with grain or corn in it.”⁸⁹

§ 894. **Verdict, sufficiency.**—Under an indictment containing one count charging every essential fact necessary to constitute arson in the first degree, a verdict of guilty fixing the punishment at ten years in the penitentiary, without stating the degree, is sufficient to sustain a conviction.⁹⁰

⁸⁶ Thomas v. S., 107 Ala. 13, 18 So. 229. See Halleck v. S., 65 Wis. 147, 26 N. W. 572; Morris v. S., 124 Ala. 44, 27 So. 336; Ethridge v. S., 124 Ala. 106, 27 So. 320 (tracks).

⁸⁷ Carlton v. P., 150 Ill. 181, 37 N. E. 244, 41 Am. St. 346; Whitfield v. S., 25 Fla. 289, 5 So. 805; Johnson v. S., 89 Ga. 107, 14 S. E. 889; P. v. Burridge, 99 Mich. 343, 58 N. W. 319; P. v. Levine, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; Bluman v. S., 33 Tex. Cr. 43, 21 S. W. 1027, 26 S. W. 75; S. v. Tennebom, 92 Iowa 551, 61 N. W. 193; Brooks v. S., 51 Ga. 612; Ross v. S., 109 Ga. 516, 35 S. E. 102; Allen v. S., 91 Ga. 189, 16 S. E. 980; S. v. Burgor, 94 Iowa 33, 62 N. W. 696; Ethridge v. S., 124 Ala. 106, 27 So. 320; S. v. Shines, 125 N. C. 730, 34 S. E. 552; P. v. Hiltel (Cal., 1901), 63 Pac. 919; P. v. Fitzgerald, 46 N. Y. Supp. 1020, 12 N. Y. Cr. R.

524, 156 N. Y. 253, 50 N. E. 846; Meeks v. S., 103 Ga. 420, 30 S. E. 252.

⁸⁸ Brown v. Com., 87 Va. 215, 12 S. E. 472; Com. v. Phillips, 12 Ky. L. 410, 14 S. W. 378; Tullis v. S., 41 Tex. 598; Anderson v. Com., 83 Va. 326, 2 S. E. 281; Luker v. S. (Miss.), 14 So. 259; Green v. S., 110 Ga. 270, 34 S. E. 563; Boatwright v. S., 103 Ga. 430, 30 S. E. 256; Strong v. S. (Miss.), 23 So. 392; P. v. Jones, 123 Cal. 65, 55 Pac. 698; Landers v. S., 39 Tex. Cr. 671, 47 S. W. 1008.

⁸⁹ S. v. Laughlin, 53 N. C. 354; Thomas v. S., 116 Ala. 461, 22 So. 666. As to burning a house, see Com. v. Smith, 151 Mass. 491, 24 N. E. 677. See also S. v. Roper, 88 N. C. 656; S. v. Atkinson, 88 Wis. 1, 58 N. W. 1034.

⁹⁰ Davis v. S., 52 Ala. 357; Dick v. S., 53 Miss. 384.

CHAPTER XV.

FORGERY.

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ARTICLE I. DEFINITION AND ELEMENTS.

Subdivision 1.—Uttering Defined.

§ 896. **Forgery defined.**—Forgery is the fraudulent making or alteration of a writing to the prejudice of another's rights.¹ By the statutory definition of forgery of the state of Washington, the uttering or publishing of a forged draft constitutes forgery.²

§ 897. **Alteration is forgery.**—A material alteration in part of a genuine instrument, whereby a new operation is given it, is a forgery of the whole, if done with intent to defraud.³

¹ 4 Bl. Com. 247; U. S. v. Long, 30 Fed. 678; S. v. Flye, 26 Me. 312; 3 Greenl. Ev., § 103; S. v. Rose, 70 Minn. 403, 73 N. W. 177; Underhill Cr. Ev., § 419.

² S. v. Harding, 20 Wash. 556, 56 Pac. 399, 929. An exhaustive note citing many authorities as to what

is and what is not forgery, and also what instruments may be the subject of forgery, may be found at the end of the case of S. v. Hilton, 35 Kan. 338, 11 Pac. 164, 8 Am. C. R. 273, note.

³ S. v. Wooderd, 20 Iowa 541; S. v. Kattlemann, 35 Mo. 105; Owen v.

§ 898. **Nature of forgery.**—The nature of a forgery in writing or changing a document consists in endeavoring to give an appearance of truth to a mere deceit and falsity, to make it appear that a man did an act, when in fact he did not, or that a person did some act at a time when it was not done, with the intention of defrauding.⁴

§ 899. **Changing date.**—When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law, such as a false date in a telegram.⁵

§ 900. **Indorsing same name.**—If the accused have the same name as the payee and write his name on the back of the draft, it is forgery.⁶

§ 901. **Fictitious name.**—Forgery may be committed by the false making of a written instrument in the name of a fictitious person.⁷

§ 902. **Forgery of deed.**—The signing of the name of another to a deed, feloniously, with intent to defraud, completes the offense of forgery, without acknowledgment or delivery of the deed.⁸

§ 903. **Public documents.**—Forging of public documents is punishable, such as forging the certificate of a county judge to requisition papers, or the forging of a witness' certificate.⁹

§ 904. **Aiding and abetting.**—It is not necessary, in order to charge the defendant with forging the instrument, that he should have actu-

Brown, 70 Vt. 521, 41 Atl. 1025; P. v. Underhill, 26 N. Y. Supp. 1030, 75 Hun 329, 142 N. Y. 38, 36 N. E. 1049; Com. v. Hide, 94 Ky. 517, 15 Ky. L. 264, 23 S. W. 195; 2 McClain Cr. L., § 765; 3 Greenl. Ev. (Redf. ed.), § 104; 2 East P. C. 861; 1 Hawk. P. C., ch. 70, § 2.

⁴ S. v. Redstrake, 39 N. J. L. 365, 3 Am. C. R. 129.

⁵ Reg. v. Ritson, L. R. 1 C. C. 200; Queen v. Riley, L. R. (1896) 1 Q. B. D. 309, 10 Am. C. R. 406 (telegram); Owen v. Brown, 70 Vt. 521, 41 Atl. 1025.

⁶ 1 Whar. Cr. L. (8th ed.), § 657; Barfield v. S., 29 Ga. 127; U. S. v. Long, 30 Fed. 678; P. v. Peacock, 6 Cow. 72; 3 Greenl. Ev., § 103.

⁷ Thompson v. S., 49 Ala. 16; P. v.

Warner, 104 Mich. 337, 62 N. W. 405; S. v. Minton, 116 Mo. 605, 22 S. W. 808; Ex parte Hibbs, 26 Fed. 421; Scott v. S., 40 Tex. Cr. 105, 48 S. W. 523; 3 Greenl. Ev. (Redf. ed.), § 109; Johnson v. S., 35 Tex. Cr. 271, 33 S. W. 231; Lacelles v. S., 90 Ga. 347, 16 S. E. 945; Underhill Cr. Ev., § 427; Hanks v. S. (Tex. Cr. Ap., 1899), 54 S. W. 587.

⁸ S. v. Tobie, 141 Mo. 547, 42 S. W. 1076; Lassiter v. S., 35 Tex. Cr. 540, 34 S. W. 751. See Caffey v. S., 36 Tex. Cr. 198, 36 S. W. 82; P. v. Baker, 100 Cal. 188, 34 Pac. 649. But see Johnson v. S., 40 Tex. Cr. 605, 51 S. W. 382.

⁹ Langdon v. P., 133 Ill. 388, 24 N. E. 874; S. v. Bullock, 54 S. C. 300, 32 S. E. 424.

ally participated in uttering and passing the same. It is sufficient if he forged the paper, or aided or assisted in its forgery, with the intent that it should be uttered as true and genuine.¹⁰

§ 905. Procuring another.—The defendant by false representations induced the daughter to sign her father's name to a promissory note; the daughter was innocent of any wrongful conduct in doing so, she having previously executed a similar instrument under her father's directions. Held that the defendant was guilty of forgery.¹¹

§ 906. Uttering is offering.—To constitute an uttering it is not necessary that the forged instrument should have been actually received as genuine by the person upon whom the attempt to defraud is made. To utter a thing is to offer it, whether it be taken or not.¹²

§ 907. Uttering deed.—If one procures a forged deed to be recorded or undertakes to raise money upon it, he will be guilty of uttering, if done so with intent to defraud.¹³

§ 908. Uttering not included.—A statute which defines the offense of forgery in the fourth degree to be the having in one's possession, buying or receiving a forged instrument knowing it to be forged, with intent to injure and defraud, by uttering it as true and genuine, does not include the offense of actually uttering the instrument as true and genuine.¹⁴

Subdivision 2.—Instrument Effective.

§ 909. Instrument must be effective.—The instrument alleged to be forged must be such an instrument as, if genuine, would be effective,¹⁵ or would effect the transfer of property.^{15a}

¹⁰ Roscoe Cr. Ev., 566; Whar. Cr. L. (8th ed.), §§ 1446, 1452; 2 Bish. Cr. L., § 598; Anson v. P., 148 Ill. 494, 502, 35 N. E. 145. See Greenl. Ev. (Redf. ed.), § 104; Koch v. S., 115 Ala. 99, 22 So. 471.

¹¹ Gregory v. S., 26 Ohio St. 510.

¹² P. v. Caton, 25 Mich. 388; Rex v. Cooke, 8 C. & P. 582; 3 Greenl. Ev. (Redf. ed.), § 110; Espalla v. S., 108 Ala. 38, 19 So. 82; P. v. Tomlinson, 35 Cal. 503; Com. v. Hall, 4 Allen (Mass.) 305; McGregor v. S., 16 Ind. 9.

¹³ P. v. Dane, 79 Mich. 361, 44 N. W. 617; U. S. v. Brooks, 3 MacArthur 315; P. v. Baker, 100 Cal. 188, 34 Pac. 649.

¹⁴ S. v. Mills, 146 Mo. 195, 47 S. W. 938.

¹⁵ Brown v. P., 86 Ill. 241; Waterman v. P., 67 Ill. 93, 1 Am. C. R. 225; Hendricks v. S., 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. C. R. 281.

^{15a} Noakes v. P., 25 N. Y. 380; Com. v. Wilson, 89 Ky. 157, 11 Ky. L. 375, 12 S. W. 264; S. v. Evans, 15 Mont. 539, 39 Pac. 850; P. v. Shall,

§ 910. **Instrument, order.**—The instrument alleged to be forged is as follows: “La Grange, June 19, 1881. Mr. Allen: Please let A. Garmire have team to go to Mongo, and charge same to me.” It comes within the provisions of the statute defining forgery.¹⁶

§ 911. **Draft, check, bill of exchange, order.**—A draft made payable to the bearer is included in an order for the payment of money, within the meaning of the statute.¹⁷ A “bill of exchange” is comprehensive enough to include a check drawn upon a bank.¹⁸

§ 912. **Contract, not bill or note.**—A statute against uttering or passing any fictitious bill, note or check or other instrument of writing for the payment of money or property, does not include a contract for the purchase of a marble monument.¹⁹

§ 913. **Warehouse receipts, not notes.**—Warehouse receipts are not included in promissory notes, bonds, due bills, or other instruments in writing as respects the title, in case of an assignment.²⁰

§ 914. **Crucible is not tool.**—The words “instrument” and “tool,” being considered as generic terms, will not include the word “crucible” as one of their family within the meaning of the criminal law.²¹

Subdivision 3.—Persons Defrauded.

§ 915. **Persons defrauded.**—The prosecution is not required to prove that the defendant participated in the intent to defraud the particular person named in the indictment. It is sufficient if he forged the paper or aided or assisted in its forgery with intent that it should be uttered as true and genuine.²² It is no defense to a

9 Cow. 778; Barnum v. S., 15 Ohio 717; 3 Greenl. Ev., § 103; S. v. Van Auken, 98 Iowa 674, 68 N. W. 454.

¹⁶Garmire v. S., 104 Ind. 444, 4 N. E. 54, 5 Am. C. R. 238; Com. v. Fisher, 17 Mass. 46; Anderson v. S., 65 Ala. 553; S. v. Keeter, 80 N. C. 472; S. v. Morgan, 35 La. 293; Peete v. S., 2 Lea (Tenn.) 513.

¹⁷P. v. Brigham, 2 Mich. 550; S. v. Lee, 32 Kan. 360, 4 Pac. 653; P. v. Howell, 4 Johns. (N. Y.) 296. See P. v. Kemp, 76 Mich. 410, 43 N. W. 439; S. v. Brett, 16 Mont. 360, 40 Pac. 873.

¹⁸Hawthorn v. S., 56 Md. 530; 2 McClain Cr. L., § 752. *Contra*, Townsend v. S., 92 Ga. 732, 19 S. E. 55; Canadian Bank v. McCrea, 106 Ill. 289.

¹⁹Shirk v. P., 121 Ill. 66, 11 N. E. 888.

²⁰Canadian Bank v. McCrea, 106 Ill. 289.

²¹S. v. Bowman, 6 Vt. 594.

²²Anson v. P., 148 Ill. 502, 35 N. E. 145; Roscoe Cr. Ev., 566; 2 Bish. Cr. L., § 598; 3 Greenl. Ev., § 18.

charge of forgery that the person to whom the forged instrument was delivered was not defrauded. The crime is complete if the defendant intends him to be defrauded.²³

§ 916. **Person defrauded.**—If the writing purports to be an order which the party has a right to make, although in truth he had no such right, and although no such person existed in fact as the order purports to be made by, it falls within the penalty of the act. It is not essential that the person in whose name it purports to be made should have the legal capacity to make it.²⁴

§ 917. **Intent, knowledge essential.**—The intent to defraud in the forging of an instrument, or the knowledge that it is a forgery, is an essential element, and must be alleged in the indictment and proven on the trial.²⁵ In a prosecution for having possession of or passing counterfeit money, it must appear that the defendant knew of the spurious character of the money.²⁶

§ 918. **Instrument sufficient.**—The following instrument is not incomplete or meaningless: "Mr. Gladstone please let Bare Have the sume of 5 Dollars in Grosses and charge the same to Dr. F. T. Cooke." It is the subject of forgery without the averment of extrinsic facts.²⁷ The instrument alleged to be forged reads as follows: "Akron, May 2, 1874. Mr. Schroeder: Please let Mr. Bosswick have his clothes, and I will hold his pay till next Tuesday, and will see that paid for." This instrument is an order for the delivery of goods and chattels within the meaning of the statute.²⁸

²³ *Benson v. S.*, 124 Ala. 92, 26 So. 119.

²⁴ *S. v. Eades*, 68 Mo. 150, 3 Am. C. R. 124; *P. v. Stearns*, 21 Wend. (N. Y.) 409; *Clinch's Case*, 2 East P. C. 938.

²⁵ *P. v. Smith*, 103 Cal. 563, 37 Pac. 516; *Gates v. S.*, 71 Miss. 874, 16 So. 342; *Powers v. S.*, 87 Ind. 97; *S. v. Williams*, 66 Iowa 573, 24 N. W. 52; *U. S. v. Carll*, 105 U. S. 611.

²⁶ *Pigman v. S.*, 14 Ohio 555, 45 Am. D. 558; *Brown v. P.*, 9 Ill. 439; *Hopkins v. Com.*, 3 Metc. (Mass.) 464; *U. S. v. Roudenbush*, 1 Baldw. (U. S.) 514.

²⁷ *Hendricks v. S.*, 26 Tex. App. 176, 9 S. W. 555, 557, 8 Am. C. R. 279; *Lee v. S.*, 118 Ala. 672, 23 So. 669. See *S. v. Coyle*, 41 Wis. 267, 2 Am. C. R. 150.

²⁸ *Chidester v. S.*, 25 Ohio St. 433, 2 Am. C. R. 154; *P. v. Phillips*, 118 Mich. 699, 77 N. W. 245; *Lampkin v. S.*, 105 Ala. 1, 16 So. 575; *Glenn v. S.*, 116 Ala. 483, 23 So. 1; *Morearty v. S.*, 46 Neb. 652, 65 N. W. 784; *Elkins v. S.*, 35 Tex. Cr. 207, 32 S. W. 1047; 3 Greenl. Ev. (Redf. ed.), § 103.

§ 919. **Character of instrument immaterial.**—It is not material whether the instrument does or does not possess the legal requisites of a bill of exchange or an order for the payment of money. The particular name or character of the instrument is of no consequence. The question is whether it will have the effect to deceive and defraud.²⁹

§ 920. **Check not stamped.**—The fact that the check alleged to be forged was not stamped under the act of congress was not material, and is no defense.³⁰

ARTICLE II. MATTERS OF DEFENSE.

Subdivision 1.—When no Defense.

§ 921. **Alteration plain to be seen.**—If a person alters an instrument with intent to defraud, it can not avail him as a defense that the alterations were plain to be seen, and that no special attempt was made to conceal the alterations.³¹

§ 922. **Defrauded person indebted to defendant.**—It is no defense to a charge of forgery that the person whose name was forged was indebted to the defendant. The fact of such indebtedness would not authorize the defendant to sign the name of such person.³²

§ 923. **Witness' certificate.**—The fact that the statute makes no provision and prescribes no form for a witness' certificate is no defense to an indictment charging the defendant with the forgery of such a certificate.³³

§ 924. **Forgery or false pretense.**—Where the evidence shows that the accused obtained the signature of his daughter to the forged instrument, intending to falsely use it as that of his wife, he will be

²⁹ S. v. Eades, 68 Mo. 150, 3 Am. C. R. 124; P. v. Krummer, 4 Park. Cr. (N. Y.) 217.

³⁰ Cross v. P., 47 Ill. 155; Laird v. S., 61 Md. 309; P. v. Frank, 28 Cal. 507. See Com. v. McKean, 98 Mass. 9; Miller v. P., 52 N. Y. 304.

³¹ Rohr v. S., 60 N. J. L. 576, 38 Atl. 673.

³² Curtis v. S., 118 Ala. 125, 24 So. 111.

³³ S. v. Bullock, 54 S. C. 300, 32 S. E. 424.

guilty of forgery, though the testimony may also support a charge of false pretense.³⁴

Subdivision 2.—When Defense.

§ 925. Mere possession no offense.—Merely having possession of counterfeit coins or instruments by which the same are made is not an offense at common law.³⁵ But having possession of counterfeit coins with intent to pass the same, or having possession of instruments with intent to make such coins, is by statute a criminal offense.³⁶

§ 926. Mere delivery no offense.—Merely delivering a forged instrument to another, knowing it to be a forgery, with intent to have it-uttered or passed as a genuine instrument, is not sufficient to constitute forgery, under a statute making it forgery to attempt to pass a forged instrument as true and genuine with intent to cheat or injure another.³⁷

§ 927. Intent—Possession alone not sufficient.—The mere making and possession of a forged instrument do not necessarily prove an intent to defraud. Such making and possession is evidence, it is true, but it can not be said, as a legal proposition, that it proves a fraudulent intent.³⁸

§ 928. No deception, no offense.—Where the defendant made a note and without authority signed the names of several persons to it, and appended to it the following: "I was authorized to sign the above note," held not to be forgery, even though he was not authorized to sign the names to the note.³⁹

§ 929. Passing, when complete.—The act of passing is not complete until the instrument is received by the person to whom it is

³⁴ S. v. Farrell, 82 Iowa 553, 48 N. W. 940; Reg. v. Inder, 2 C. & K. 635.

³⁵ Dugdale v. Reg., 1 El. & Bl. 435; Rex v. Wheatly, 2 Burr. 1127; U. S. v. Wright, 2 Cranch 68; Rex v. Heath, R. & R. C. C. 184.

³⁶ Miller v. P., 3 Ill. 233; Bell v. S., 10 Ark. 536; S. v. Griffin, 18 Vt. 178; P. v. White, 34 Cal. 183; Peoples v. S., 6 Blackf. (Ind.) 95; S. v. Myers, 10 Iowa 448.

³⁷ P. v. Compton, 123 Cal. 403, 56 Pac. 44. See Miller v. S., 51 Ind. 405.

³⁸ Fox v. P., 95 Ill. 76; Miller v. S., 51 Ind. 405; 2 McClain Cr. L., § 767; Kotter v. P., 150 Ill. 441, 37 N. E. 932. But see S. v. Williams, 152 Mo. 115, 53 S. W. 424.

³⁹ S. v. Taylor, 46 La. 1332, 16 So. 190.

offered. Declaring the instrument to be good with the intention or attempt to pass it is "uttering."⁴⁰

§ 930. When not uttering.—The defendant, by placing a forged note in a bank for collection which he had received from the person who forged it, knowing it to be forged, is not guilty of uttering with intent to defraud, where the person whose name was forged was the father of the forger, and where the defendant knew at the time of attempting to so collect that the father had learned his son had committed such forgery.⁴¹

Subdivision 3.—Instruments Void.

§ 931. Instrument void.—An instrument absolutely void on its face, and which could work no injury to the person for whom it was obtained, can not be made the subject of forgery, if genuine.⁴²

§ 932. Instrument not basis of forgery.—An instrument not being or purporting to be a record, no indictment for forging it can be based on it.⁴³ A fictitious letter purporting to have been written by the superintendent of a railroad company, introducing the bearer, asking courtesies and stating that the bearer had been in the employ of the company, is not the subject of forgery.⁴⁴

§ 933. Order void.—The defendant was indicted for forging the following instrument: "Savannah, Ga., May 24, 1873. Central Railroad and Banking Co., pay to the order of ——— three hundred and sixty dollars. J. Lamer." The check, not being payable to bearer or to the order of any person, could not have defrauded the bank or any person.⁴⁵

§ 934. Certificate void.—A certificate issued by a clerk of a court certifying that a juror had attended court a certain number of days,

⁴⁰ 3 Greenl. Ev., § 110; U. S. v. Mitchell, Baldw. (U. S.) 366.

⁴¹ S. v. Redstrake, 39 N. J. L. 365, 3 Am. C. R. 131.

⁴² Roode v. S., 5 Neb. 174; Brown v. P., 86 Ill. 239; S. v. Pierce, 8 Iowa 231; S. v. Young, 46 N. H. 266; Reed v. S., 28 Ind. 396; Rex v. M'Intosh, 2 East P. C. 942; Terry v. Com., 87 Va. 672, 13 S. E. 104; 3 Greenl. Ev., § 103. See King v. S. (Tex. Cr.), 57 S. W. 845.

⁴³ Brown v. P., 86 Ill. 242; Underhill Cr. Ev., § 431.

⁴⁴ Waterman v. P., 67 Ill. 92; P. v. Wong Sam, 117 Cal. 29, 48 Pac. 972; 2 McClain Cr. L., § 756; P. v. Tomlinson, 35 Cal. 503.

⁴⁵ Williams v. S., 51 Ga. 535, 1 Am. C. R. 227; Moore v. S., 13 Ohio C. C. 10, 7 Ohio C. D. 70; P. v. Galloway, 17 Wend. (N. Y.) 540.

entitling him to payment for such attendance, not being authorized by law, is void, and can not be the basis of forgery.⁴⁶

§ 935. Instrument void.—If the instrument alleged to have been forged is so imperfect and incomplete that no one could be defrauded by it, a conviction can not be had on it.⁴⁷ To make falsely an instrument which upon its face is clearly void is not forgery, because from its character it could not have operated to defraud; but it is forgery to make falsely an instrument with intent to defraud, although, if it had been genuine, other steps must have been taken to complete the instrument.⁴⁸ An instrument not executed or signed by anybody is not an obligation; it is merely a blank piece of paper, and, therefore, is not such an instrument as the statute defining forgery contemplates.⁴⁹ Passing as genuine a bank bill of another state which has no legal value in Illinois and, under the law, purports to have none, is not a violation of the statute of Illinois defining forgery.⁵⁰

§ 936. Document not subject of forgery.—A document not intended to pass or create any interest, or give any title to anything, but merely to certify that a certain ceremony had been performed admitting a certain person into the holy order of deacon according to the rites and ceremonies of a church, is not the subject of forgery.⁵¹

§ 937. Trade-marks, not forgery.—Trade-marks and labels are not the subject of forgery at common law. Forgery at common law is the false making or materially altering of any writing with intent to defraud, which if genuine might apparently be of legal efficacy or a foundation of legal liability.⁵²

ARTICLE III. INDICTMENT.

§ 938. Statutory words sufficient.—Where the indictment alleged the forging or altering of the collector's book, stating the offense in the language of the statute, it was held sufficient.⁵³

⁴⁶ *Ter. v. Delana*, 3 Okla. 573, 41 Pac. 618. See *S. v. Gee*, 28 Or. 100, 42 Pac. 7.

⁴⁷ *P. v. Galloway*, 17 Wend. (N. Y.) 540; *Williams v. S.*, 51 Ga. 535, 1 Am. C. R. 227.

⁴⁸ *P. v. Bibby*, 91 Cal. 470, 474, 27 Pac. 781; *Com. v. Costello*, 120 Mass. 367; *Snell v. S.*, 2 Humph. (Tenn.) 347; *Smith v. S.*, 29 Fla. 408, 10 So.

894; *S. v. Wingard*, 40 La. 733, 5 So. 54.

⁴⁹ *U. S. v. Sprague*, 48 Fed. 828.

⁵⁰ *Gutchins v. P.*, 21 Ill. 641, 644; 2 McClain Cr. L., § 774.

⁵¹ *Reg. v. Morton*, 12 Cox C. C. 456, 1 Green C. R. 135.

⁵² *White v. Wagar*, 185 Ill. 195, 204, 57 N. E. 26, 50 L. R. A. 60.

⁵³ *Loehr v. P.*, 132 Ill. 507, 24 N. E.

§ 939. **Alleging alteration.**—The indictment, in alleging forgery by altering the instrument alleged to have been forged, must set out in what the alteration consisted; otherwise it will be defective.⁵⁴

§ 940. **Description of forged instrument.**—If the indictment charging forgery describes the forged instrument as it was at the time it is claimed the forgery was committed, it is sufficient although other additions or alterations may afterwards appear on the instrument.⁵⁵

§ 941. **Setting out instrument unnecessary.**—While it is not necessary to set out in the indictment the forged instrument, yet when the pleader attempts to set it out *in hoc verba*, he is bound to set out each and every part of the written instrument which constituted any part of the contract, and a failure to do so might be fatal.⁵⁶ But the number of the document and figures in the margin stating the amount are no parts of the document, and need not be set out in the indictment, nor need indorsements be alleged.⁵⁷

§ 942. **Instrument, in foreign language.**—Where the forged instrument is in a foreign language it is the better pleading to set out the instrument in the language in which it is written, but it is not indispensable that this should be done. A translation is sufficient.⁵⁸

§ 943. **Stating how defrauded.**—How and in what manner the party was to be defrauded is no ingredient of the crime, but is mere matter of evidence, and need not be set out in the indictment or in-

68. See Com. v. Bachop, 2 Pa. Sup. Ct. 294; Eldridge v. Com., 21 Ky. L. 1088, 54 S. W. 7.

⁵⁴ Kahn v. S., 58 Ind. 168; S. v. Fisher, 58 Mo. 256; S. v. Weaver, 13 Ired. (N. C.) 491. See S. v. Van Auken, 98 Iowa 674, 68 N. W. 454.

⁵⁵ Sampson v. P., 188 Ill. 592, 59 N. E. 427; Miller v. P., 52 N. Y. 304.

⁵⁶ Trask v. P., 151 Ill. 528, 38 N. E. 248; Langdale v. P., 100 Ill. 268; Griffin v. S., 14 Ohio St. 55; Com. v. Taylor, 5 Cush. (Mass.) 605; S. v. Carr, 5 N. H. 367; S. v. Gaubert, 49 La. 1692, 22 So. 930; S. v. Fleshman, 40 W. Va. 726, 22 S. E. 309; S. v. Childers, 32 Or. 119, 49 Pac. 801. *Contra*, S. v. Davis, 69 N. C. 313, 1 Green C. R. 540; McMillen v. S., 5

Ohio 268; S. v. Atkins, 5 Blackf. (Ind.) 458; S. v. Johnson, 26 Iowa 407; Davis v. S., 58 Neb. 465, 78 N. W. 930; Pierce v. S., 38 Tex. Cr. 604, 44 S. W. 292; Hill v. Com., 17 Ky. L. 1135, 33 S. W. 823.

⁵⁷ Langdale v. P., 100 Ill. 268; Cross v. P., 47 Ill. 157; Trask v. P., 151 Ill. 528, 38 N. E. 248; Com. v. Ward, 2 Mass. 397; Hennessy v. S., 23 Tex. App. 340, 5 S. W. 215; S. v. Jackson, 90 Mo. 156, 2 S. W. 128; Miller v. P., 52 N. Y. 304; S. v. Ridge, 125 N. C. 655, 34 S. E. 439; Lovejoy v. S., 40 Tex. Cr. 89, 48 S. W. 520.

⁵⁸ P. v. Ah Woo, 28 Cal. 205. See Duffin v. P., 107 Ill. 113; P. v. Bennett, 122 Mich. 281, 81 N. W. 117.

formation, on which all the authorities agree.⁵⁹ To constitute a good indictment, the defendant must be charged with not only the fraudulent use of the instrument in counterfeiting, but also the manner in which it was used.⁶⁰

§ 944. Indictment stating facts.—It is not necessary to allege in the indictment every fact the existence of which is assumed in the forged instrument, where the instrument on its face is a valid one.⁶¹

§ 945. Extrinsic averments necessary.—When the instrument is imperfect and its meaning and terms standing alone not intelligible from its words and figures, as “Due, 8.25, Askew Brothers,” then extrinsic facts should be alleged to make it intelligible.⁶² An indictment designed to be based upon a forged certificate of qualification to teach a common school, and which was lost, should set forth the substance of such certificate as would authorize the accused to be employed as a teacher and draw the public money, if genuine; the statute states the qualifications of a school teacher, and such qualifications should be alleged in the indictment.⁶³

§ 946. Strictness as in larceny.—Whether the same strictness should be required in forgery as in larceny, it is clear that a partnership should be alleged when the forged instrument purports to be the act of partners, and the name of each member of the partnership stated.⁶⁴

⁵⁹ *P. v. Van Alstine*, 57 Mich. 69, 23 N. W. 594, 6 Am. C. R. 276; *West v. S.*, 22 N. J. L. 212; *Rex v. Goate*, 1 Ld. Raym. 737. See also *Com. v. White*, 145 Mass. 392, 7 Am. C. R. 197, 14 N. E. 611; *Morearty v. S.*, 46 Neb. 652, 65 N. W. 784; *Shope v. S.*, 106 Ga. 226, 32 S. E. 140.

⁶⁰ *Bell v. S.*, 10 Ark. 536; *Peoples v. S.*, 6 Blackf. (Ind.) 95.

⁶¹ *P. v. Todd*, 77 Cal. 464, 19 Pac. 883; *S. v. Bibb*, 68 Mo. 286; *S. v. Covington*, 94 N. C. 913; *P. v. Clements*, 26 N. Y. 193.

⁶² *Rembert v. S.*, 53 Ala. 467, 2 Am. C. R. 143; *Crawford v. S.*, 40 Tex. Cr. 344, 50 S. W. 378; *P. v. Stearns*, 21 Wend. (N. Y.) 413; *Lynch v. S.* (Tex. Cr., 1899), 53 S. W. 693; *S. v. Briggs*, 34 Vt. 503; *Cox v. S.* 66 Miss. 14, 5 So. 618; *Com. v. Hinds*,

101 Mass. 211; *Chidester v. S.*, 25 Ohio St. 433, 2 Am. C. R. 157; *Hobbs v. S.*, 75 Ala. 1; *Polk v. S.*, 40 Tex. Cr. 668, 51 S. W. 909; *Womble v. S.*, 39 Tex. Cr. 24, 44 S. W. 827; *P. v. Parker*, 114 Mich. 442, 72 N. W. 250; *S. v. Rose*, 70 Minn. 403, 73 N. W. 177; *S. v. Patch*, 21 Mont. 534, 55 Pac. 108; *S. v. Wheeler*, 19 Minn. 98, 1 Green C. R. 542. See *Algood v. S.*, 87 Ga. 668, 13 S. E. 569; *Com. v. Dunleay*, 157 Mass. 386, 32 N. E. 356; *Yount v. S.*, 64 Ind. 443.

⁶³ *Wallace v. P.*, 27 Ill. 45; *S. v. Grant*, 74 Mo. 33; *Maddox v. S.*, 87 Ga. 429, 13 S. E. 559.

⁶⁴ *Labbaite v. S.*, 6 Tex. App. 483; *Hutton v. S.* (Tex. Cr.), 38 S. W. 209. See also *Booth v. S.*, 36 Tex. Cr. 600, 38 S. W. 196.

§ 947. **To whom uttered, immaterial.**—It has been held that an indictment for forgery which fails to allege the name of the person to whom the forged instrument was uttered is good.⁶⁵ The allegation properly charging the accused with passing the forged bank note is sufficient without alleging to whom the same was passed.⁶⁶ In charging the uttering of a forged instrument, the indictment need not allege by whom nor how the forged instrument was made.⁶⁷

§ 948. **Duplicity—Forgery and uttering.**—Charging the forging and uttering of a forged instrument in the same count of an indictment is bad for duplicity, each being a substantive offense.⁶⁸ An indictment which charges a prisoner in the same count with the offenses of falsely making, forging and counterfeiting, and causing and procuring to be falsely made, forged and counterfeited, is not bad for duplicity, the language of the statute having been pursued in drawing the indictment.⁶⁹

§ 949. **Forging several indorsements.**—An indictment alleging the forging and uttering of a check, by raising it, and the forging of several indorsements on the back of it and passing it on a certain corporation, charges but a single offense, all the acts having been alleged with a single intent to defraud.⁷⁰

§ 950. **Joining counts.**—Forging three different receipts of three different persons to the same document, to wit: a fee bill, constitutes three different forgeries, and can not be joined in the same indictment.⁷¹ A count for forging an instrument and one for passing the same instrument, may be joined in the same indictment, but only one conviction and one judgment is permissible on the same.⁷²

⁶⁵ *S. v. Stuart*, 61 Iowa 203, 16 N. W. 91; *S. v. Hart*, 67 Iowa 142, 25 N. W. 99; *S. v. Gaubert*, 49 La. 1692, 22 So. 930.

⁶⁶ *Swain v. P.*, 4 Scam. (Ill.) 179.

⁶⁷ *S. v. Goodrich*, 67 Minn. 176, 69 N. W. 815.

⁶⁸ *P. v. Van Alstine*, 57 Mich. 69, 6 Am. C. R. 276, 23 N. W. 594.

⁶⁹ *S. v. Hastings*, 53 N. H. 452, 2 Green C. R. 339; *P. v. Altman*, 147 N. Y. 473, 42 N. E. 180; *P. v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *S. v. Morton*, 27 Vt. 310; *In re Walsh*, 37 Neb. 454, 55 N. W. 1075; *Parker*

v. P., 97 Ill. 36; *S. v. Greenwood*, 76 Minn. 207, 78 N. W. 1044, 1117; *S. v. Myers*, 10 Iowa 448. See *S. v. Bracken*, 152 Ind. 565, 53 N. E. 838; *Munoz v. S.*, 40 Tex. Cr. 457, 50 S. W. 949.

⁷⁰ *P. v. Dole*, 122 Cal. 486, 55 Pac. 581; *P. v. Ellenwood*, 119 Cal. 166, 51 Pac. 553.

⁷¹ *Kotter v. P.*, 150 Ill. 441, 37 N. E. 932; *Barton v. S.*, 23 Wis. 587.

⁷² *Parker v. P.*, 97 Ill. 37; *In re Walsh*, 37 Neb. 454, 55 N. W. 1075, 9 Am. C. R. 655; *S. v. Egglesht*, 41 Iowa 574; *S. v. Hennessey*, 23 Ohio

§ 951. **Person defrauded immaterial.**—Under the statutes of some of the states, it is not necessary to allege in the indictment an intention to defraud any particular person.⁷³ But if the name of the person intended to be defrauded is alleged in the indictment, it must be proved.⁷⁴ Generally there are two persons who may be defrauded: the one whose name is forged and the one to whom the forged instrument is passed. The indictment may, therefore, lay the intent to defraud either or both in different counts.⁷⁵

§ 952. **Indictment sufficient.**—An indictment which, with proper averments, alleges that the defendant did unlawfully have in his possession a certain false, forged and counterfeit check purporting to have been made and drawn on certain named persons, with intent to utter, pass or sell such check as true, to certain persons, knowing such check to be false, forged and fraudulent, sufficiently states an offense under a statute which provides that any person "having possession of any forged check with intent to utter, pass or sell the same as true shall" be guilty of forgery.⁷⁶ In charging the forgery of an order on a certain named bank, it is not necessary to allege in the indictment that, if the order had been genuine, the bank would have been bound to honor it, nor is it necessary to allege the existence of such bank. These matters are immaterial.⁷⁷

§ 953. **Forged deed.**—Under a statute against "passing, uttering or publishing" any forged instrument, an indictment alleging that the defendant sold and delivered a forged deed of trust knowing it to be forged, intending to have the same uttered and passed with intent to defraud, sufficiently charges the offense.⁷⁸

St. 339; *S. v. Benham*, 7 Conn. 414; *Ex parte Snow*, 120 U. S. 274, 7 S. Ct. 556; *P. v. Adler*, 140 N. Y. 331, 35 N. E. 644; *S. v. Zimmerman*, 47 Kan. 242, 27 Pac. 999; *Pitts v. S.*, 40 Tex. Cr. 667, 51 S. W. 906.

⁷³ *S. v. McElvain*, 35 Or. 365, 58 Pac. 525; *S. v. Barrett*, 8 Iowa 538; *Harrison v. S.*, 36 Ala. 248; *S. v. Turner*, 148 Mo. 206, 49 S. W. 988; *Gentry v. S.*, 6 Ga. 503; *Rohr v. S.*, 60 N. J. L. 576, 38 Atl. 673; *Riley v. S.* (Tex. Cr.), 44 S. W. 498; *Dukes v. S.*, 94 Ga. 393, 21 S. E. 54. *Contra*, *Huff v. Com.*, 19 Ky. L. 1064, 42 S. W. 907.

⁷⁴ *S. v. Newland*, 7 Iowa 242; *S. v. Samuels*, 144 Mo. 68, 45 S. W. 1088.

⁷⁵ *Rounds v. S.*, 78 Me. 42, 2 Atl. 673, 6 Am. C. R. 267; *Anson v. P.*, 148 Ill. 494, 502, 35 N. E. 145; *Barnes v. Com.*, 101 Ky. 556, 19 Ky. L. 803, 41 S. W. 772; *S. v. Hastings*, 53 N. H. 452, 2 Green C. R. 339; 3 Greenl. Ev., § 18; 2 Bish. New Cr. L., § 598.

⁷⁶ *S. v. Turner*, 148 Mo. 206, 49 S. W. 988; *S. v. Greenwood*, 76 Minn. 211, 78 N. W. 1042, 1117. See *S. v. Webster*, 152 Mo. 87, 53 N. W. 423.

⁷⁷ *Com. v. Russell*, 156 Mass. 196, 30 N. E. 763.

⁷⁸ *S. v. Mills*, 146 Mo. 195, 47 S. W. 938.

§ 954. **Uttering, indictment sufficient.**—An indictment which alleges that the defendant uttered a fictitious order for the payment of money to a person named, with intent to defraud a certain company, sufficiently states the offense, and need not allege that such person was connected with the company mentioned.⁷⁹

§ 955. **Payment of money not essential.**—Under a statute providing that “every person who shall have in his possession any forged promissory note or notes, bank bill or bills, for the payment of money, with intent to utter or pass the same,” shall be punished, an indictment charging the offense is not defective in failing to aver that the instrument was “for the payment of money.”⁸⁰

§ 956. **“As true” is material.**—An indictment charging forgery by uttering, offering, putting off or disposing of a certain forged instrument, is defective in omitting to allege “as true,” the phrase “as true” being a part of the statutory definition of the crime.⁸¹

§ 957. **“With intent” is material.**—The phrase “with intent to defraud” is an essential element of the definition of forgery, and an indictment omitting to allege such intent, though otherwise good, is defective.⁸²

§ 958. **Signing name—Knowledge immaterial.**—An indictment charging forgery by signing the name of a person to an order is not required to allege that the name was signed without the knowledge of such person. It is sufficient to aver that the name was signed without authority.⁸³

§ 959. **Purport clause and tenor clause.**—A material variance between the purport clause and the tenor clause of an indictment renders it defective, as where the purport clause alleges the instrument to

⁷⁹ *P. v. Arlington*, 123 Cal. 356, 55 Pac. 1003. *Contra*, *Colter v. S.*, 40 Tex. Cr. 165, 49 S. W. 379.

⁸⁰ *Townsend v. P.*, 3 Scam. (Ill.) 328.

⁸¹ *S. v. Cody*, 65 Minn. 121, 67 N. W. 798; *S. v. Hesseltine*, 130 Mo. 468, 32 S. W. 983.

⁸² *P. v. Turner*, 113 Cal. 278, 45

Pac. 331; *Gates v. S.*, 71 Miss. 874, 16 So. 342 (knowingly); *P. v. Smith*, 103 Cal. 563, 37 Pac. 516; *S. v. Williams*, 139 Ind. 43, 38 N. E. 339; *S. v. Heyeman*, 2 Pen. (Del.) 143, 44 Atl. 623. See *S. v. Tobie*, 141 Mo. 547, 42 S. W. 1076.

⁸³ *Eldridge v. Com.*, 21 Ky. L. 1088, 54 S. W. 7.

be the act of one person named and the tenor clause states the instrument to be the act of two persons named.⁸⁴

§ 960. Contradictory and repugnant averments.—An indictment which is contradictory in its averments is bad; as, where it alleges that the defendant willfully and fraudulently made a certain false instrument purporting to have been made by a certain person named, and then sets out the instrument by its tenor and alleges that it, having been signed by such person as aforesaid, creates a liability. Such averments are contradictory.⁸⁵ An information charging that the defendant “altered, forged and counterfeited a receipt for money” is defective. To allege that the receipt was “altered” and “counterfeited” is repugnant.⁸⁶

§ 961. Alleging corporation of company.—An indictment which charges forgery by signing the name of a certain company, by proper averments, is sufficient without alleging that the company is a company or corporation.⁸⁷

§ 962. Uttering—How instrument forged not material.—An indictment charging the uttering of a forged document is not required to set out how the forgery was committed or by whom. If it states that the defendant delivered it, knowing it to be a forgery, that is sufficient.⁸⁸

§ 963. Information imperfect.—An information charging the forgery of a mortgage without alleging whether on real or personal property or whether given to secure the payment of any debt or note, does not charge an offense under the statute of California.⁸⁹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 964. Production of document.—The bills, notes or coins alleged in the indictment to be counterfeit must be produced at the trial by

⁸⁴ *Fite v. S.*, 36 Tex. Cr. 4, 34 S. W. 922; *Campbell v. S.*, 35 Tex. Cr. 182, 32 S. W. 899; *Overly v. S.*, 34 Tex. Cr. 500, 31 S. W. 377.

⁸⁵ *Scott v. S.*, 40 Tex. Cr. 105, 48 S. W. 523. See *Booth v. S.*, 36 Tex. Cr. 600, 38 S. W. 196.

⁸⁶ *S. v. Bracken*, 152 Ind. 565, 53

N. E. 838. See also *Munoz v. S.*, 40 Tex. Cr. 457, 50 S. W. 949.

⁸⁷ *Benson v. S.*, 124 Ala. 92, 26 So. 119.

⁸⁸ *Eldridge v. Com.*, 21 Ky. L. 1088, 54 S. W. 7, 10.

⁸⁹ *P. v. Terrill*, 127 Cal. 99, 59 Pac. 836.

the prosecution, or their absence accounted for, as by showing their loss, destruction, or that they are in possession of the defendant. And this rule equally applies to testimony in reference to other counterfeit bills or coins to prove guilty intent.⁹⁰ And the same rule applies with reference to any document alleged to have been forged.⁹¹

§ 965. Tools are competent evidence.—Tools or machinery used in coining money or counterfeit coins, found in the possession of the accused, may be proved and used in evidence for the purpose of proving guilty knowledge or the criminal intent alleged in the indictment.⁹²

§ 966. Forged instrument competent.—The instrument alleged to be forged is always competent evidence where there is no material variance between it and that alleged in the indictment.⁹³

§ 967. Disproving fictitious person.—That no such person exists or can be found bearing the name mentioned in the alleged forged instrument may be shown by any resident of the town in which it is claimed such person lived; or by postmen or others who never heard of such person; and evidence of search for such person is competent; and the searcher may tell what he did and said in making his search.⁹⁴

§ 968. Proving existence of bank.—It is not necessary, on an indictment for forgery of bank notes, to prove by direct evidence the incorporation of the bank; testimony of the most general character is sufficient for such a purpose.⁹⁵ The existence of the bank may be proved by reputation, that it was acting as a bank, and as such issued bank bills as currency.⁹⁶ Proof of the existence of the bank on which the counterfeit notes purport to have been drawn, is not necessary

⁹⁰ *S. v. Cole*, 19 Wis. 129, 88 Am. D. 678; *Com. v. Bigelow*, 8 Metc. (Mass.) 235; *Armitage v. S.*, 13 Ind. 441; *Kirk v. Com.*, 9 Leigh (Va.) 627. See *Reg. v. Robinson*, 10 Cox C. C. 107.

⁹¹ 3 Greenl. Ev. (Redf. ed.), § 107; *S. v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *S. v. Breckenridge*, 67 Iowa 206, 25 N. W. 130; *Underhill Cr. Ev.*, §§ 43, 425.

⁹² *P. v. Thoms*, 3 Park. Cr. (N. Y.) 262; *Com. v. Price*, 10 Gray (Mass.) 472; *P. v. White*, 34 Cal. 183; *Stalker v. S.*, 9 Conn. 341.

⁹³ *P. v. Dole*, 122 Cal. 486, 55 Pac. 581.

⁹⁴ *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *P. v. Sharp*, 53 Mich. 523, 19 N. W. 168; *P. v. Jones*, 106 N. Y. 523, 13 N. E. 93; 3 Greenl. Ev. (Redf. ed.), § 109.

⁹⁵ *P. v. D'Argencour*, 95 N. Y. 624, 4 Am. C. R. 242; *P. v. Davis*, 21 Wend. (N. Y.) 309; *P. v. Peabody*, 25 Wend. (N. Y.) 472; *S. v. Williams*, 152 Mo. 115, 53 S. W. 424.

⁹⁶ *P. v. Ah Sam*, 41 Cal. 645; *Com. v. Carey*, 2 Pick. (Mass.) 47; *Cady v. Com.*, 10 Gratt. (Va.) 776; *Underhill Cr. Ev.*, § 428.

unless required by statute.⁹⁷ But if the charge in the indictment be to defraud some particular bank named, then the existence of the bank must be proven as matter of description.⁹⁸

§ 969. Coins and money presumed.—The prosecution is not required to prove the existence of the current coins or paper currency of the United States. The courts will take judicial notice of the legal coins or currency.⁹⁹

§ 970. Resemblance of coins.—In a case of forgery of coins, the question of resemblance or similitude is one for the jury.¹⁰⁰ It is not necessary that the resemblance should be exact in all respects: it is sufficient if the coins are so alike that the counterfeit would likely deceive a person exercising ordinary caution and observation.¹ On the question of the resemblance of the spurious or counterfeit to the genuine money, see the following additional cases.²

§ 971. Witness to prove counterfeits.—Bills alleged to be counterfeits may be proved by other persons than the officers of the bank, if they are acquainted with the signatures of the president and cashier.³

§ 972. Intent presumed from forgery—Knowledge.—Where the intent alleged is to defraud the person whose name is forged, it should be presumed from the forgery, without further proof. In fact, the allegation needs no proof.⁴ That the defendant knew the instrument was forged may be inferred from circumstances alone.⁵ The intent to

⁹⁷ *Benson v. S.*, 5 Minn. 19; *P. v. Peabody*, 25 Wend. (N. Y.) 472; *McCartney v. S.*, 3 Ind. 353, 56 Am. D. 510; *S. v. Cole*, 19 Wis. 129, 88 Am. D. 678; *Jones v. S.*, 11 Ind. 360.

⁹⁸ *P. v. Peabody*, 25 Wend. (N. Y.) 473; *S. v. Morton*, 8 Wis. 352; *S. v. Brown*, 4 R. I. 528, 70 Am. D. 168; *Com. v. Houghton*, 8 Mass. 107; *S. v. Cole*, 19 Wis. 129, 88 Am. D. 678. See *P. v. McDonnell*, 80 Cal. 285, 13 Am. St. 159, 22 Pac. 190; *S. v. Murphy*, 17 R. I. 698, 24 Atl. 473.

⁹⁹ *U. S. v. Williams*, 4 Biss. (U. S.) 302; *U. S. v. Burns*, 5 McLean (U. S.) 23; *U. S. v. King*, 5 McLean (U. S.) 208.

¹⁰⁰ *U. S. v. Morrow*, 4 Wash. C. C. 733, 48 Fed. 828, 831; *U. S. v. Stevens*, 52 Fed. 120.

¹ *U. S. v. Hopkins*, 26 Fed. 443; *S. v. McKenzie*, 42 Me. 392.

² *U. S. v. Morrow*, 4 Wash. C. C. 733, 48 Fed. 828; *U. S. v. Abrams*, 18 Fed. 823, 21 Blatchf. 553; *Dement v. S.*, 2 Head (Tenn.) 505, 73 Am. D. 747; *U. S. v. Sprague*, 48 Fed. 828; *U. S. v. Hopkins*, 26 Fed. 443.

³ *Martin v. Com.*, 2 Leigh (Va.) 745; *S. v. Carr*, 5 N. H. 367; *S. v. Harris*, 5 Ired. (N. C.) 287; *Com. v. Carey*, 2 Pick (Mass.) 47.

⁴ *Rounds v. S.*, 78 Me. 42, 2 Atl. 673, 6 Am. C. R. 268; 2 Bish. Cr. Proc., § 427.

⁵ *Parker v. P.*, 97 Ill. 38; *Fletcher v. S.*, 49 Ind. 124, 19 Am. R. 673; *Smith v. S.*, 29 Fla. 408, 10 So. 894; *U. S. v. Brooks*, 3 MacArthur 315;

defraud in making, having possession of, or passing counterfeit coin or money may be inferred from the facts and circumstances proven.⁶

§ 973. **Intent—Possession of other counterfeits.**—Evidence that the defendant had possession of other counterfeit money besides that alleged in the indictment may be shown in evidence as tending to prove guilty knowledge.⁷ And the possession of instruments for making counterfeit money may be shown in evidence to prove guilty intent.⁸

§ 974. **Passed other forged instruments.**—Evidence that the defendant, about the same time and under like circumstances, passed other forged documents, is admissible to prove guilty knowledge and intention.⁹ But there must be strict proof that such other documents are forgeries. The burden is on the prosecution to prove such other forgeries.¹⁰

§ 975. **Several forgeries one transaction.**—Several forgeries may be shown in evidence, where they form part of one transaction and give character to the transaction,—part of the *res gestae* and identify the accused.¹¹

S. v. Kimball, 50 Me. 409; *Phillips v. S.*, 6 Tex. App. 364; *Timmons v. S.*, 80 Ga. 216, 4 S. E. 766; *Underhill Cr. Ev.*, § 422.

⁶ *S. v. McPherson*, 9 Iowa 53; *McGregor v. S.*, 16 Ind. 9; *P. v. Page*, 1 Idaho 189.

⁷ *U. S. v. Hinman*, 1 Baldw. (U. S.) 292; *Com. v. Price*, 10 Gray (Mass.) 472; *S. v. Spalding*, 19 Conn. 233, 48 Am. D. 158; *P. v. Stewart*, 5 Mich. 243; *S. v. Brown*, 4 R. I. 528, 70 Am. D. 168; *Hess v. S.*, 5 Ohio 5, 22 Am. D. 767. See *Com. v. Edgerly*, 10 Allen (Mass.) 184.

⁸ *S. v. Antonio*, 3 Brev. (S. C.) 562. See *S. v. Odel*, 3 Brev. (S. C.) 552; *Bluff v. S.*, 10 Ohio St. 547.

⁹ *P. v. Everhardt*, 104 N. Y. 591, 11 N. E. 62, 5 N. Y. Cr. 91; *S. v. Williams*, 2 Rich. (S. C.) 418, 45 Am. Dec. 741; *Com. v. White*, 145 Mass. 392, 14 N. E. 611, 7 Am. C. R. 195; *Fox v. P.*, 95 Ill. 71; *Steele v. P.*, 45 Ill. 152; *Whar. Cr. Ev.* (8th ed.), § 34; *Bishop v. S.*, 55 Md. 138; *S. v.*

Rose, 70 Minn. 403, 73 N. W. 177; *S. v. Hodges*, 144 Mo. 50, 45 S. W. 1093; *Anson v. P.*, 148 Ill. 506, 35 N. E. 145; *P. v. Sanders*, 114 Cal. 216, 46 Pac. 153; *S. v. Habib*, 18 R. I. 558, 30 Atl. 462; *S. v. Valwell*, 66 Vt. 558, 29 Atl. 1018; *S. v. Robinson*, 16 N. J. L. 507; *S. v. Minton*, 116 Mo. 610, 613, 22 S. W. 808; *Thomas v. S.*, 103 Ind. 419, 432, 2 N. E. 808; *Langford v. S.*, 33 Fla. 233, 14 So. 815; *S. v. Cole*, 19 Wis. 129, 134; *Com. v. Russell*, 156 Mass. 196, 30 N. E. 763; *Lindsey v. S.*, 38 Ohio St. 507; *Underhill Cr. Ev.*, §§ 89, 423; *S. v. Crawford*, 39 S. C. 343, 17 S. E. 799.

¹⁰ 3 Greenl. Ev., § 111; *Anson v. P.*, 148 Ill. 494, 35 N. E. 145; *U. S. v. Mitchell*, Bald. 366; *Whar. Cr. Ev.*, § 48; *P. v. Altman*, 147 N. Y. 473, 42 N. E. 180; *S. v. Lowry*, 42 W. Va. 205, 24 S. E. 561; *P. v. Bird*, 124 Cal. 32, 56 Pac. 639; *S. v. Swan*, 60 Kan. 461, 56 Pac. 750.

¹¹ *Cross v. P.*, 47 Ill. 161.

§ 976. **Proving intent—Deed.**—On a charge of uttering a forged deed it is competent, on intent, to show that the defendant, in a civil case against him, introduced the same deed in evidence.¹²

§ 977. **Declarations, confessions.**—Evidence of mere statements, conversations or admissions, or confessions alone as to any collateral forgery or uttering, are not admissible to prove guilty intention; but, of course, they are admissible where they relate to the forgery or uttering charged in the indictment upon which the defendant is being tried.¹³

§ 978. **Uttering not evidence of forging.**—It can not be laid down as a rule of law that the uttering and publishing, as true, of a commercial instrument with the name of the payee forged thereon, raises a presumption that the person uttering and publishing is guilty of forging the instrument.¹⁴

§ 979. **Evidence of persons who know defendant's writing.**—"As a matter of law, evidence of witnesses who know the hand-writing of the accused, to the effect that the signature to the alleged forged writing is not his, is of little value, as the forger seeks to disguise his own hand-writing and to imitate that of the man whose signature he forges."¹⁵

§ 980. **Bank bill is a note.**—The indictment properly describes the instrument alleged to have been forged to be a "promissory note."

¹² Preston v. S., 40 Tex. Cr. 72, 48 S. W. 581.

¹³ Fox v. P., 95 Ill. 71; P. v. Corbin, 56 N. Y. 363; S. v. Breckenridge, 67 Iowa 204, 25 N. W. 130; Rex v. Cooke, 8 C. & P. 582; Rex v. Millard, Rus. & Ry. 245; 2 McClain Cr. L., § 808; 3 Greenl. Ev., § 111.

¹⁴ Miller v. S., 51 Ind. 405, 1 Am. C. R. 232.

¹⁵ Underhill Cr. Ev., § 429, citing Langdon v. P., 133 Ill. 382, 24 N. E. 874; P. v. Sanders, 114 Cal. 216, 46 Pac. 153. The evidence in the following cases was held sufficient to sustain convictions: P. v. Laird, 118 Cal. 291, 50 Pac. 431; Grooms v. S., 40 Tex. Cr. 319, 50 S. W. 370; P. v. Lundin, 120 Cal. 308, 52 Pac. 807; Darby v. S. (Fla., 1899), 26 So. 315;

Shope v. S., 106 Ga. 226, 32 S. E. 140; Howell v. P., 178 Ill. 176, 52 N. E. 873; S. v. Matlock, 119 N. C. 806, 25 S. E. 817; P. v. Leyshon, 108 Cal. 440, 41 Pac. 480; Williams v. S. (Tex. Cr.), 32 S. W. 532; Smith v. S. (Tex. Cr.), 32 S. W. 696; S. v. Vineyard, 16 Mont. 138, 40 Pac. 173; P. v. King, 125 Cal. 369, 58 Pac. 19; Womble v. S., 107 Ga. 666, 33 S. E. 630. The evidence in the following cases was held not sufficient to sustain convictions: P. v. Creegan, 121 Cal. 554, 53 Pac. 1082; Eldridge v. S., 76 Miss. 353, 24 So. 313; S. v. White, 98 Iowa 346, 67 N. W. 267; McCombs v. S., 109 Ga. 496, 34 S. E. 1021; Roberts v. S. (Tex. Cr., 1899), 53 S. W. 864.

The instrument said to have been forged was a bank bill of an incorporated bank doing business in another state: Held no variance.¹⁶

§ 981. **Forging one of several names.**—The indictment charges a forgery of the whole instrument, whereas the evidence shows a forgery of only one name, while the defendant's own name is genuine: Held sufficient.¹⁷

§ 982. **Immaterial variance—Date.**—On a charge of forgery, there is no material variance between the date alleged in the indictment as "Oct. 18, 1895," and the date in the instrument alleged to be forged as "Oct. the 18, 1895;" nor does the word "numbers" vary from "Nos." where the latter appears at the head of a column of figures in the instrument alleged to be forged.¹⁸

§ 983. **Immaterial variance—Name.**—The indictment alleges an intent to defraud one John H. Harris, and the evidence showed an intent to defraud "Harris & Co.," of which firm John H. Harris was a member: Held no variance on a charge of forgery, though it would be otherwise on a charge of larceny as to ownership of property.¹⁹ The indictment charged the defendant with forging the name of the firm of "Williams & Murchison" with intent to defraud George W. Williams and Daniel M. Murchison. There was evidence tending to show that he forged the name of the firm, but there was no evidence as to who composed the firm mentioned. Held a fatal variance.²⁰ The indictment having charged that the accused had uttered and published as true and genuine the promissory note set out, signed "S. B. Skinner," with intent to defraud one "Solomon B. Skinner," it should also have been averred in the indictment that Solomon B. Skinner was the same person meant by the name subscribed to the note.²¹

¹⁶ *Com. v. Woods*, 10 Gray (Mass.) 477, 481; 3 Greenl. Ev., § 108.

¹⁷ *S. v. Davis*, 69 N. C. 313, 1 Green C. R. 540; *Duffin v. P.*, 107 Ill. 123; *S. v. Gardiner*, 1 Ired. (N. C.) 27; 1 Whar. Cr. L. (8th ed.), § 677.

¹⁸ *Agee v. S.*, 117 Ala. 169, 23 So. 486; *Shope v. S.*, 106 Ga. 226, 32 S. E. 140.

¹⁹ *S. v. Hastings*, 53 N. H. 452. See *Underhill Cr. Ev.*, § 421.

²⁰ *S. v. Harrison*, 69 N. C. 143, 1 Green C. R. 537. See *Underhill Cr. Ev.*, § 421.

²¹ *Shinn v. S.*, 57 Ind. 144, citing *Rex v. Barton*, 1 Moody 141; *S. v. Jones*, 1 McAll. 236. See also *Agee v. S.*, 117 Ala. 169, 21 So. 207; *Hanks v. S.* (Tex. Cr., 1899), 54 S. W. 587.

§ 984. **Payee of money order.**—Proof that the defendant forged the name of the payee to a receipt on a money order does not sustain an indictment charging him with forging a postal money order.²²

§ 985. **Variance—Forging or passing.**—Forging a note is one offense and having possession of and passing it with intent to deceive and defraud is another; and proof of one will not support a charge of the other.²³

§ 986. **Variance—Selling or uttering.**—And “selling and bartering” bank notes is a different offense than “uttering and publishing” such notes.²⁴

§ 987. **Variance as to number of document.**—A variance between the number of a check as described in the indictment and the one offered in evidence is fatal, though the description in other respects may be correct.²⁵

§ 988. **Forging name to check is forgery of check.**—An indictment charging the forgery of a certain name to a check, under the statute of California, sufficiently charges the forgery of the check itself.²⁶

ARTICLE V. VENUE; JURISDICTION.

§ 989. **Venue.**—Proof that the accused attempted to pass a forged note in Sangamon county is sufficient from which to infer that he forged it in the same county, in the absence of other proof to the contrary.²⁷

§ 990. **Jurisdiction—Courts.**—State as well as federal courts have jurisdiction over the crime of counterfeiting.²⁸ The teller of a

²² *Pierce v. S.*, 38 Tex. Cr. 604, 44 S. W. 292.

²³ *Parker v. P.*, 97 Ill. 35; *Ball v. S.*, 48 Ark. 94, 2 S. W. 462; *S. v. McCormack*, 56 Iowa 585, 9 N. W. 916; *Bell v. S.*, 57 Md. 108; *Peterson v. S.*, 25 Tex. App. 70, 7 S. W. 530; *S. v. Williams*, 152 Mo. 115, 53 S. W. 424; *Preston v. S.* (Tex. Cr., 1899), 53 S. W. 127.

²⁴ *Vanvalkenburg v. S.*, 11 Ohio 404.

²⁵ *Haupt v. S.*, 108 Ga. 53, 34 S. E.

313. See *Sutton v. S.*, 58 Neb. 567, 79 N. W. 154.

²⁶ *P. v. King*, 125 Cal. 369, 58 Pac. 19.

²⁷ *Bland v. P.*, 3 Scam. (Ill.) 366; *Mason v. S.*, 32 Tex. App. 95, 22 S. W. 144, 408; *McGuire v. S.*, 37 Ala. 161; *S. v. Gullette*, 121 Mo. 447, 26 S. W. 354; *S. v. Blanchard*, 74 Iowa 628, 38 N. W. 519; *Underhill Cr. Ev.*, § 426. *Contra*, *Com. v. Parmenter*, 5 Pick. (Mass.) 279.

²⁸ *In re Truman*, 44 Mo. 181; *Dash-*

national bank, in making false entries in the books of the bank, with intent to defraud, may be tried in the state court, under the common law.²⁹

§ 991. **Jeopardy—Possessing several documents.**—Where a person has in his possession, at the same time, several forged bank notes of different banks, with the intent to pass them and thereby defraud the person who might take them, and also defraud the several banks, such facts constitute only one offense.³⁰

ing v. S., 78 Ind. 357; S. v. McPherson, 9 Iowa 53; Jett v. Com., 18 Gratt. (Va.) 933; Martin v. S., 18 Tex. App. 224; Ex parte Geisler, 50 Fed. 411.

²⁹ Com. v. Luberg, 94 Pa. St. 85.

³⁰ S. v. Colgate, 31 Kan. 511, 3 Pac. 346, 5 Am. C. R. 74; P. v. Allen, 1 Park. Cr. (N. Y.) 445; S. v. Egglesht, 41 Iowa 574, 20 Am. R. 612; S. v. Benham, 7 Conn. 414.

CHAPTER XVI.

FRAUDULENT CONVEYANCES.

ART. I.	What Constitutes the Offense,	§§ 992-994
II.	Matters of Defense,	§§ 995-996
III.	Indictment,	§ 997
IV.	Evidence,	§ 998

ARTICLE I. WHAT CONSTITUTES THE OFFENSE.

§ 992. **What constitutes offense.**—Where a person unlawfully conveys land which he had previously conveyed and failed to mention such former transfer in the second conveyance, with intent to defraud, the offense is complete, without showing that anybody was actually defrauded. The fraudulent intent is the essential element of the crime.¹

§ 993. **Valuable consideration essential.**—On a charge of selling or disposing of land a second time with intent to defraud, after having previously sold it to another, it must appear that the second sale was for a valuable consideration, to constitute the offense defined by statute.²

§ 994. **Conveying through another.**—Under a statute making it a criminal offense to transfer or convey land knowing that it is incumbered, with intent to cheat and defraud, one who so conveys through an innocent third person is criminally liable.³

¹ S. v. Wilson, 66 Mo. App. 540; Herold v. S., 21 Neb. 50, 31 N. W. 258; Lillie v. McMillan, 52 Iowa 463, 3 N. W. 601; S. v. Jones, 68 Mo. 197. But see S. v. Robinson, 29 N. H. 274; S. v. Chapman, 68 Me. 477.

² Clement v. Major, 8 Colo. App. 86, 44 Pac. 776.

³ S. v. Hunkins, 90 Wis. 264, 62 N. W. 1047, 63 N. W. 167.

ARTICLE II. MATTERS OF DEFENSE.

§ 995. **Selling land twice.**—Under a statute providing that any person who, after once disposing of any lands, or executing any bond or agreement for their sale, shall again and for a valuable consideration knowingly or fraudulently sell, or execute a bond or agreement to sell or dispose of the same lands to any other person, shall be deemed guilty of a felony and punished, it is not an offense to fraudulently give a mortgage on the same lands after having sold or contracted to sell the land. The statute contemplates the parting with the title to the lands. A mortgage is not such a sale or agreement to sell.⁴

§ 996. **Secreting, when not liable.**—Where a person in good faith buys property not knowing that another has a claim on it, he will not be criminally liable for refusing to disclose the location of the property.⁵

ARTICLE III. INDICTMENT.

§ 997. **Duplicity—Stating different ways.**—An indictment which sets out in one count the several different methods or ways of fraudulently removing property by the debtor, is not bad for duplicity, although the offense would be complete by such removal by any one of the methods.⁶

ARTICLE IV. EVIDENCE.

§ 998. **Declarations of one against all.**—Under an indictment charging two persons jointly, one as principal and the other as aiding, with disposing of goods with intent to defraud creditors of the former, evidence of what the principal said at the time he procured the goods may be admitted as competent against both, considering the relationship between them,—brothers-in-law.⁷

⁴ P. v. Cox, 45 Cal. 342.

⁶ Com. v. Lewis, 6 Pa. S. Ct. 610.

⁵ Thomas v. S., 92 Ala. 49, 9 So.

⁷ Reg. v. Chapple, 17 Cox C. C. 455.

CHAPTER XVII.

BLACKMAIL; THREATS.

ART. I.	Definition and Elements,	§§ 999-1002
II.	Matters of Defense,	§§ 1003-1007
III.	Indictment,	§§ 1008-1009
IV.	Evidence,	§ 1010

ARTICLE I. DEFINITION AND ELEMENTS.

§ 999. **Blackmail defined.**—In common parlance, blackmail is extortion,—the exaction of money for the performance of a duty, the prevention of an injury, or the exercise of an influence. It imports an unlawful service and an involuntary payment. Not unfrequently, the money is extorted by threats, or by operating upon the fears or the credulity, or by promises to conceal or threats to expose the weakness, the folly, or the criminal acts of another.¹

§ 1000. **Any criminal offense included.**—A statute which makes it a criminal offense to maliciously threaten to accuse a person of a “crime or offense with intent to compel him to do an act against his will,” includes any criminal offense which may be prosecuted within the territorial limits of the United States.²

§ 1001. **Stating that another threatens.**—Under a statute making it a criminal offense to threaten to accuse another of a crime, with intent to extort money, a person who, by telling another that a third person is threatening to prosecute him, and that he had better fix it up, commits an offense.³

¹ Anderson Law Dictionary.

² Moore v. P., 69 Ill. App. 398.

³ S. v. Waite, 101 Iowa 377, 70 N. W. 596.

§ 1002. **Collecting debt by threatening letter.**—If a person, seeking to collect a debt, sends a letter to a debtor threatening to publish him among his neighbors as a bad debtor unless he pays the debt, he violates the statute which makes it an offense to deliver any letter or writing threatening to do injury to the credit or reputation of another.⁴

ARTICLE II. MATTERS OF DEFENSE.

§ 1003. **Truth of accusation.**—Where the defendant is on trial for sending a threatening letter to another charging him with selling water-soaked cotton to increase its weight, with intent to extort money from such person, the truth of the accusation is competent evidence on the issue of intent.⁵

§ 1004. **Agent of society—Defense.**—Where the defendant, acting as the agent of a society for the prevention of crime, is on trial for attempted extortion, in threatening to accuse another of keeping a house of ill-fame, he is entitled to show that he was acting in obedience to his instructions as such agent.⁶

§ 1005. **Threat must have influence.**—The threat to do an injury to the person or property of another, with intent to extort money or compel a person to do an act against his will, must be so made and under such circumstances as to operate to some extent on the mind of the one whom it is intended to influence by such threat.⁷

§ 1006. **Acquiescence of person threatened no defense.**—If a person threatens to accuse another of a crime with the intent to extort money from such other person, and in fact succeeds in obtaining the money, he will be guilty of an attempt to commit extortion; and it can be no defense that such other person was endeavoring to induce him to take the money for the purpose of accusing him of extortion.⁸

§ 1007. **Guilt of person threatened no defense.**—Where a person maliciously threatens to prosecute another for perjury with intent to

⁴ *S. v. McCabe*, 135 Mo. 450, 37 S. W. 123.

⁵ *Cohen v. S.*, 37 Tex. Cr. 118, 38 S. W. 1005. See *S. v. Debolt*, 104 Iowa 105, 73 N. W. 499.

⁶ *P. v. Gardner*, 144 N. Y. 119, 38 N. E. 1003.

⁷ *S. v. Brownlee*, 84 Iowa 473, 51 N. W. 25.

⁸ *P. v. Gardner*, 144 N. Y. 119, 38 N. E. 1003; *Wynne v. S.* (Tex. Cr.), 55 S. W. 837.

compel such other person "to do an act against his will," such threat constitutes an offense, and the guilt or innocence of the person so threatened is not material.⁹

ARTICLE III. INDICTMENT.

§ 1008. **Statutory words sufficient.**—An information following the statutory words which alleges that the defendant "did verbally, unlawfully and maliciously threaten to accuse" another of a crime named, with intent to extort money, sufficiently states the offense of threatening to prosecute for a crime.¹⁰

§ 1009. **Indictment defective.**—An indictment which charges that the defendant did verbally and maliciously threaten to accuse a person named of selling intoxicating liquor without then and there having a legal license to keep a dram-shop, with intent to extort money from the person named, is defective.¹¹

ARTICLE IV. EVIDENCE.

§ 1010. **Intent—Evidence proving.**—Evidence that the accused had caused the arrest of a person whom the complaint alleges he threatened to prosecute for perjury, is competent, on the trial of the defendant, as tending to prove his intention.¹²

⁹ P. v. Whittemore, 102 Mich. 519, W. 548. See S. v. Waite, 101 Iowa 61 N. W. 13; P. v. Choynski, 95 Cal. 377, 70 N. W. 596.

640, 30 Pac. 791.

¹¹ Rank v. P., 80 Ill. App. 40.

¹⁰ P. v. Frey, 112 Mich. 251, 70 N.

¹² P. v. Whittemore, 102 Mich. 519, 61 N. W. 13.

CHAPTER XVIII.

FOWLING AND FISHING.

ART. I. Definition and Elements,	§§ 1011-1012
II. Statutes Held Valid,	§§ 1013-1023
III. Matters of Defense,	§§ 1024-1030
IV. Indictment,	§§ 1031-1034

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1011. **Game defined.**—Birds and beasts of a wild nature, obtained by fowling and hunting, are game.¹ The word “game,” used in the section of the South Carolina constitution prohibiting special legislation for the protection of game, includes fish.²

§ 1012. **Game, property of public.**—Game and fish, like air and water to a large extent, are the common inheritance of mankind, and they belong to the entire community collectively, and always have been subject to legislative control.³

ARTICLE II. STATUTES HELD VALID.

§ 1013. **Statutes constitutional—Police power.**—The power of the legislature to pass laws for the protection and preservation of fish in the waters of the state has been so frequently exercised and so long and uniformly acquiesced in, that the existence of the power, at the present day, is scarcely open to question.⁴ A statute prohibiting

¹ 1 Bouv. Law Dict.

Collison, 85 Mich. 105, 48 N. W.

² S. v. Higgins, 51 S. C. 51, 28 S. E. 15.

292.

³ Parker v. P., 111 Ill. 588; Howes v. Grush, 131 Mass. 207; S. v. Lewis, 134 Ind. 250, 33 N. E. 1024; P. v.

⁴ P. v. Bridges, 142 Ill. 41, 31 N. E.

115; S. v. Blount, 85 Mo. 543;

Hughes v. S., 87 Md. 298, 39 Atl. 747;

Com. v. Richardson, 142 Mass. 71,

the obstruction to the free passage of fish up or down or through any of the rivers, creeks, streams, ponds, lakes, sloughs, bayous or other water-courses within the state, by any dam or other obstruction, is not unconstitutional; nor can any person claim the right to so obstruct the passage of fish by prescription.⁵ A statute regulating and restricting fishing in navigable waters, is valid, and is not an interference with the natural rights of citizens of the state.⁶ A statute prohibiting fishing with gig or like instrument during certain months of the year, is within the proper exercise of the police power.⁷

§ 1014. **Fish are wild.**—Fish in streams or bodies of water have always been classed by the common law as *ferae naturae*, in which the owner of the soil covered by the water has at best but a qualified property, though he may have the sole and exclusive right of fishing in such waters.⁸

§ 1015. **Waters, public or private.**—There may be and doubtless are various lakes, ponds, sloughs and bayous in the state which are so far private property that the owner may drain them or fill them up without infringing any public or private right, but which, so long as they are permitted to remain in a natural condition, are places where fish common to the waters of the state are propagated and raised.⁹

§ 1016. **Water-course defined.**—To constitute a water-course, there must be a stream flowing in a particular direction into some other stream or body of water.¹⁰

§ 1017. **Obstructing free passage.**—Where a person has authority to construct a mill-dam, he, in its construction, must observe the laws

7 N. E. 26; *Magner v. P.*, 97 Ill. 320; *Gentile v. S.*, 29 Ind. 409; *S. v. Beal*, 75 Me. 289; *Weller v. Snover*, 42 N. J. L. 341; *Drew v. Hilliker*, 56 Vt. 641; *S. v. Franklin Falls Co.*, 49 N. H. 240; *M'Candlish v. Com.*, 76 Va. 1002; *S. v. Gallop*, 126 N. C. 979, 35 S. E. 180.

⁸ *Parker v. P.*, 111 Ill. 585.

⁹ *S. v. Woodard*, 123 N. C. 710, 31 S. E. 219; *S. v. Gallop*, 126 N. C. 979, 35 S. E. 180.

¹⁰ *Lewis v. S.*, 148 Ind. 346, 47 N.

E. 675; *Hughes v. S.*, 87 Md. 298, 39 Atl. 747.

⁵ *P. v. Bridges*, 142 Ill. 40, 31 N. E. 115; *Treat v. Parsons*, 84 Me. 520, 24 Atl. 946; *Ex parte Marsh*, 57 Fed. 719; *Peters v. S.*, 96 Tenn. 682, 36 S. W. 399; *S. v. Lewis*, 134 Ind. 250, 33 N. W. 1024.

⁶ *P. v. Bridges*, 142 Ill. 38, 31 N. E. 115. See *S. v. Theriault*, 70 Vt. 617, 41 Atl. 1030.

¹⁰ *Palmer v. Waddell*, 22 Kan. 352; *P. v. Bridges*, 142 Ill. 37, 31 N. E. 115.

relating to the protection of fish; and he will not be permitted to obstruct the free passage of fish in the water-course.¹¹

§ 1018. Fishing with net.—A statute which prohibits the catching of trout with a net during any season of the year includes the catching of trout in a stream on one's own land.¹²

§ 1019. Carrying to market.—A statute making it unlawful for any person, corporation or carrier to convey or transport to market, quail and certain other game mentioned during a certain season of each year, is valid, and any violation thereof will subject the offender to the penalty prescribed.¹³

§ 1020. Jeopardy but once.—Section fourteen of the fish law of Illinois, of the acts of 1885 and 1887, providing for an appeal from a judgment acquitting one charged with a breach of that law and for another trial on such appeal, is unconstitutional, in violation of section 10, article 2, of the constitution, providing that "No person shall be compelled in any criminal case to give evidence against himself, or twice put in jeopardy for the same offense."¹⁴

§ 1021. Game shipped into state.—A statute prohibiting persons killing, selling or having in possession for sale certain kinds of game during a designated period of time of each year, includes any such game shipped into the state from other states for sale; and such statute is not in conflict with section 8 of article 1 of the constitution of the United States, which confers upon congress power to regulate commerce among the states.¹⁵

§ 1022. Knowledge essential.—Before a common carrier engaged in transporting goods to market can be held liable for having posses-

¹¹ S. v. Gilmore, 141 Mo. 506, 42 S. W. 817; West Point Water Power, etc., Co. v. S., 49 Neb. 218, 66 N. W. 6; S. v. Beardsley, 108 Iowa 396, 79 N. W. 138.

¹² Com. v. Follett, 164 Mass. 477, 41 N. E. 676.

¹³ Amer. Exp. Co. v. P., 133 Ill. 649, 24 N. E. 758.

¹⁴ P. v. Miner, 144 Ill. 308, 33 N. E. 40.

¹⁵ *Magner v. P.*, 97 Ill. 333; *Stev-*

ens v. S., 89 Md. 669, 43 Atl. 929; *Com. v. Young*, 165 Mass. 396, 43 N. E. 118 (lobsters); *Roth v. S.*, 51 Ohio St. 209, 37 N. E. 259; *Ex parte Maier*, 103 Cal. 476, 37 Pac. 402; *S. v. Schuman*, 36 Or. 16, 58 Pac. 661, 47 L. R. A. 153; *Javins v. U. S.*, 11 App. D. C. 345. See *Applegarth v. S.*, 89 Md. 140, 42 Atl. 941. *Contra*, *P. v. Buffalo Fish Co.*, 62 N. Y. Supp. 543, 1143, 30 Misc. 130.

sion of prohibited game, such as short lobsters, in barrels, it must appear that the carrier knew or had reasonable cause to believe the barrels contained such lobsters.¹⁶

§ 1023. **Animal in one's park.**—The owner of a park of several hundred acres, mostly covered with woods, can not lawfully, during the close season, kill a deer which was put in his park when a fawn, where it roamed about wildly.¹⁷

ARTICLE III. MATTERS OF DEFENSE.

§ 1024. **Fishing with nets.**—Under a statute which prohibits fishing with gill nets more than twenty yards long, it is a violation to fasten several nets of that length together, with six inches of space between each net.¹⁸

§ 1025. **Fishing with hook.**—After a fish has been caught by means of a hook, the use of a landing-net for the purpose of bringing it into physical possession is not fishing with a net in violation of a statute prohibiting such fishing.¹⁹

§ 1026. **Selling lobsters.**—Under a statute prohibiting the selling, offering for sale, or having in possession, lobsters less than a stated length are included dead lobsters.²⁰

§ 1027. **Fishing with hook and line.**—A common fishing line with one hook used in fishing can not be regarded as a "set line" within the meaning of the law relating to fishing with a "pound net, seine, gill net, set net or fyke."²¹

§ 1028. **Fishing for turtles.**—Where a person uses nets to catch turtles, but made with openings for the escape of fish, he will not be liable for catching fish with such nets, if he returns any fish alive, to the water, which he happens to catch, so far as he possibly can.²²

¹⁶ S. v. Swett, 87 Me. 99, 32 Atl. 806.

¹⁷ S. v. Parker, 89 Me. 81, 35 Atl. 1021.

¹⁸ S. v. Woodard, 123 N. C. 710, 31 S. E. 219.

¹⁹ Com. v. Wetherill, 8 Pa. Dist. R. 653, 13 York Leg. Rec. 113.

²⁰ Com. v. Hodgkins, 170 Mass. 197, 49 N. E. 97.

²¹ S. v. Stevens, 69 Vt. 411, 38 Atl. 80; In re Yell, 107 Mich. 228, 65 N. W. 97.

²² P. v. Deremo, 106 Mich. 621, 64 N. W. 489.

§ 1029. **Having possession of birds.**—A person having in his possession live birds and exposing them for sale is not liable under a statute making it an offense to kill or expose for sale or have in his possession, after the same are killed, certain birds named in the statute.²³

§ 1030. **Killing rabbits.**—A statute which makes it an offense to “shoot or in any manner catch, kill or have possession” of any rabbit during a certain season of the year, does not include such rabbits lawfully killed in another state.²⁴

ARTICLE IV. INDICTMENT.

§ 1031. **Indictment sufficient.**—An indictment charging that the defendant, on October 26, 1894, had in his possession ninety-six rabbits, contrary to the statute, sufficiently states the offense under a statute which provides that no person shall “catch, kill or have in his possession” any rabbit between December 24th and November 1st next following.²⁵

§ 1032. **Negative averment.**—Under a statute prohibiting the catching of fish with a “net other than a dip-net,” an indictment charging the fishing “with a net” does not sufficiently state an offense.²⁶

§ 1033. **Indictment defective.**—An indictment charging that the defendant had in his possession, for transportation, a trout that “weighed four and one-half” does not state the weight of the fish.²⁷

§ 1034. **Alleging exception.**—An indictment or complaint for the unlawful sale of trout during a certain season of the year, need not allege that the sale did not come within the exception mentioned in other statutes.²⁸

²³ P. v. Fishbough, 134 N. Y. 393, 31 N. E. 983.

²⁴ Dickhaut v. S., 85 Md. 451, 37 Atl. 21.

²⁵ Dickhaut v. S., 85 Md. 451, 37 Atl. 21.

²⁶ Com. v. Bell, 17 Ky. L. 277, 30 S. W. 997.

²⁷ S. v. Whitten, 90 Me. 53, 37 Atl. 331.

²⁸ S. v. Skolfield, 86 Me. 149, 29 Atl. 922; Com. v. Bell, 17 Ky. L. 277, 30 S. W. 997; Com. v. Drain, 99 Ky. 162, 18 Ky. L. 50, 35 S. W. 269.

CHAPTER XIX.

FORCIBLE ENTRY AND DETAINEE.

ART. I.	Definition and Elements,	§§ 1035-1037
II.	Matters of Defense,	§§ 1038-1039
III.	Indictment,	§§ 1040-1044
IV.	Evidence,	§§ 1045

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1035. **Common law offense.**—The offense of violently taking or keeping possession of lands or tenements with menaces, force and arms, and without authority at law, is a common law offense.¹

§ 1036. **Premises in possession essential.**—It is essential that the premises in question be in the actual possession of the person claiming to have been unlawfully dispossessed.²

§ 1037. **"Force" essential.**—The entry must be effected by actual force and violence against the person in possession of the premises, or with such numbers of persons and show of force as would be calculated to deter the owner making resistance.³

ARTICLE II. MATTERS OF DEFENSE.

§ 1038. **May resist being dispossessed.**—Although the person entitled to possession of the premises may not take forcible possession, yet he may hold the same by force when rightfully in possession.⁴

¹ 4 Bl. Com. 128.

² S. v. Bryant, 103 N. C. 436, 9 App. 618, 37 N. E. 279; S. v. Davis, S. E. 1; Com. v. Brown, 138 Pa. St. 109 N. C. 809, 13 S. E. 883.

447, 21 Atl. 17.

⁴ Com. v. Knarr, 135 Pa. St. 35, 19

³ S. v. Talbot, 97 N. C. 494, 2 S. E. Atl. 805; Vess v. S., 93 Ind. 211.

148; Com. v. Shattuck, 4 Cush.

§ 1039. **Better title, no defense.**—Forcibly entering a house in the lawful possession of another constitutes an offense under a statute making it a criminal offense to “willfully deface, damage or injure any house,” although the accused may have a better title to the premises than the person so in possession.⁵

ARTICLE III. INDICTMENT.

§ 1040. **General description sufficient.**—A general description of the premises is all that is necessary to be alleged in the indictment where restitution is not involved in the criminal proceedings.⁶

§ 1041. **Different counts, different owners.**—An indictment setting out separate and distinct counts of forcible entry and detainer, some of which allege the possession of the premises to be in the owner and others in possession of a tenant, is not bad for repugnancy.⁷

§ 1042. **Facts constituting “force” essential.**—Under a statute making it a misdemeanor to “take possession of land by force and violence,” an indictment or information must set out the facts constituting the force and violence by which the land was taken.⁸ An indictment alleging forcible entry “with force and arms” does not sufficiently state an offense, under a statute making it a criminal offense to take possession by force “and with a strong hand or by menaces or threats.”⁹

§ 1043. **Indictment—Written lease.**—An indictment alleging that “one (a person named) then and there having a valid and existing written lease and being entitled to the possession” of the premises in question, sufficiently states that he had a written lease and was entitled to the possession of the premises.¹⁰

⁵ *Rex v. Smyth*, 5 C. & P. 201; *S. v. Howell*, 107 N. C. 835, 12 S. E. 569; *P. v. Leach*, *Addis*. 352; *Bish. New Cr. Proc.*, § 385.

⁶ *S. v. Warren*, 13 Tex. 45; *Vanpool v. Com.*, 13 Pa. St. 391.

⁷ *S. v. Robbins*, 123 N. C. 730, 31 S. E. 669.

⁸ *Smith v. S.*, 2 Mo. App. Rep. 134.

⁹ *Com. v. Brown*, 138 Pa. St. 447, 21 Atl. 17, 28 W. N. C. 149; *Com. v. Shattuck*, 4 Cush. (Mass.) 141; *S. v. Leathers*, 31 Ark. 44; *S. v. Pearson*, 2 N. H. 550; 2 *Bish. New Cr. Proc.*, §§ 371, 372, 378.

¹⁰ *Winn v. S.*, 55 Ark. 360, 18 S. W. 375.

§ 1044. **Duplicity—Entry and detainer.**—An indictment charging in the same count a forcible entry and a forcible detainer, is not bad for duplicity.¹¹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1045. **Fact of civil suit, incompetent.**—Evidence that the prosecuting witness had commenced a civil suit in reference to the same land involved in the criminal case of forcible entry, is not competent.¹²

¹¹ *Com. v. Miller*, 107 Pa. St. 276; *Com. v. Rogers*, 1 Serg. & R. 124. cases was held sufficient to sustain convictions: *S. v. Robbins*, 123 N. C. 730, 31 S. E. 669; *S. v. Lawson*, 123 N. C. 740, 31 S. E. 667.

¹² *Lewis v. S.*, 105 Ga. 657, 31 S. E. 576. The evidence in the following

CHAPTER XX.

TRESPASS.

ART.	I. Definition and Elements,	§§ 1046-1052
	II. Matters of Defense,	§§ 1053-1060
	III. Indictment,	§§ 1061-1064
	IV. Evidence; Witnesses,	§§ 1065-1066

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1046. **What constitutes trespass.**—If a person enters upon the land of another after he is forbidden, he will be liable to a charge of criminal trespass, no matter what may be his intention, under a statute which makes it a criminal offense “if any person, after being forbidden to do so, shall go or enter upon the lands of another without a license therefor.”¹

§ 1047. **Destroying fences.**—Entering the premises of another and maliciously or wantonly destroying or tearing down fences is made criminal by statute.²

§ 1048. **Ownership—Legal title immaterial.**—The person in possession of the land which the defendant is charged with entering upon by trespass, need not be the owner in the sense of holding the legal title. It is sufficient if the person in possession be an agent or tenant.³

¹ S. v. Fisher, 109 N. C. 817, 13 S. St. 55, 23 Atl. 233; Brazleton v. S., E. 878; S. v. Green, 35 S. C. 266, 14 66 Ala. 96.

S. E. 619. See Lindley v. S. (Tex. Cr.), 44 S. W. 165. ³ S. v. Green, 35 S. C. 266, 14 S. E. 619; S. v. Whittier, 21 Me. 341.

² S. v. Biggers, 108 N. C. 760, 12 See Withers v. S., 117 Ala. 89, 23 S. E. 1024; Com. v. Drass, 146 Pa. So. 147; Sherman v. S., 105 Ala. 115, 17 So. 103; 2 McClain Cr. L., § 830.

§ 1049. "Willful" is essential.—To constitute the offense of trespass on the land of another, it must appear that the trespass was committed willfully; a trespass by mistake is not criminal.⁴

§ 1050. Force or demonstration essential.—There must be actual force employed, or such a demonstration by use of weapons or other appearance of violence, or by numbers, as is calculated to put the occupant of the premises in fear.⁵

§ 1051. Premises must be in possession or control.—Criminal trespass can not be committed on unoccupied land or land not in actual possession of the owner or person entitled to possession.⁶ A guardian having the management of the estate of an insane person "has the control" of such estate within the meaning of a statute forbidding trespassing upon land in the control of another.⁷

§ 1052. Officer breaking door to levy.—An officer can not lawfully break an outer door of a dwelling-house for the purpose of levying an attachment upon the property of the owner; his act in doing so is a criminal trespass, and all persons aiding him are likewise guilty.⁸

ARTICLE II. MATTERS OF DEFENSE.

§ 1053. Entering under belief of claim.—It is a good defense to a charge of willful trespass upon the land of another that the defendant entered under a *bona fide* claim to the land.⁹

§ 1054. Receiving assent is defense.—It is a good defense to a charge of knowingly and willfully, without color of title, cutting and destroying trees upon the land of a corporation, that the board of

⁴ Boykin v. S., 40 Fla. 484, 24 So. 141; Lossen v. S., 62 Ind. 437; Boarman v. S., 66 Ark. 65, 48 S. W. 899. See Cox v. S., 105 Ga. 610, 31 S. E. 650; S. v. Glenn, 118 N. C. 1194, 23 S. E. 1004. See also on intent: S. v. Malloy, 34 N. J. L. 410; Duncan v. S., 49 Miss. 331; Padgett v. S., 81 Ga. 466, 8 S. E. 445; Branch v. S., 41 Tex. 622; Folwell v. S., 49 N. J. L. 31, 6 Atl. 619.

⁵ S. v. Gray, 109 N. C. 790, 14 S. E. 55; S. v. Covington, 70 N. C. 71; S. v. Barefoot, 89 N. C. 565.

⁶ S. v. Newbury, 122 N. C. 1077, 29 S. E. 367; Hester v. S., 67 Miss. 129, 6 So. 687.

⁷ Gray v. Parke, 162 Mass. 582, 39 N. E. 191.

⁸ S. v. Whitaker, 107 N. C. 802, 12 S. E. 456.

⁹ S. v. Glenn, 118 N. C. 1194, 23 S. E. 1004; S. v. Durham, 121 N. C. 546, 28 S. E. 22; Barlow v. S., 120 Ind. 56, 22 N. E. 88; Lackey v. S., 14 Tex. App. 164.

trustees, of which the defendant was a member, assented to the cutting and removal of the trees and expressed opinions that the trees should be removed, though such assent was not given in a formal way by resolution.¹⁰

§ 1055. Entering by permission—Defense.—If the owner of land which is occupied by himself and his tenants directs one to go upon the land and drive away some cattle belonging to such owner, the person so entering upon the land for that purpose will not be guilty of trespass, although the tenants object.¹¹

§ 1056. Removing fence from premises.—A railroad company has a right to remove a fence constructed on its right of way by the owner of adjoining lands, without becoming liable to criminal trespass.¹²

§ 1057. Taking from dwelling.—Taking and carrying away the person's goods from his dwelling-house, without the consent of the owner, is not a criminal act within the meaning of a statute forbidding the carrying away any article of value from the land, inclosed or uninclosed, of another person.¹³

§ 1058. Claim of superior title—Bona fide claim.—On a charge of criminal trespass, the claim of the defendant that he had a superior title to the land in question than the prosecutor, is no defense.¹⁴ To a charge of willfully entering on the land of another and carrying off wood, it is no defense that the defendant merely made an entry and location of such land without making a survey or obtaining a grant from the state. This is not sufficient to show a *bona fide* claim to the land.¹⁵

§ 1059. Mere belief, no defense.—A bare belief that one has a right to enter upon the land of another under a claim, unsupported by facts showing such claim to be reasonable, is no defense to a charge of criminal trespass.¹⁶

¹⁰ *Mettler v. P.*, 135 Ill. 410, 414, 25 N. E. 748; *S. v. Prince*, 42 La. 817, 8 So. 591.

¹¹ *Bowles v. S.* (Miss.), 14 So. 261. See *Padgett v. S.*, 81 Ga. 466, 8 S. E. 445; *Mays v. S.*, 89 Ala. 37, 8 So. 28.

¹² *Ryan v. S.*, 5 Ind. App. 396, 31 N. E. 1127; *Wise v. Com.* (Va.), 36 S. E. 479 (belief as to ownership).

¹³ *Grier v. S.*, 103 Ga. 428, 30 S. E. 255.

¹⁴ *Lawson v. S.*, 100 Ala. 7, 14 So. 870; *Burks v. S.*, 117 Ala. 148, 23 So. 530; *Carter v. S.*, 18 Tex. App. 573.

¹⁵ *S. v. Calloway*, 119 N. C. 864, 26 S. E. 46.

¹⁶ *S. v. Durham*, 121 N. C. 546, 28 S. E. 22.

§ 1060. **Driving horses across.**—Driving a herd of horses over and across the land of another, thereby destroying the growing grass, does not constitute a willful and malicious trespass upon the land of another.¹⁷

ARTICLE III. INDICTMENT.

§ 1061. **Forbidden to enter premises.**—It is not necessary to allege, in an indictment charging criminal trespass, that the defendant had been forbidden to enter the premises.¹⁸

§ 1062. **Taking timber—"Without consent" essential.**—An indictment charging the unlawful taking away of timber, though following the language of the statute, is not sufficient unless it also contains an averment that the taking was without the consent of the owner.¹⁹

§ 1063. **Not duplicity.**—An indictment, charging that the defendant unlawfully cut down trees growing upon different sections of land, is not bad for duplicity, although the different tracts of land are not contiguous.²⁰

§ 1064. **Indictment sufficient—Cutting timber.**—An indictment charging criminal trespass by cutting down trees on the land of another, which alleges that the defendant did "cut down, destroy, and carry away timber," sufficiently avers that the timber was growing timber.²¹

ARTICLE IV. EVIDENCE; WITNESSES.

§ 1065. **Owner, not necessary witness.**—It is not essential that the owner of the land should be the prosecutor in a case of criminal trespass upon the land of another.²²

§ 1066. **Variance—Two owners.**—Under an indictment charging trespass on the land of two persons named, evidence of a trespass on land owned by one of such persons will not support the indictment.²³

¹⁷ S. v. Tinch, 57 Kan. 136, 45 Pac. 91.

¹⁸ S. v. Austin, 121 N. C. 620, 28 S. E. 361.

¹⁹ Com. v. Moore, 17 Ky. L. 212, 30 S. W. 873.

²⁰ S. v. Paul, 81 Iowa 596, 47 N. W. 773.

²¹ Boarman v. S., 66 Ark. 65, 48 S. W. 899.

²² S. v. Turner, 60 Conn. 222, 22 Atl. 542. See Parham v. S. (Ala.), 27 So. 778 (deed of premises, evidence).

²³ Eubank v. S., 105 Ga. 612, 31 S. E. 741.

PART THREE

OFFENSES AGAINST PEACE AND ORDER

CHAPTER XXI.

ABANDONMENT OF WIFE.

ART. I. Definition and Elements,	§§ 1067-1069
II. Matters of Defense,	§§ 1070-1073
III. Indictment,	§§ 1074-1076
IV. Evidence; Variance; Witnesses,	§§ 1077-1080

ARTICLE I. DEFINITION AND ELEMENTS

§ 1067. **Statutory provisions.**—In some of the states it is made a criminal offense for a man to abandon his wife or children, or to fail to properly support them.¹

§ 1068. **Statute includes charitable institutions.**—Statutory provisions exist in most of the states making it a criminal offense for any parent or person having the care and custody of children of tender age to fail to furnish them with proper food and clothing; and such statutes are comprehensive enough to include any charitable institution assuming the responsibility of caring for such children.²

¹ Com. v. Baldwin, 149 Pa. St. 305, 280; Com. v. Baldwin, 149 Pa. St. 24 Atl. 283; S. v. Kerby, 110 N. C. 305, 24 Atl. 283; Bull v. S., 80 Ga. 558, 14 S. E. 856. 704, 6 S. E. 178; Com. v. Ellis, 160 Mass. 165, 35 N. E. 773; S. v. Smith, Kerby, 110 N. C. 558, 14 S. E. 856; 46 Iowa 670; Com. v. Johnson, 162 Com. v. Stoddard, 9 Allen (Mass.) Mass. 596, 39 N. E. 349.

§ 1069. **Intent to abandon.**—Under a statute providing that “if any father shall willfully abandon his child or children, leaving them in a destitute condition, such father shall be guilty of a misdemeanor,” it must appear that he has left his children intending to abandon them to their own fate, without providing for them the necessities of life.³

ARTICLE II. MATTERS OF DEFENSE.

§ 1070. **Wife's adultery.**—It is a good defense to a charge of abandonment if the husband left his wife because she had committed adultery.⁴ Misconduct of the wife by committing adultery after she has been abandoned is no defense to a charge against him for abandonment.⁵ That the wife had been guilty of illicit intercourse with another man before her marriage is no defense to a charge against her husband for abandonment, when he was fully informed of her conduct at the time.⁶

§ 1071. **Divorce pending.**—The fact that divorce proceedings may be pending between the husband and wife is no defense to a charge against the husband for neglecting to support his wife.⁷

§ 1072. **Husband attending his father.**—The fact that the husband abandoned his wife to give his attention and services to his father, with the expectation of securing his father's home at his death, is no defense to a charge of failing to support his wife.⁸

§ 1073. **Without means.**—It is no defense to a charge of abandonment against a husband that he is without means and therefore unable to support his wife or family. But physical or mental inability is a good defense.⁹

³ Crow v. S., 96 Ga. 297, 22 S. E. 948, 10 Am. C. R. 1.

⁴ P. v. Brady, 34 N. Y. Supp. 1118, 13 Misc. 294; P. v. Bliskey, 47 N. Y. Supp. 974, 21 Misc. 433; Com. v. Porter, 4 Pa. Dist. R. 503; S. v. Link, 68 Mo. App. 161 (drunkenness); Carney v. S., 84 Ala. 7, 4 So. 285, 7 Am. C. R. 7; Com. v. Ham, 156 Mass. 485, 31 N. E. 639. But see S. v. Tierney, 1 Pen. (Del.) 116, 39 Atl. 774.

⁵ Hall v. S., 100 Ala. 86, 14 So. 867.

⁶ S. v. Maher, 77 Mo. App. 401; S. v. Ransell, 41 Conn. 433.

⁷ Com. v. Simmons, 165 Mass. 356, 43 N. E. 110. See Hall v. S., 100 Ala. 86, 14 So. 867.

⁸ P. v. Malsch, 119 Mich. 112, 77 N. W. 638.

⁹ Com. v. Baldwin, 149 Pa. St. 305, 24 Atl. 283; S. v. Witham, 70 Wis. 473, 35 N. W. 934.

ARTICLE III. INDICTMENT.

§ 1074. **Statutory words sufficient.**—An indictment charging a husband with the offense of abandonment or failure to support his wife or children, will be sufficient if it states the offense in the words of the statute, without setting out the particular facts constituting the offense.¹⁰

§ 1075. **Residence not essential.**—An information against a husband for willful neglect to support his wife need not allege that the defendant is a resident to confer jurisdiction to prosecute him.¹¹

§ 1076. **Duplicity—Wife and child.**—Under a statute against a husband for neglecting or refusing to provide for his wife or child, an information charging him with neglecting both his wife and child is not bad for duplicity.¹²

ARTICLE IV. EVIDENCE; VARIANCE; WITNESSES.

§ 1077. **In rebuttal.**—The husband having testified that he was always willing to support his wife and child, the prosecution may show, on cross-examination of the defendant, that he gave public notice in a local newspaper that he would not be responsible for debts contracted by his wife.¹³

§ 1078. **In rebuttal to charges.**—In rebuttal to the husband's charges of misconduct of his wife that she had been guilty of breaches of her marriage obligations, she may show in evidence a decree against him in a divorce proceeding.¹⁴

§ 1079. **Witness—Wife competent.**—The wife of the defendant is a competent witness against her husband on a charge of abandonment or failure to support her, and she may make the complaint against him.¹⁵

¹⁰ S. v. Davis, 70 Mo. 467.

¹¹ Poole v. P., 24 Colo. 510, 52 Pac. 1025. See P. v. Meyer, 33 N. Y. Supp. 1123, 12 Misc. 613; S. v. McCullough, 1 Pen. (Del.) 274, 40 Atl. 237.

¹² Jenness v. S., 103 Wis. 553, 79 N. W. 759.

¹³ Jenness v. S., 103 Wis. 553, 79 N. W. 759.

¹⁴ Com. v. Ham, 156 Mass. 485, 31 N. E. 639.

¹⁵ S. v. Newberry, 43 Mo. 429.

§ 1080. **Wife non-resident—Jurisdiction.**—The court will not be authorized to try an abandonment cause if the wife was not a resident within the jurisdiction of the court at the time the abandonment took place.¹⁶

¹⁶ P. v. Sagazei, 59 N. Y. Supp. 701, 27 Misc. 727.

CHAPTER XXII.

DISORDERLY CONDUCT.

ART. I. What Constitutes Offense,	§§ 1081-1090
II. Matters of Defense,	§§ 1091-1094
III. Indictment,	§§ 1095-1106
IV. Evidence; Variance,	§§ 1107-1111

ARTICLE I. WHAT CONSTITUTES OFFENSE.

§ 1081. **Boisterous conduct.**—Boisterous conduct or threatening language, creating or tending to create a breach of the peace, constitutes disorderly conduct.¹

§ 1082. **Offensive language.**—If a person calls another a damned highway robber in a public house or place, in a loud voice, he is guilty of disorderly conduct.²

§ 1083. **Disturbing family.**—Disturbing a woman occupying her dwelling alone is a “disturbance of a family.”³ But disturbing the peace of a single individual by calling her a whore in a loud and abusive manner, is not disturbing a family.⁴

§ 1084. **Disturbing religious meeting.**—Disturbing a public assembly of people met for religious worship is a common law offense.⁵

¹ P. v. Johnson, 86 Mich. 175, 48 N. W. 870, 24 Am. R. 116; Com. v. Foley, 99 Mass. 497; S. v. Warner, 34 Conn. 276; Hearn v. S., 34 Ark. 550. See Metcalf v. P., 2 Colo. App. 262, 30 Pac. 39; Davis v. Burgess, 54 Mich. 514, 20 N. W. 540, 52 Am. R. 828.

² S. v. Sherrard, 117 N. C. 716, 23

S. E. 157; Newton v. S., 94 Ga. 593, 19 S. E. 895. See S. v. McConnell (N. H.), 47 Atl. 267.

³ Noe v. P., 39 Ill. 97. See S. v. Burns, 35 Kan. 387, 11 Pac. 161; Bones v. S., 117 Ala. 146, 23 So. 485.

⁴ S. v. Schlottman, 52 Mo. 164, 1 Green C. R. 553.

⁵ S. v. Wright, 41 Ark. 412, 48

The use of abusive or insulting language to one of the worshipers at a religious meeting is sufficient to constitute an offense, though not heard or observed by any others than the one to whom addressed.⁶ An assemblage of people met for the purpose of religious worship is not confined to worship in a church, house, or any building. It may be an open-air meeting or in a private place.⁷ And the statutory protection from disturbance extends to all religious denominations, irrespective of creed or mode of worship, unless unlawful.⁸

§ 1085. **Singing school is "school."**—A singing school kept and taught for culture and improvement in sacred and church music, is a school within the meaning of the statute as to disturbing any public or private school. But to constitute a school there must be a master who instructs, and there must be pupils who receive instruction from the master.¹⁰

§ 1086. **Meeting for temperance discussion.**—The statute of Massachusetts is: "Every person who shall willfully interrupt or disturb any school or other assembly met for a lawful purpose within the place of such meeting or out of it, shall be punished." This statute includes meetings assembled for the discussion of temperance and such other meetings.¹¹

§ 1087. **Discharging fire-arms.**—Discharging fire-arms in a wanton manner in the street of a city is a breach of the peace.¹²

§ 1088. **Willfulness essential.**—That the act in disturbing an assembly met for religious worship was willfully or intentionally done

Am. R. 43; P. v. Degey, 2 Wheeler Cr. Cas. (N. Y.) 135; U. S. v. Brooks, 4 Cranch 428; P. v. Crowley, 23 Hun (N. Y.) 413; S. v. Jasper, 4 Dev. (N. C.) 325.

⁶ S. v. Wright, 41 Ark. 414, 48 Am. R. 43; McVea v. S., 35 Tex. Cr. 1, 26 S. W. 834, 28 S. W. 469; Cockreham v. S., 7 Humph. (Tenn.) 12. ⁷ Rogers v. Brown, 20 N. J. L. 121; S. v. Norris, 59 N. H. 536; Stratton v. S., 13 Ark. 691; S. v. Swink, 4 Dev. & Bat. (N. C.) 358; Bush v. S., 6 Tex. App. 422.

⁸ Wood v. S., 11 Tex. App. 321; Hull v. S., 120 Ind. 154, 23 N. E. 117.

¹⁰ S. v. Gager, 28 Conn. 234. See S. v. Spray, 113 N. C. 686, 18 S. E. 700.

¹¹ Com. v. Porter, 1 Gray (Mass.) 476. See Von Rueden v. S., 96 Wis. 671, 71 N. W. 1048; S. v. Yeaton, 53 Me. 127.

¹² P. v. Bartz, 53 Mich. 493, 19 N. W. 161.

is essential to constitute the offense;¹³ but the intent may be inferred.^{13a} Willfulness is not essential to constitute the offense of disturbing the peace.¹⁴

§ 1089. **Intoxicated in public place.**—A statute which provides that “any person intoxicated in a public place is a disorderly person,” and shall be fined or imprisoned, defines a misdemeanor.¹⁵

§ 1090. **Ordinance valid.**—A city, by its charter, being authorized to prohibit drunkenness, an ordinance passed and adopted by virtue of such authority, against drunkenness, is a proper exercise of the police power within the constitution.¹⁶

§ 1090a. **Vagrancy.**—Persons who spend their time in idleness, or roam about begging or living without labor or visible means of support, are guilty of vagrancy.^{16a}

ARTICLE II. MATTERS OF DEFENSE.

§ 1091. **Disturbing religious meeting.**—The defendant was fighting with another near a church, but the language used by him during the fight was not loud enough to create any disturbance in the congregation. But some one in the church happened to see the fight and said, “They are fighting out yonder,” causing many of the congregation to go out, and services were interrupted. Held not a violation.¹⁷ After the minister in charge of a religious meeting dismisses his congregation, it then ceases to be a congregation, met for religious worship. The acts charged against the defendant occurring after the dismissal do not constitute a violation.¹⁸

¹³ *S. v. Stroud*, 99 Iowa 16, 68 N. W. 450; *S. v. Jacobs*, 103 N. C. 397, 9 S. E. 404; *Williams v. S.*, 83 Ala. 68, 3 So. 743; *S. v. Karnes*, 51 Mo. App. 295; *Johnson v. S.*, 92 Ala. 84, 9 So. 539; *Brown v. S.*, 46 Ala. 183. But see *Salter v. S.*, 99 Ala. 207, 13 So. 535.

^{13a} *McElroy v. S.*, 25 Tex. 509; *McAdoo v. S.*, 35 Tex. Cr. 603, 34 S. W. 955; *Wright v. S.*, 8 Lea (Tenn.) 567.

¹⁴ *Watson v. S.* (Tex. Cr.), 50 S. W. 340.

¹⁵ *P. v. Markell*, 45 N. Y. Supp. 904, 20 Misc. 149.

¹⁶ *City of Gallatin v. Tarwater*, 143 Mo. 40, 44 S. W. 750.

^{16a} *Anderson's Law Dictionary*.

See *Teasley v. S.*, 109 Ga. 282, 34 S. E. 577; *Com. v. Tay*, 170 Mass. 192, 48 N. E. 1086; *P. v. Denby*, 108 Cal. 54, 40 Pac. 1051; *Daniels v. S.*, 110 Ga. 915, 36 S. E. 293 (evidence not sufficient). See *City of St. Louis v. Babcock*, 156 Mo. 148, 56 S. W. 732.

¹⁷ *S. v. Kirby*, 108 N. C. 772, 12 S. E. 1045.

¹⁸ *S. v. Jones*, 53 Mo. 486. See *S. v. Snyder*, 14 Ind. 429; 2 Thompson Trials, § 2182; *S. v. Bryson*, 82 N. C. 578; *S. v. Davis*, 126 N. C. 1059, 35 S. E. 600. *Contra*, *Freeman v. S.* (Tex. Cr.), 44 S. W. 170; *Love v. S.*, 35 Tex. Cr. 27, 29 S. W. 790; *Kinney v. S.*, 38 Ala. 226; *S. v. Lusk*, 68 Ind. 265.

§ 1092. **Breaking peace by abating nuisance.**—It is no defense to a charge of a breach of the peace that the defendant was trying to abate a nuisance, and that the party causing and maintaining the nuisance was in the wrong.¹⁹

§ 1093. **Slandorous words, no defense.**—That the defendant had been informed that just prior to the threatening conduct with which he was charged the complaining party had slandered the wife of the defendant, is no defense, and therefore not admissible in evidence.²⁰

§ 1094. **Boxing amusement.**—On a charge of a breach of the peace by engaging in a boxing match, it is not competent to show as an excuse that such boxing is a harmless amusement and practiced in colleges.²¹

ARTICLE III. INDICTMENT.

§ 1095. **Religious meeting.**—An indictment charging one with disturbing a congregation and assembly of people "met for religious worship at the southeast corner of the public square," is defective, and charges no offense within the statute, not being a "camp-meeting," nor "house or place of worship," as defined by statute.²²

§ 1096. **Disturbing school.**—A disturbance which prevents a school from coming together is not "interrupting and disturbing a school" within the meaning of the statute.²³

§ 1097. **Profane language.**—The complaint alleging that the defendant used toward another a profane epithet at the residence of such person, does not state an offense under an ordinance for making an "improper noise, riot, disturbance or breach of the peace on the streets or highways or elsewhere within the city."²⁴

§ 1098. **Acquittal of one of two.**—Where two persons are indicted for an affray, the successful defense of one will operate as an acquittal of both. They are to be tried together, having a common interest.²⁵

¹⁹ S. v. White, 18 R. I. 473, 28 Atl. 968.

²⁰ Arnold v. S., 92 Ind. 187; Newton v. S., 94 Ga. 593, 19 S. E. 895.

²¹ S. v. Burnham, 56 Vt. 445, 48 Am. R. 801.

²² S. v. Schieneman, 64 Mo. 386.

²³ S. v. Spray, 113 N. C. 687, 18 S. E. 700. See Douglass v. Barber, 18 R. I. 459, 28 Atl. 805.

²⁴ S. v. City of Camden, 52 N. J. L. 289, 19 Atl. 539. See also Brooks v. S., 67 Miss. 577, 7 So. 494; Daniel v. City of Athens, 110 Ga. 289, 34 S. E. 1016. *Contra*, City of Grand Rapids v. Williams, 112 Mich. 247, 70 N. W. 547.

²⁵ Hawkins v. S., 13 Ga. 324, 58 Am. D. 517; S. v. Wilson, Phil. L. (N. C.) 237; Ohio v. Foy, Tapp. 71.

§ 1099. **Statutory words—Equivalent.**—In setting out the offense in the indictment, the use of the words “commonly assembled” is a substantial compliance with the words of the statute, “common resort,” and the indictment, if otherwise sufficient, is good.²⁶

§ 1100. **Description of place.**—The indictment for fighting in a “public place” need not describe the public place.²⁷

§ 1101. **Several acts, one offense.**—Committing a breach of the public peace by “tumultuous and offensive carriage, by threatening, quarreling, and challenging to fight,” constitute but one offense, and should be alleged in the same count.²⁸

§ 1102. **Abusive language in presence.**—An indictment charging the use of abusive language in the presence of and concerning another is sufficient in the statutory words, and need not allege the language used by the defendant.²⁹ An information by proper averments charging the defendant with using abusive language concerning a person named, charged that he used such language in the “presence and hearing” of such person, and did then and there call him a “son of a dog.” This sufficiently alleges that the defendant used the abusive language “concerning” the person named.³⁰

§ 1103. **Information insufficient.**—An information charging drunkenness, founded upon the report of a policeman without the names of witnesses, and which does not set out that the drunkenness of the accused annoyed any one, is not sufficient to give jurisdiction.³¹

§ 1104. **Stating offense.**—A charge, under an ordinance, of “creating a disturbance within the corporate limits” of the city, does not sufficiently set out an offense of riotous and disorderly conduct, loud and boisterous cursing and swearing, or the use of vulgar or obscene

Contra, McClellan v. S., 53 Ala. 640; Cash v. S., 2 Tenn. 198.

²⁶ Hammond v. S. (Tex. Cr.), 28 S. W. 204. Indictment for former convictions: P. v. Booth, 121 Mich. 131, 79 N. W. 1100.

²⁷ Shelton v. S., 30 Tex. 431. See S. v. Hanley, 47 Vt. 290.

²⁸ S. v. Matthews, 42 Vt. 542.

²⁹ S. v. Fare, 39 Mo. App. 110;

Foreman v. S., 31 Tex. Cr. 477, 20 S. W. 1109; S. v. Parker, 39 Mo. App. 116; S. v. Hocker, 68 Mo. App. 415. *Contra*, Walton v. S., 64 Miss. 207, 8 So. 171.

³⁰ Menasco v. S., 32 Tex. Cr. 582, 25 S. W. 422.

³¹ City of St. Joseph v. Harris, 59 Mo. App. 122.

language, indecent exposure of the person, or creating a disturbance within the corporate limits.³²

§ 1105. **Information insufficient.**—An information charging a person with using loud, offensive and indecent language in the presence and hearing of others, including both sexes, does not properly charge disorderly conduct under the statute of New Jersey.³³

§ 1106. **Abusive language at dwelling.**—Abusive language uttered “at the dwelling-house of another, or the yard or curtilage thereof, or upon any public highway or any other place near the premises” in the presence of a family, is not sufficiently stated in an indictment charging the use of such language in a public highway near the premises of a person named.³⁴

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1107. **Evidence sufficient.**—Where the evidence shows that a man and woman, who were riding on a street car with other persons, were intoxicated, and were hugging and kissing each other and using profane language to the extent of attracting the attention of other passengers on the car, including females, this is sufficient to sustain a charge of “indecent or disorderly conduct in the presence of females on street cars.”³⁵

§ 1108. **Facts for jury.**—The question whether there was sufficient provocation as an excuse for the use of opprobrious words must be determined by the jury, being a question of fact.³⁶

§ 1109. **Variance—Laughing or swearing.**—Disturbing a meeting of people for public worship by “laughing and talking” will not support a charge of disturbance by “loud and vociferous exclamations and swearing.”³⁷

³² S. v. Hettrick, 126 N. C. 977, 35 S. E. 125.

³³ Cowell v. S., 63 N. J. L. 523, 43 Atl. 436.

³⁴ S. v. Reed, 76 Miss. 211, 24 So. 308.

³⁵ Sailors v. S., 108 Ga. 35, 33 S. E. 813.

³⁶ Echols v. S., 110 Ga. 257, 34 S. E. 289; Williams v. S., 105 Ga. 608, 31 S. E. 738.

³⁷ Lyons v. S., 25 Tex. App. 403, 8 S. W. 643; S. v. Horn, 19 Ark. 579. See Stratton v. S., 13 Ark. 690; Howard v. S., 87 Ind. 70; S. v. Hettrick, 126 N. C. 977, 35 S. E. 125.

§ 1110. **Sunday-school is not religious worship.**—The information charged the unlawful disturbance of a congregation assembled for religious worship. The evidence conclusively showed it was a Sunday-school that was disturbed. Held, a fatal variance.³⁸

§ 1111. **Opium smoking.**—The offense of keeping open or maintaining “a place where opium is smoked by others, or to sell or give away opium to be there smoked or otherwise used,” is not supported by evidence that the defendant kept a place where opium was smoked, but which fails to show who did the smoking—the defendant or other persons.³⁹

³⁸ Hubbard v. S., 32 Tex. Cr. 391, 24 S. W. 30, citing Wood v. S., 11 Tex. App. 318; Layne v. S., 4 Lea (Tenn.) 201. *Contra*, S. v. Stuth, 11 Wash. 423, 39 Pac. 665; Martin v. S., 6 Baxt. (Tenn.) 234.
³⁹ P. v. Reed, 61 N. Y. Supp. 520, 14 N. Y. Cr. 326.

CHAPTER XXIII.

AFFRAY.

ART.	I. Definition and Elements,	§§ 1112-1113
	II. Matters of Defense,	§ 1114
	III. Indictment,	§§ 1115-1116
	IV. Evidence; Variance,	§§ 1117-1117

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1112. **Affray defined.**—Affrays, as defined by Blackstone (from *affraier*, to terrify), are the fighting of two or more persons in some public place, to the terror of his majesty's subjects; for if the fighting be in private, it is no affray, but an assault.¹ Fighting in a public road is an affray.² If one person, by the use of such abusive language towards another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow.³ It is an affray for two travelers to mutually engage in a fight in a public road, in the presence of another.⁴

§ 1113. **Affray includes assault.**—Assault and battery may be included in an affray: an affray being the fighting of two or more persons in a public place, to the terror of the people.⁵

¹ 4 Bl. Com. 145; Underhill Cr. Ev., § 488; 1 Bish. Cr. L., § 535; 2 Hawk. P. C., ch. 63; Taylor v. S., 22 Ala. 15; S. v. Warren, 57 Mo. App. 502; Simpson v. S., 13 Tenn. 356; Champer v. S., 14 Ohio St. 437; McClellan v. S., 53 Ala. 640; Com. v. Simmons, 29 Ky. 614; P. v. Judson, 11 Daly (N. Y.) 1; S. v. Glad-den, 73 N. C. 150; S. v. Heflin, 8 Humph. (Tenn.) 84.

² Pollock v. S., 32 Tex. Cr. 29, 1118.

22 S. W. 19. See S. v. Weekly, 29 Ind. 206; Wilson v. S., 59 Tenn. 278; S. v. Davis, 80 N. C. 351, 30 Am. R. 86.

³ S. v. Fanning, 94 N. C. 944, 53 Am. R. 653; S. v. Perry, 5 Jones 9. See 4 Bl. Com. 150; S. v. Sumner, 5 Strob. (S. C.) 53; Hawkins v. S., 13 Ga. 322, 58 Am. D. 517. *Contra*, O'Neill v. S., 16 Ala. 65.

⁴ Piper v. S. (Tex. Cr.), 57 S. W. 1118.

⁵ 4 Bl. Com. 145; Fritz v. S., 40

ARTICLE II. MATTERS OF DEFENSE.

§ 1114. **Belief of harm, not sufficient.**—Mere belief of one of the parties charged with affray that he and his companion were about to suffer great bodily harm, is not sufficient to justify their fighting their antagonist in self-defense.⁶

ARTICLE III. INDICTMENT.

§ 1115. **Indictment for affray.**—The indictment, in setting out the charge of an affray, is sufficient if it allege the fighting to have taken place in a public place, without further description of the place.⁷

§ 1116. **Indictment sufficient.**—An indictment charging that the defendant “did, in a public place, unlawfully assault and beat, strike, kick and bruise” a person named, which assault so as aforesaid was in an angry and quarrelsome manner, to the disturbance of others, the citizens of said county, with proper conclusion, is sufficient under the Missouri statute.⁸

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1117. **Affray—Evidence insufficient.**—The bare fact of two or more persons fighting is not *per se* ground to presume they fought by agreement; and proof of such fact only will not support a charge for affray.⁹ If the defendant admits the charge of fighting with deadly weapons, it will devolve on him to show that he was justified in his conduct.¹⁰

Ind. 18, 1 Green C. R. 557; S. v. Allen, 4 Hawks (N. C.) 356. *Contra*, Com. v. Perdue, 2 Va. Cas. 227.

⁶ S. v. Harrell, 107 N. C. 944, 12 S. E. 439.

⁷ Wilson v. S., 3 Heisk. (Tenn.) 278, 1 Green C. R. 550; S. v. Baker, 83 N. C. 649. See S. v. Weekly, 29 Ind. 206; S. v. Billingsley, 43 Tex. 93; Shelton v. S., 30 Tex. 431. See S. v. Benthall, 24

Tenn. 519; S. v. Sumner, 5 Strob. (S. C.) 53. An inclosed lot visible from the public street, though some distance from the street, is a public place: Carwile v. S., 35 Ala. 392. But see Taylor v. S., 22 Ala. 15.

⁸ S. v. Dunn, 73 Mo. 586.

⁹ Klum v. S., 1 Blackf. (Ind.) 377. See Duncan v. Com., 36 Ky. 295.

¹⁰ S. v. Barringer, 114 N. C. 840, 19 S. E. 275. See Childs v. S., 15 Ark. 204.

CHAPTER XXIV.

DISORDERLY HOUSE.

ART.	I. Definition and Elements,	§§ 1119-1130
	II. Matters of Defense,	§§ 1131-1135
	III. Indictment,	§§ 1136-1143
	IV. Evidence,	§§ 1144-1152

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1119. **What constitutes disorderly house.**—A disorderly house is a house in which people abide or to which they resort, disturbing the repose of the neighborhood, or where the conduct of the inmates is injurious to the public morals, health, safety or conscience, and such a house includes disorderly inns, ale-houses, saloons, bawdy houses, gaming houses, stage-plays, booths and stages for rope-dancers, mountebanks and the like; such houses, under the common law, are nuisances.¹ But such houses are not common or public nuisances under the common law unless they annoy or disturb the public generally.²

§ 1120. **Dancing halls—Saloons.**—Permitting lewd women to resort to a dancing hall where liquors are sold and spend their time in lewd conduct, such as sitting in the laps of men and hugging and kissing them, is keeping a “disorderly house” under the statute of

¹ S. v. Maxwell, 33 Conn. 259; 536, 17 Atl. 1044; Cahn v. S., 110 Cheek v. Com., 79 Ky. 362; S. v. Ala. 56, 20 So. 380; S. v. Wilson, 93 Williams, 30 N. J. L. 102; P. v. N. C. 608.
 Carey, 4 Park. Cr. (N. Y.) 241; ² S. v. Wright, 51 N. C. (6 Jones) Com. v. Goodall, 165 Mass. 588, 43 25; Palfus v. S., 36 Ga. 280; Hickey N. E. 520; Thatcher v. S., 48 Ark. v. S., 53 Ala. 514; Mains v. S., 42 60, 2 S. W. 343; Com. v. Hopkins, Ind. 327, 13 Am. R. 364; S. v. Calley, 133 Mass. 381; 4 Bl. Com. 169; 104 N. C. 858, 17 Am. R. 104, 10 S. E. Beard v. S., 71 Md. 276, 17 Am. R. 455.

Texas.³ But where such women resort to a saloon only for the purpose of buying and drinking beer, it is not a disorderly house.⁴

§ 1121. **House an habitual resort.**—On a charge of keeping a disorderly house, it is sufficient that the defendant allowed his house to become the habitual resort of drunkards, thieves and prostitutes at late and unreasonable hours at night.⁵ Noise or disturbance is not an essential element of the offense of keeping a disorderly house.⁶

§ 1122. **House for prostitution.**—The term “disorderly house” at common law includes every house that is so kept as directly to disturb public order at the time, or tend to the corruption of public morals and the ultimate disturbance of the general good order of the community. A house kept as a place of public resort for the purpose of prostitution or other immoral conduct is a disorderly house.⁷

§ 1123. **House attracting idlers.**—Where a house is so conducted as to attract and bring together idle, dissolute or disorderly persons, it is a “disorderly house,” and the disorderly conduct may be either inside or outside the house.⁸

§ 1124. **Resort for criminals.**—A house of public resort, where criminal offenses are habitually committed, is a “disorderly house,” and a common or public nuisance.⁹

§ 1125. **Tents, boats, halls.**—The offense of keeping a disorderly house may be committed not only in a dwelling-house, but in other

³ *Ahr v. S.* (Tex. Cr.), 31 S. W. 657.

⁴ *Harmes v. S.*, 26 Tex. App. 190, 8 Am. R. 470, 9 S. W. 487. But see *Couch v. S.*, 24 Tex. 559; *Brown v. S.*, 2 Tex. App. 189.

⁵ *Com. v. Cobb*, 120 Mass. 356; *Beard v. S.*, 71 Md. 275, 17 Atl. 1044, 8 Am. C. R. 173; *S. v. Young*, 96 Iowa 262, 65 N. W. 160; *S. v. Williams*, 30 N. J. L. 102; *Lord v. S.*, 16 N. H. 325. See *Com. v. Goodall*, 165 Mass. 588, 43 N. E. 520.

⁶ *Com. v. Cobb*, 120 Mass. 356; *Kneffler v. Com.*, 94 Ky. 359, 22 S. W. 446, 15 Ky. L. 176; *Beard v. S.*, 71 Md. 275, 17 Atl. 1044, 17 Am. R. 536; *Price v. S.*, 96 Ala. 1, 11 So. 128; *S. v. Williams*, 30 N. J. L.

102; *S. v. McGregor*, 41 N. H. 407; *King v. P.*, 83 N. Y. 587.

⁷ *Com. v. Goodall*, 165 Mass. 594, 43 N. E. 520; *S. v. Calley*, 104 N. C. 858, 17 Am. R. 704, 10 S. E. 455; *Thatcher v. S.*, 48 Ark. 60, 2 S. W. 343; *S. v. Wilson*, 93 N. C. 608.

⁸ *Cahn v. S.*, 110 Ala. 56, 20 So. 380; *S. v. Mathews*, 2 Dev. & B. (N. C.) 424; *S. v. Pierce*, 65 Iowa 85, 21 N. W. 195; *Tanner v. Albion*, 5 Hill (N. Y.) 121, 40 Am. D. 337; *Hall's Case*, 1 Mod. 76; *S. v. Williams*, 30 N. J. L. 102; *S. v. Webb*, 25 Iowa 235.

⁹ *Hickey v. S.*, 53 Ala. 514; *P. v. Weithoff*, 51 Mich. 203, 16 N. W. 442; *Cheek v. Com.*, 79 Ky. 359; *S. v. Lovell*, 39 N. J. L. 463; *Brown v. S.*, 49 N. J. L. 61, 7 Atl. 340.

buildings or places, such as a tent, boat, dance-hall, saloon, store, shop or lodging-rooms of a house.¹⁰

§ 1126. **Gaming house.**—A common gaming house is in legal contemplation a disorderly house. The defendant, in keeping a house where he permitted divers persons to habitually assemble and engage in betting, is guilty of keeping a disorderly house.¹¹ The defendant kept a room to which persons commonly resorted for the purpose of betting upon horse races, run at various places throughout the country: Held to be a disorderly house under the statute.¹² And such a place is a nuisance at common law, because it encourages persons to meet there and engage in gaming in violation of the law.^{12a}

§ 1127. **Selling intoxicating liquor.**—Where the keeper of a house is in the habit of selling intoxicating liquors on his premises unlawfully, he will be guilty of keeping a disorderly house, and it can make no difference that he may be liable to indictment for each specific sale so unlawfully made.¹³ The keeper of a saloon or dramshop where intoxicating liquors are sold, though under a license, will be guilty of keeping a disorderly house if he permits idle, dissolute, drunken or other disorderly persons to collect in or about his premises and disturb or annoy the people of the community by swearing, cursing, fighting, or by any other disorderly conduct.¹⁴

¹⁰ Killman v. S., 2 Tex. App. 222, 28 Am. R. 432 (tent); S. v. Mullen, 35 Iowa 199 (boat); Com. v. Cardoze, 119 Mass. 210 (dance hall); Com. v. Cobb, 120 Mass. 356 (saloon); S. v. Robertson, 86 N. C. 628; Hickey v. S., 53 Ala. 514; S. v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. D. 442; S. v. Powers, 36 Conn. 77; S. v. Garity, 46 N. H. 61; P. v. Buchanan, 1 Idaho 681. See Com. v. Wise, 110 Mass. 181; Clifton v. S., 53 Ga. 241; S. v. Main, 31 Conn. 572.

¹¹ Kneffler v. Com., 94 Ky. 360, 22 S. W. 446, 15 Ky. L. 176; McClain v. S., 49 N. J. L. 471, 9 Atl. 681. See also P. v. Weithoff, 51 Mich. 203, 16 N. W. 442, 47 Am. R. 557, 4 Cr. L. Mag. 682; Haring v. S., 51 N. J. L. 386, 17 Atl. 1079; Cheek v. Com., 79 Ky. 359 (pool rooms); King v. P., 83 N. Y. 587; Lord v. S., 16 N. H. 330, 41 Am. D. 729.

¹² Haring v. S., 51 N. J. L. 386, 17 Atl. 1079; S. v. Bailey, 21 N. H. 343; Price v. S., 96 Ala. 1, 11 So. 128. See Hawkins v. Lutton, 95 Wis. 492, 70 N. W. 483; Cahn v. S., 110 Ala. 56, 20 So. 380.

^{12a} Cheek v. Com., 79 Ky. 359; P. v. Weithoff, 51 Mich. 203, 47 Am. R. 557, 4 Cr. L. Mag. 682, 16 N. W. 442.

¹³ Parker v. S., 61 N. J. L. 308, 39 Atl. 651; Brown v. S., 49 N. J. L. 61, 7 Atl. 340; Wilson v. Com., 12 B. Mon. (Ky.) 2; Henry v. Com., 9 B. Mon. (Ky.) 361. But see Jarmon v. S. (N. J. L.), 45 Atl. 1032.

¹⁴ Com. v. Cobb, 120 Mass. 356; Com. v. Wallace, 143 Mass. 88, 9 N. E. 5; Price v. S., 96 Ala. 1, 11 So. 128; Delaney v. S., 51 N. J. L. 37, 16 Atl. 267; Garrison v. S., 14 Ind. 287; S. v. Foley, 45 N. H. 466; S. v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. D. 442; S. v. Robertson, 86

§ 1128. **Continuing offense.**—The keeping of a disorderly house is a continuing offense, unless made otherwise by statute.¹⁵

§ 1129. **Manager or agent liable.**—Any person who manages or controls, or in any manner assists as agent or servant in conducting a disorderly house, is alike guilty with the owner as principal.¹⁶

§ 1130. **Husband and wife liable.**—A wife may be indicted together with her husband, and be condemned with him for keeping a bawdy house, for this is an offense as to the government of the house, in which the wife has a principal share.¹⁷ And where the husband is charged as owner with knowingly permitting a place to be kept as a disorderly house, it is no defense that the house is owned by his wife.¹⁸

ARTICLE II. MATTERS OF DEFENSE.

§ 1131. **Preventing disorderly conduct.**—The fact that the defendant endeavored to prevent disorderly conduct, breaches of the peace and the like, in or about his premises, is no defense to a charge of keeping a disorderly house.¹⁹

§ 1132. **License no defense.**—That a person has a license to retail spirituous liquors will not warrant him in keeping a nuisance by permitting evil-disposed persons to congregate in or about his place of business and engage in blackguarding, swearing, fighting, etc.²⁰

N. C. 628; S. v. Garity, 46 N. H. 61; Wilson v. Com., 12 B. Mon. (Ky.) 2; S. v. Pierce, 65 Iowa 85, 21 N. W. 195; Cable v. S., 8 Blackf. (Ind.) 531; U. S. v. Elder, 4 Cranch 508; S. v. Mullikin, 8 Blackf. (Ind.) 261.

¹⁵ Reed v. S. (Tex. Cr.), 29 S. W. 1085; Com. v. Bessler, 97 Ky. 498, 30 S. W. 1012, 17 Ky. L. 357.

¹⁶ Com. v. Maroney, 105 Mass. 467; Stevens v. P., 67 Ill. 587; S. v. Williams, 30 N. J. L. 102; Clifton v. S., 53 Ga. 241; Ter. v. Stone, 2 Dak. 155, 4 N. W. 697; S. v. McGregor, 41 N. H. 407; Harlow v. Com., 11 Bush (Ky.) 610; P. v. Erwin, 4 Den. (N. Y.) 129; Engeman v. S., 54 N. J. L. 257, 23 Atl. 679; Smith v. S., 6 Gill (Md.) 425; Hipes v. S., 73 Ind. 39; Com. v. Burke, 114 Mass.

261; S. v. Dow, 21 Vt. 484. See Jacobi v. S., 59 Ala. 71; S. v. Marchant, 15 R. I. 539, 9 Atl. 902; Carlton v. S. (Tex. Cr.), 51 S. W. 213; Sparks v. S. (Tex. Cr.), 47 S. W. 1120.

¹⁷ 1 Hawk. P. C. 12; Reg. v. Warren, 16 Ont. 590; Com. v. Hopkins, 133 Mass. 381, 43 Am. R. 527; Hunter v. S., 14 Ind. App. 683, 43 N. E. 452.

¹⁸ Willis v. S., 34 Tex. Cr. 148, 29 S. W. 787.

¹⁹ Com. v. Cobb, 120 Mass. 356; Cable v. S., 8 Blackf. (Ind.) 531; Price v. S., 96 Ala. 1, 11 So. 128; S. v. Schaffer, 74 Iowa 704, 39 N. W. 89; Underhill Cr. Ev., § 482.

²⁰ S. v. Mullikin, 8 Blackf. (Ind.) 260.

§ 1133. **Owner, when not liable.**—If the owner, at the time he leases his house to a tenant, does not know the purpose for which the house is to be kept, and afterwards learns that it is kept for an unlawful purpose, he can not be held criminally liable merely because he continues to collect the rents and makes no remonstrance against the house being kept for such unlawful purpose.²¹

§ 1134. **Kept for lawful purpose.**—If the purpose of the house be not necessarily injurious to society, the keeping of such a house (bowling alley) is never criminal, though kept for gain, unless it be made so by the manner in which it is conducted. One may use his house for any purpose which, in itself, is not necessarily hurtful to the community.²²

§ 1135. **Disorderly conduct in private house.**—Disorderly conduct in a private house, such as fighting or gaming, does not make the house a disorderly house unless such conduct in some manner annoys the public, but otherwise if the house is a public place, such as an inn.²³

ARTICLE III. INDICTMENT.

§ 1136. **Description of premises.**—In charging the keeping of a disorderly house, the indictment need not describe the lot or block on which it is located, or state the name of the house.²⁴ Stating the offense in the language of the statute is sufficient, without stating any particular acts of idleness, fornication, etc.^{24a}

§ 1137. **"Lucre or gain" immaterial.**—The indictment charging the keeping of a disorderly house need not allege that it was kept for "lucre and gain," and any attempted averment of keeping for such purpose may be treated as surplusage.²⁵

²¹ S. v. Williams, 30 N. J. L. 102; S. v. Pearsall, 43 Iowa 630; Campbell v. S., 55 Ala. 89; S. v. Leach, 50 Mo. 535; S. v. Frazier, 79 Me. 95, 8 Atl. 347; P. v. Saunders, 29 Mich. 273. See Crofton v. S., 25 Ohio St. 249; S. v. Abrahams, 6 Iowa 117, 71 Am. D. 399.

²² S. v. Hall, 32 N. J. L. 158; P. v. Sergeant, 8 Cow. (N. Y.) 139; S. v. Haines, 30 Me. 65. See Cahn v. S., 110 Ala. 56, 20 So. 380; P. v. Klock, 48 Hun (N. Y.) 275; Beard v. S., 71 Md. 275, 15 Am. R. 536, 17 Atl. 1044; Berry v. P., 77 N. Y. 588, 1 N. Y. Cr. 57.

²³ S. v. Mathews, 2 Dev. & B. L.

(N. C.) 424; Hunter v. Com., 2 S. & R. (Pa.) 298. See also Com. v. Cobb, 120 Mass. 356; S. v. Haines, 30 Me. 65; Rex v. Moore, 3 B. & Ad. 184, 23 E. C. L. 52; S. v. Wilson, 93 N. C. 608; Bloomhuff v. S., 8 Blackf. (Ind.) 205; S. v. Buckley, 5 Harr. (Del.) 508.

²⁴ Sprague v. S. (Tex. Cr.), 44 S. W. 837.

^{24a} Howard v. P. (Colo.), 61 Pac. 595. See Shutze v. S. (Tex. Cr.), 56 S. W. 918.

²⁵ S. v. Parks, 61 N. J. L. 438, 39 Atl. 1023; Com. v. Wood, 97 Mass. 225.

§ 1138. **Duplicity—When not.**—Where a statute in the same general description enumerates different ways of keeping a disorderly house, subject to the same punishment, they may all be joined in the same count in the indictment without being bad for duplicity.²⁶

§ 1139. **Opium—Keeper of place.**—In an information charging a person with being present at a “place, house, building or tenement” where and when implements for smoking opium are found, it is not necessary to allege who was the keeper of the place, not being an essential element of the offense as defined by statute.²⁷

§ 1140. **Owner or tenant material.**—Under a statute against the keeping of a disorderly house by the “owner, lessee, or tenant,” an indictment which fails to aver that the defendant was the “owner, lessee or tenant” of the house is not good.²⁸

§ 1141. **Lewd women in theatre.**—An indictment which sets out, by proper averments, that the defendant owned and was the manager of a certain theatre and dance house where intoxicating liquors were sold, and that the defendant kept and employed in such theatre lewd women and prostitutes, sufficiently states an offense, under the statute of Texas.²⁹

§ 1142. **House for prostitution.**—The indictment charged that the defendant was the owner of a certain house, and that he did “knowingly permit the keeping in said house of a disorderly house, to wit, a house kept for prostitution, and where prostitutes were permitted to resort and reside for the purpose of plying their vocation.” Held sufficient.³⁰

§ 1143. **Charging nuisance—Defective.**—The statute of Washington provides: “All houses used as a place of resort where women are employed to draw custom, dance, or for purposes of prostitution, are nuisances.” The information charged that the defendant, on a day

²⁶ Willis v. S., 34 Tex. Cr. 148, 29 S. W. 787. See Com. v. Myers, 21 Ky. L. 1770, 56 S. W. 412.

²⁷ Com. v. Kane, 173 Mass. 477, 53 N. E. 919.

²⁸ Lamar v. S., 30 Tex. App. 693, 18 S. W. 788. A servant taking care of the house for the owner is not the “owner, lessee or tenant” with-

in the meaning of the statute: Mitchell v. S., 34 Tex. Cr. 311, 30 S. W. 810.

²⁹ Callaghan v. S., 36 Tex. Cr. 536, 38 S. W. 188.

³⁰ Mansfield v. S. (Tex. Cr.), 24 S. W. 901; Swaggart v. Ter., 6 Okla. 344, 50 Pac. 96.

stated, kept a certain house, which "was then used as a place of resort where women are employed to draw custom, and to dance." Held defective in not alleging that women were employed to draw custom and dance at the time the house is alleged to have been kept by the defendant.³¹

ARTICLE IV. EVIDENCE.

§ 1144. **Keeper of house.**—On the trial of a charge for keeping a disorderly house, it must be shown that the defendant in some manner had the management or control of the house, as alleged in the indictment.³² Before a conviction can be sustained for "keeping a disorderly house," it must be shown that the defendant was in some manner connected with the house in question; that she purchased the house and put it into the possession of some girls, and did not remain there afterwards, is not sufficient to sustain a conviction.³³

§ 1145. **Reputation of house.**—Evidence of the general reputation of the house is competent as tending to prove that it is a disorderly house.³⁴ It need not be shown that the house charged with being disorderly had acquired the reputation of being a disorderly house. It is sufficient if it is, in fact, such a house.³⁵ That a house bears the reputation of being a disorderly house, is not of itself sufficient to make it such.³⁶

§ 1146. **Reputation of inmates.**—Evidence of the character of the inmates and frequenters of a house is competent as tending to prove

³¹ *S. v. Brown*, 7 Wash. 10, 34 Pac. 132.

³² *Com. v. Cobb*, 120 Mass. 356; *King v. S.*, 17 Fla. 183; *Rabb v. S.* (Tex. App.), 13 S. W. 1000; *P. v. Ah Ho*, 1 Idaho 691; *Drake v. S.*, 14 Neb. 536, 17 N. W. 117; *Vowells v. Com.*, 83 Ky. 193; *Toney v. S.*, 60 Ala. 97; *Nelson v. Ter.*, 5 Okla. 512, 49 Pac. 920.

³³ *Morse v. S.* (Tex. Cr.), 47 S. W. 989; *Bindernagle v. S.*, 60 N. J. L. 307, 37 Atl. 619. See *Howard v. P.* (Colo.), 61 Pac. 595 (permitting).

³⁴ *Hogan v. S.*, 76 Ga. 82; *Betts v. S.*, 93 Ind. 375; *S. v. Brunell*, 29 Wis. 435; *S. v. Hendricks*, 15 Mont. 194, 39 Pac. 93, 48 Am. R. 666; *Golden v. S.*, 34 Tex. Cr. 143, 29 S.

W. 779; *Drake v. S.*, 14 Neb. 536, 17 N. W. 117; *S. v. West*, 46 La. 1009, 15 So. 418; *S. v. Bresland*, 59 Minn. 281, 61 N. W. 450; *O'Brien v. P.*, 28 Mich. 213. See *Shaffer v. S.*, 87 Md. 124, 39 Atl. 313. *Contra*, *Beard v. S.*, 71 Md. 275, 17 Atl. 1044, 8 Am. C. R. 174; *S. v. Lee*, 80 Iowa 75, 20 Am. R. 401, 45 N. W. 545; *S. v. Boardman*, 64 Me. 523, 1 Am. C. R. 352; *Toney v. S.*, 60 Ala. 97; *Handy v. S.*, 63 Miss. 207, 56 Am. R. 803; *Heflin v. S.*, 20 N. J. L. 151.

³⁵ *Herzinger v. S.*, 70 Md. 278, 17 Atl. 81; *S. v. Maxwell*, 33 Conn. 259.

³⁶ *S. v. Brunell*, 29 Wis. 435; *Drake v. S.*, 14 Neb. 535, 17 N. W. 117.

that it is a disorderly house, and this may be shown by general reputation.³⁷ And the weight of authority maintains that not only the reputation of the inmates, but also of the house itself, may be established by general repute.³⁸

§ 1147. Language of inmates.—On the trial of one charged with keeping a disorderly house, the language and general conduct of the inmates and frequenters may be shown in evidence.³⁹

§ 1148. Selling liquor competent.—Evidence that the defendant was in the habit of selling intoxicating liquors at his house, is competent as tending to prove the keeping of a disorderly house.⁴⁰

§ 1149. Annoyance essential.—On a charge of keeping a disorderly house, it is sufficient if the proof shows that persons passing by the house on a highway were annoyed.⁴¹ If the disorderly conduct or acts would tend to annoy the entire neighborhood, this is sufficient to make the house a disorderly house, although the proof shows but one person was actually annoyed or disturbed.⁴²

§ 1150. Surplus averments.—It is necessary to prove matters of description only when the averment of which the descriptive matter forms a part is material. Matters alleged in the indictment which

³⁷ Beard v. S., 71 Md. 275, 17 Atl. 1044, 8 Am. C. R. 174; Com. v. Clark, 145 Mass. 251, 13 N. E. 888; P. v. Russell, 110 Mich. 46, 67 N. W. 1099; S. v. Hendricks, 15 Mont. 194, 39 Pac. 93, 48 Am. R. 666; S. v. Boardman, 64 Me. 523; Toney v. S., 60 Ala. 97; Roop v. S., 58 N. J. L. 479, 34 Atl. 749; Betts v. S., 93 Ind. 375; S. v. West, 46 La. 1009, 15 So. 418; S. v. Bean, 21 Mo. 267; P. v. Buchanan, 1 Idaho 681; S. v. Lyon, 39 Iowa 379; King v. S., 17 Fla. 183; Morris v. S., 38 Tex. 603; Sprague v. S. (Tex. Cr.), 44 S. W. 837; Howard v. P. (Colo.), 61 Pac. 595. See Dailey v. S. (Tex. Cr.), 55 S. W. 823.

³⁸ P. v. Gastro, 75 Mich. 127, 42 N. W. 937; Ter. v. Bowen, 2 Idaho 607, 23 Pac. 82; S. v. Mack, 41 La. 1079, 6 So. 808; P. v. Saunders, 29 Mich. 269, 1 Am. C. R. 348; Sylvester v. S., 42 Tex. 496, 1 Am. C. R. 350; Nelson v. Ter., 5 Okla. 512, 49

Pac. 920; Sprague v. S. (Tex. Cr.), 44 S. W. 837; Com. v. Murr, 7 Pa. Sup. Ct. 391, 42 W. N. C. 263; Hogan v. S., 76 Ga. 82; King v. S., 17 Fla. 183.

³⁹ S. v. Garing, 75 Me. 591; S. v. Toombs, 79 Iowa 741, 45 N. W. 300; Berry v. P., 77 N. Y. 588, 1 N. Y. Cr. 57; Com. v. Sliney, 126 Mass. 49; Harwood v. P., 26 N. Y. 190, 84 Am. D. 175; Toney v. S., 60 Ala. 97; Beard v. S., 71 Md. 275, 17 Am. R. 536, 17 Atl. 1044; Bindernagle v. S., 60 N. J. L. 307, 37 Atl. 619.

⁴⁰ Derby v. S., 60 N. J. L. 258, 37 Atl. 614.

⁴¹ Hackney v. S., 8 Ind. 494; S. v. Wilson, 93 N. C. 608; Com. v. Davenport, 2 Allen (Mass.) 299.

⁴² Com. v. Hopkins, 133 Mass. 381, 43 Am. R. 527; Price v. S., 96 Ala. 5, 11 So. 128. See S. v. Robertson, 86 N. C. 628; Hackney v. S., 8 Ind. 494.

are not material to the offense as defined by statute may be rejected as surplusage.⁴³

§ 1151. **Statute affirming common law.**—A statute leveled against disorderly houses does not necessarily repeal the common law by implication, unless the legislative intent to alter or repeal is clearly expressed. The statute may be in affirmance of the common law, adding new regulations or remedies.⁴⁴

§ 1152. **Authority to suppress disorderly house.**—The legislature may lawfully empower cities and villages to pass ordinances against the keeping of gaming and other disorderly houses.⁴⁵ And the enactment of such ordinances by cities or other municipalities does not suspend and render inoperative the general law of the state on the same subject, nor of the common law.⁴⁶

⁴³ *S. v. Dame*, 60 N. H. 479, 4 Am. C. R. 444; *Rex v. May*, 1 Doug. 193.

⁴⁴ *Com. v. Chemical Works*, 16 Gray (Mass.) 231; *Parker v. S.*, 61 N. J. L. 308, 39 Atl. 651; *Com. v. Goodall*, 165 Mass. 588, 43 N. E. 520; *P. v. Sadler*, 97 N. Y. 146; *Vanderworker v. S.*, 13 Ark. 700. See *P. v. Goldman*, 1 Idaho 714; *P.*

v. Gustin, 57 Mich. 407, 24 N. W. 156; *Huber v. S.*, 25 Ind. 175.

⁴⁵ *Rogers v. P.*, 9 Colo. 450, 59 Am. R. 146, 12 Pac. 483; *Wong v. Astoria*, 13 Or. 538, 11 Pac. 295.

⁴⁶ *Seibold v. P.*, 86 Ill. 33; *P. v. Mallette*, 79 Mich. 600, 44 N. W. 962; *S. v. Wister*, 62 Mo. 592; *Com. v. Hunter*, 19 Ky. L. 1109, 41 S. W. 284.

CHAPTER XXV.

DUELING.

ART. I. What Constitutes Offense,	§§ 1153-1154
II. Matters of Defense,	§ 1155

ARTICLE I. WHAT CONSTITUTES OFFENSE.

§ 1153. **Sending challenge.**—The sending of a written or verbal challenge to another to fight a duel is an act tending toward a breach of the peace, and is an indictable offense, though no duel be fought.¹

§ 1154. **Killing as result.**—If the fighting of a duel results in killing, then all participants as principals, seconds, spectators or others aiding, abetting or encouraging such duel are guilty of murder.²

ARTICLE II. MATTERS OF DEFENSE.

§ 1155. **No offense.**—A citizen of the state of Tennessee who acted as second in a duel fought by two other persons of Tennessee, in the state of Arkansas, did not violate the constitutional provision of the former state which forbids the fighting of a duel or aiding or abetting therein, it not appearing that the accused did any act in Tennessee aiding the duel, or had any knowledge that such duel was to take place.³

¹ 4 Bl. Com. 150, 199. See 2 Bish. Cr. L., § 324; *Rex v. Rice*, 3 East Cr. L., § 143. 581.

² *S. v. Christian*, 66 Mo. 138; *Un-* ³ *S. v. Du Bose*, 88 Tenn. 753, 13 derhill Cr. Ev., § 483; 1 McClain S. W. 1088.

CHAPTER XXVI.

CONCEALED WEAPONS.

ART. I. What Constitutes Offense,	§§ 1156-1161
II. Matters of Defense,	§§ 1162-1173
III. Indictment,	§§ 1174-1179
IV. Evidence,	§§ 1180-1184

ARTICLE I. WHAT CONSTITUTES OFFENSE.

§ 1156. **Going armed, offense.**—The offense of riding or going armed with dangerous or unusual weapons is a crime against the public peace by terrifying the good people of the land.¹

§ 1157. **Concealment—In hand basket.**—Carrying a pistol in a hand basket or hand sachel in the hand, or suspended from the shoulders by a strap, is carrying a concealed weapon.² But carrying a pistol in a wagon, not on the person, or having it in a coat which is lying on the wagon, is not a violation.³

§ 1158. **What constitutes the offense.**—“Any person having or carrying about his person, unless in an open manner and fully exposed to view, any pistol (except horseman’s pistol), shall be guilty of a misdemeanor.” Carrying a pistol in a covered basket on one’s arm,

¹ 4 Bl. Com. 149; *Galvin v. S.*, 6 v. S., 86 Ga. 255, 12 S. E. 361, 8 Am. Cold. (Tenn.) 295; *S. v. Huntley*, 25 N. C. (3 Ired.) 420, 40 Am. D. App. 296.

² *Diffey v. S.*, 86 Ala. 66, 5 So. 576; *Willis v. S.*, 105 Ga. 633, 32 S. E. 155; *S. v. McManus*, 89 N. C. 555; *Warren v. S.*, 94 Ala. 79, 10 So. 838; *Garrett v. S.* (Tex. Cr.), 25 S. W. 285; *Com. v. Sturgeon*, 18 Ky. L. 613, 37 S. W. 680; *Ramsey v. S.*, 91 Ala. 29, 8 So. 568; *Boles v. S.*, 86 Ga. 255, 12 S. E. 361, 8 Am. C. R. 126; *Woodward v. S.*, 5 Tex. App. 296.

³ *Cunningham v. S.*, 76 Ala. 88; *Cathey v. S.*, 23 Tex. App. 492, 5 S. W. 137; *Com. v. Sturgeon*, 18 Ky. L. 613, 37 S. W. 680; *George v. S.* (Tex. Cr.), 29 S. W. 386; *Ladd v. S.*, 92 Ala. 58, 9 So. 401. But see *Barnes v. S.*, 89 Ga. 316, 15 S. E. 313.

not for the purpose of transportation only, but for convenience of use and access, and to evade the law, is a violation of the statute.⁴

§ 1159. Continuing offense.—Carrying a concealed weapon is, in its nature, a continuing offense, and where the defendant exhibited a pistol at two different places on the same evening, it is but one offense; and the prosecution may show such different times and places in evidence.⁵

§ 1160. Concealment essential.—The fact of the concealment of the weapon is material, and must be proved in order to support a conviction.⁶ A pistol partly concealed in a pocket or about the clothes is a "concealed weapon" within the meaning of the statute.⁷ A concealed weapon within the meaning of the law is one so carried that the persons near enough otherwise to see can not see it, when meeting the accused in ordinary social and commercial intercourse.⁸

§ 1161. Prohibitory statute, valid.—A statute which prohibits the carrying of a dirk, sword-cane, Spanish stiletto, belt or pocket-pistol; either publicly or privately, is not invalid. The carrying of such weapons may be absolutely prohibited under any and all circumstances, they not being such arms in the use of which a soldier should be trained in the defense of his liberties as well as his country.⁹

ARTICLE II. MATTERS OF DEFENSE.

§ 1162. Weapon in pieces.—The fact that the cylinder of the pistol was separated from the rest of the firearm is no defense to a charge of carrying a concealed weapon, there being nothing to prevent

⁴Boles v. S., 86 Ga. 255, 12 S. E. 361, 8 Am. C. R. 126; Diffey v. S., 86 Ala. 66, 5 So. 576. See S. v. Judy, 60 Ind. 138.

⁵Etreass v. S., 88 Ala. 191, 7 So. 49; Dean v. S., 98 Ala. 71, 13 So. 318; Smith v. S., 79 Ala. 257; Ladd v. S., 92 Ala. 58, 9 So. 401.

⁶Ridenour v. S., 65 Ind. 411.

⁷S. v. Bias, 37 La. 259; Sutton v. S., 12 Fla. 135. But see Barnard v. S., 73 Ga. 803.

⁸Street v. S., 67 Ala. 87; Sutton v. S., 12 Fla. 135; S. v. Lilly, 116 N. C. 1049, 8 Cr. L. Mag. 407, 21

S. E. 563. See S. v. Dixon, 114 N. C. 850, 19 S. E. 364; Owen v. S., 31 Ala. 387; Smith v. S., 96 Ala. 66, 11 So. 71; Carr v. S., 34 Ark. 448. 36 Am. R. 15; Ramsey v. S., 91 Ala. 29, 8 So. 568; Underhill Cr. Ev., § 484; Mayberry v. S., 107 Ala. 64, 18 So. 219; Driggers v. S., 123 Ala. 46, 26 So. 512.

⁹Andrews v. S., 3 Heisk. (Tenn.) 165, 1 Green C. R. 475. See Davenport v. S., 112 Ala. 49, 20 So. 971; S. v. Speller, 86 N. C. 697, 14 Am. R. 246.

an easy adjustment of the parts of the weapon;¹⁰ nor need the pistol be loaded.^{10a}

§ 1163. Carrying on premises—Exception.—A landlord who has leased his premises, and which is occupied by his tenant, can not claim exemption from prosecution for carrying concealed weapon under the exception permitting one to carry concealed weapons on his own premises.¹¹ The tenant is the owner of the premises within the meaning of the law.¹² A mere servant employed as a laborer on the premises of another does not come within the exception of the statute permitting the owner to carry weapons on his own premises.¹³ A contractor or person supervising the erection of a building is not within such exception.¹⁴ A statute permitting one to carry concealed weapons on his own premises will include a public road running through his premises.¹⁵

§ 1164. In own house, no defense.—In Alabama it has been held no defense to a charge of carrying a weapon concealed about the person that the defendant was in his own home.¹⁶

§ 1165. Traveler may carry.—Where one's business is in different counties, requiring him to be going nearly all the time from his home to his different places of business, he is a traveler within the meaning of the law permitting travelers to carry weapons.¹⁷ Or going to market a day's journey makes one a traveler.¹⁸ Or one who goes a short distance on a railway train, seeking employment, is a "traveler."¹⁹ Going from one's temporary residence to his permanent residence in

¹⁰ *Hutchinson v. S.*, 62 Ala. 3, 34 Am. R. 1; *Redus v. S.*, 82 Ala. 53, 2 So. 713; *Crawford v. S.*, 94 Ga. 772, 21 S. E. 992; *Com. v. Murphy*, 166 Mass. 171, 44 N. E. 138; *Underwood v. S.* (Tex. Cr.), 29 S. W. 777.

^{10a} *S. v. Bollis*, 73 Miss. 57, 19 So. 99; *S. v. Wardlaw*, 43 Ark. 73; *S. v. Duzan*, 6 Blackf. (Ind.) 31.

¹¹ *Zallner v. S.*, 15 Tex. App. 23; *Fannin v. S.* (Tex. Cr.), 34 S. W. 280.

¹² *Jones v. S.*, 55 Ark. 186, 17 S. W. 719; *Brannon v. S.*, 23 Tex. App. 428, 5 S. W. 132. See *Campbell v. S.*, 28 Tex. App. 44, 11 S. W. 832; *Sanders v. S.* (Tex. Cr.), 50 S. W. 348.

¹³ *S. v. Terry*, 93 N. C. 585, 53 Am. R. 472.

¹⁴ *Kinthead v. S.*, 45 Ark. 536; *S. v. Deyton*, 119 N. C. 880, 26 S. E. 159. See *S. v. Perry*, 120 N. C. 580, 26 S. E. 915, 1008.

¹⁵ *Ball v. S.* (Tex. Cr.), 25 S. W. 627; *Ross v. S.* (Tex. Cr.), 28 S. W. 199; *S. v. Hewell*, 90 N. C. 705.

¹⁶ *Dunston v. S.* (Ala.), 27 So. 333.

¹⁷ *Burst v. S.*, 89 Ind. 133; *Rice v. S.*, 10 Tex. App. 288.

¹⁸ *Waddell v. S.*, 37 Tex. 356.

¹⁹ *Lockett v. S.*, 47 Ala. 42. See *Wilson v. S.*, 68 Ala. 41; *Davis v. S.*, 45 Ark. 359; *McGuirk v. S.*, 64 Miss. 209, 1 So. 103.

another county makes him a "traveler."²⁰ Or returning to one's home from a distance, carrying a concealed weapon, makes him a "traveler."²¹

§ 1166. Carrying weapon openly.—A weapon is not concealed about the person if it can be seen without inspection or examination for that purpose by persons who happen to meet the person carrying the weapon passing on the street or highway, or who happen to meet him in a social way.²²

§ 1167. Merchant purchasing—For delivery.—A merchant, by purchasing a pistol as a sample and carrying it in his pocket a short distance, to pack it with other goods he bought at the same place, commits no offense.²³ The defendant, by carrying a pistol to a person to whom he has sold it, commits no offense.²⁴

§ 1168. Self-defense—When.—Where it is clearly shown that arms are worn *bona fide* to ward off or meet imminent and threatened danger to life or limb, or great bodily harm, circumstances essential to make out a case of self-defense or defense of others, it will be a good defense on a charge of carrying concealed weapons.²⁵

²⁰ Campbell v. S., 28 Tex. App. 44, 11 S. W. 832; Carr v. S., 34 Ark. 448; Eslava v. S., 49 Ala. 357. See Eubanks v. S. (Tex. Cr.), 40 S. W. 973.

²¹ Impson v. S. (Tex.), 19 S. W. 677. See Lott v. S., 122 Ind. 393, 24 N. E. 156; Blackwell v. S., 34 Tex. Cr. 476, 31 S. W. 380.

²² Smith v. S., 96 Ala. 68, 11 So. 71; Plummer v. S., 135 Ind. 308, 34 N. E. 968; Williams v. Com., 18 Ky. L. 663, 37 S. W. 680; Com. v. Sturgeon, 18 Ky. L. 613, 37 S. W. 680; Killet v. S., 32 Ga. 292; Howe v. S., 110 Ala. 54, 20 So. 451; Sutton v. S., 12 Fla. 135; Underhill Cr. Ev., § 484.

²³ S. v. Gilbert, 87 N. C. 527; S. v. Brodnax, 91 N. C. 543; Underwood v. S. (Tex. Cr.), 29 S. W. 777; Underhill Cr. Ev., § 484.

²⁴ Snider v. S. (Tex. Cr.), 43 S. W. 84.

²⁵ Andrews v. S., 3 Heisk. (Tenn.) 165; Bailey v. Com., 11 Bush (Ky.)

688; Short v. S., 25 Tex. App. 379, 8 S. W. 281; Maupin v. S., 89 Tenn. 367, 17 S. W. 1038; Sudduth v. S., 70 Miss. 250, 11 So. 680; Scott v. S., 113 Ala. 64, 21 So. 425. See Underhill Cr. Ev., § 485. *Contra*, S. v. Speller, 86 N. C. 697. See the following cases relating to self defense: Strother v. S., 74 Miss. 447, 21 So. 147; O'Neal v. S., 32 Tex. Cr. 42, 22 S. W. 25; Skeen v. S., 34 Tex. Cr. 308, 30 S. W. 554; S. v. Barnett, 34 W. Va. 74, 11 S. E. 735; Dillingham v. S. (Tex.), 32 S. W. 771; Dooley v. S., 89 Ala. 90, 8 So. 528; Com. v. Murphy, 166 Mass. 171, 44 N. E. 138; Brown v. S. (Tex. Cr.), 29 S. W. 1079; Avant v. S. (Tex. Cr.), 25 S. W. 1073; Polk v. S., 62 Ala. 237; Dooley v. S., 89 Ala. 90, 8 So. 528; Day v. S., 5 Sneed (Tenn.) 495; Brown v. S., 72 Ga. 211; S. v. Workman, 35 W. Va. 367, 14 S. E. 9; Tipler v. S., 57 Miss. 685; Bell v. S., 100 Ala. 78, 14 So. 763.

§ 1169. **Not in habit of carrying—No defense.**—That the defendant had not been in the habit of carrying his pistol concealed is no answer to the positive proof that he did carry a weapon concealed at a certain time.²⁶

§ 1170. **Officer—When may carry.**—A sheriff or other officer, while actually engaged searching for or arresting a criminal or executing the process of the court, may lawfully carry arms, but only while actually engaged in the discharge of his duty.²⁷

§ 1171. **Innocent motive, no defense.**—Where the intent is not made a material element of the offense as defined by statute, an innocent motive or intention in carrying a concealed weapon is no defense.²⁸

§ 1172. **Right to bear arms.**—Under the constitutional provision giving the right to the people "to keep and bear arms" will be included such weapons as soldiers should be trained with, such as the rifle of all descriptions, the shotgun, the musket and repeater; and the pistol designated as a revolver may or may not fall within the same class, according to the character of the weapon, to be settled by the evidence. The repeater is a soldier's weapon.²⁹ The constitutional provision of the United States that "A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed," has no application to state governments, and does not restrain the power of the states to regulate the carrying of arms.³⁰

²⁶ *Oliver v. S.*, 106 Ga. 142, 32 S. E. 18.

²⁷ *Gayle v. S.*, 4 Lea (Tenn.) 466; *S. v. Hayne*, 88 N. C. 625; *S. v. Wisdom*, 84 Mo. 177; *Irvine v. S.*, 18 Tex. App. 51; *S. v. Williams*, 72 Miss. 992, 18 So. 486; *Miller v. S.*, 6 Baxt. (Tenn.) 449; *Underhill Cr. Ev.*, § 486. See *O'Neal v. S.*, 32 Tex. Cr. 42, 22 S. W. 25; *Corley v. S.* (Tex. Cr.), 33 S. W. 975.

²⁸ *S. v. Martin*, 31 La. 849; *Ridenour v. S.*, 65 Ind. 411; *S. v. Dixon*, 114 N. C. 850, 19 S. E. 364; *Reynolds v. S.*, 1 Tex. App. 616; *Cutsinger v. Com.*, 7 Bush (Ky.) 392; *O'Neil v.*

S., 32 Tex. Cr. 42, 22 S. W. 25; *Strahan v. S.*, 68 Miss. 347, 8 So. 844; *Goldsmith v. S.*, 99 Ga. 253, 25 S. E. 624. See *S. v. Brown*, 125 N. C. 704, 34 S. E. 549.

²⁹ *Andrews v. S.*, 3 Heisk. (Tenn.) 165, 1 Green C. R. 475, 8 Am. C. R. 8; *English v. S.*, 35 Tex. 473, 14 Am. R. 374. See *Aymette v. S.*, 2 Humph. (Tenn.) 154.

³⁰ *Andrews v. S.*, 3 Heisk. (Tenn.) 165, 1 Green C. R. 467; *Presser v. Illinois*, 116 U. S. 252, 6 S. Ct. 580. See *Walburn v. Ter.*, 9 Okla. 23, 59 Pac. 972.

§ 1173. **Forfeiture of weapon.**—A statute providing for forfeiture of a weapon as a penalty for carrying concealed weapons is unconstitutional.⁸¹

ARTICLE III. INDICTMENT. .

§ 1174. **Concealment essential.**—Concealment is an essential element of the offense of carrying concealed weapons, and must be alleged in the indictment.⁸²

§ 1175. **Carrying pistol.**—In charging the carrying a pistol as a concealed weapon, it is not necessary to allege in the indictment that the pistol was loaded.⁸³

§ 1176. **Revolver loaded essential.**—On a charge of drawing a revolver on a person, the indictment must allege that the revolver was loaded, otherwise it will be defective.⁸⁴

§ 1177. **Must negative exception.**—Under a statute making it a criminal offense for any person, except officers and night watchmen, to carry concealed weapons, the indictment must contain an averment that the defendant was not an officer or night watchman.⁸⁵

§ 1178. **Alternative averment.**—An indictment which sets out an offense in the alternative is defective; as that the defendant unlawfully did carry "on or about" his person a pistol.⁸⁶

§ 1179. **Carrying pistol.**—An indictment which alleges that the defendant did, at a time and place stated, then and there go into a ball-room and social party, "and did then and there unlawfully have and carry a pistol," sufficiently charges the offense of carrying a pistol on and about his person, but is not sufficient as to carrying a pistol into a social gathering.⁸⁷

⁸¹ *Leatherwood v. S.*, 6 Tex. App. 244; *Hudeburgh v. S.*, 38 Tex. 535; 2 McClain Cr. L., § 1030.

⁸² *Com. v. Gallagher*, 9 Pa. S. Ct. 100.

⁸³ *S. v. Bollis*, 73 Miss. 57, 19 So. 99; *Ridenour v. S.*, 65 Ind. 411; *S. v. Wardlaw*, 43 Ark. 73.

⁸⁴ *S. v. Williams*, 2 Mo. App. 1180.

⁸⁵ *P. v. Pendleton*, 79 Mich. 317, 44 N. W. 615; *Young v. S.*, 42 Tex. 462.

⁸⁶ *Canterberry v. S.* (Tex. Cr.), 44 S. W. 522.

⁸⁷ *Lomax v. S.*, 38 Tex. Cr. 318, 43 S. W. 92; *Powell v. S.* (Tex. Cr.), 25 S. W. 286.

ARTICLE IV. EVIDENCE.

§ 1180. **Burden as to concealment.**—The burden of proof that the defendant carried the weapon concealed is on the prosecution.³⁸ The defendant having admitted that he carried a pistol home in his pocket, it is presumed that he carried it with intent to conceal it, and also that it was loaded.³⁹

§ 1181. **Burden—As to defense.**—If the defendant sets up a statutory exception as a defense to carrying a concealed weapon, the burden will be on him to bring himself within the exception.⁴⁰

§ 1182. **Possession *prima facie*.**—Where the statute makes the possession of a weapon *prima facie* evidence of its concealment, the defendant will have the right to rebut such evidence.⁴¹

§ 1183. **Defendant's statements.**—Evidence that shortly before the offense charged the defendant said he was going "to raise hell," is competent as tending to prove his guilt.⁴²

§ 1184. **Weapon as evidence.**—If a person is arrested for some other offense than that of carrying a concealed weapon, and on being searched such weapon is found on his person, it may be used in evidence against him on a charge of carrying a concealed weapon.⁴³

³⁸ S. v. Hale, 70 Mo. App. 143.

³⁹ S. v. Hinnant, 120 N. C. 572, 26 S. E. 643; Carr v. S., 34 Ark. 448.

⁴⁰ S. v. Hayne, 88 N. C. 625; S. v. Julian, 25 Mo. App. 133; S. v. Maddox, 74 Ind. 105; Lewis v. S., 7 Tex. App. 567; Skeen v. S., 34 Tex. Cr. 308, 30 S. W. 554. But see P. v. Pendleton, 79 Mich. 317, 44 N. W. 615.

⁴¹ S. v. McManus, 89 N. C. 555; S. v. Gilbert, 87 N. C. 527, 42 Am. R. 518.

⁴² Dean v. S., 98 Ala. 71, 13 So. 318. See O'Neal v. S., 32 Tex. Cr. 42, 22 S. W. 25; Etress v. S., 88 Ala. 191, 7 So. 49.

⁴³ Chastang v. S., 83 Ala. 29, 3 So. 304; Terry v. S., 90 Ala. 635, 8 So. 664. The evidence in the following cases was held sufficient proof of concealment: Christian v.

S. (Tex. Cr., 1899), 49 S. W. 376; Terry v. S., 90 Ala. 635, 8 So. 664; Com. v. Howard, 3 Metc. (Ky.) 407; Fitzgerald v. S., 12 Ga. 213; Scott v. S., 94 Ala. 80, 10 So. 505; French v. S., 94 Ala. 93, 10 So. 553; Hicks v. Com., 7 Gratt. (Va.) 597. See Cotton v. S., 88 Ala. 168, 7 So. 148; Smith v. S. (Miss., 1898), 24 So. 316; Jones v. S. (Tex. Cr., 1898), 45 S. W. 596; Sexton v. S. (Tex. Cr.), 45 S. W. 920. But held not sufficient in the following: Smith v. S., 10 Tex. App. 420; Rickard v. S. (Tex. App.), 16 S. W. 341; Garrett v. S. (Tex. Cr.), 25 S. W. 285; George v. S. (Tex. Cr.), 29 S. W. 386; Cunningham v. S., 76 Ala. 88; Sanderson v. S., 23 Tex. App. 520, 5 S. W. 138; S. v. Gilbert, 87 N. C. 527, 42 Am. R. 518.

CHAPTER XXVII.

CONSPIRACY.

ART.	I. Definition and Elements,	§§ 1185-1207
	II. Matters of Defense,	§§ 1208-1218
	III. Indictment,	§§ 1219-1231
	IV. Evidence; Variance,	§§ 1232-1254

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1185. **Conspiracy defined.**—A conspiracy is a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.¹

§ 1186. **Formal agreement not necessary.**—It is not essential that there should be a formal agreement between the parties to commit the conspiracy, nor that the conspiracy should originate with the defendants. Persons entering into a conspiracy already formed are responsible for all acts done by any of the other parties before or after its formation.²

§ 1187. **Common law misdemeanor.**—Conspiracy at common law to commit a felony or misdemeanor is only a misdemeanor, and therefore, where it is not declared by statute to be a felony, it is but a misdemeanor.³

¹ 3 Greenl. Ev., § 89; *Smith v. P.*, 25 Ill. 9; *Spies v. P.*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898. See *Com. v. Quay*, 7 Pa. Dist. R. 723; *S. v. Mayberry*, 48 Me. 218; *Pettibone v. S.*, 148 U. S. 197, 13 S. Ct. 542; *S. v. Stevens*, 30 Iowa 391; *Underhill Cr. Ev.*, § 490. Compare *Lipschitz v. P.*, 25 Colo. 261, 53 Pac. 1111.

² 3 Greenl. Ev., § 93; *Spies v. P.*, 122 Ill. 179, 12 N. E. 865, 17 N. E. 898; *McKee v. S.*, 111 Ind. 378, 12 N. E. 510; *U. S. v. Cassidy*, 67 Fed. 698; *S. v. Clark*, 9 Houst. (Del.) 536, 33 Atl. 310.

³ *Berkowitz v. U. S.*, 93 Fed. 452; *S. v. Thompson*, 69 Conn. 720, 38 Atl. 868.

§ 1188. **Committed by two or more.**—By the common law, a criminal conspiracy can not be committed by less than three persons, but by statutory definition two or more may commit the offense.⁴

§ 1189. **Overt act not essential.**—No overt act is necessary to constitute conspiracy, the gist of the offense being the unlawful confederacy to do an unlawful act, or a lawful act by some criminal or unlawful means. The bare engagement to break the law completes the offense.⁵ In some jurisdictions conspiracy, as defined by statute, requires that some overt act must be committed by one or more of the parties to the conspiracy to effect its object before the offense is complete.⁶

§ 1190. **Bare agreement sufficient.**—A bare conspiracy to obtain money by false pretenses is sufficient to constitute the offense, although the accomplishment of the object of the conspiracy may be impossible.⁷

§ 1191. **Killing, probable result.**—Where a number of persons conspire together to do an unlawful act, and in the prosecution of the common design a person is killed, all will be guilty of murder, where the killing is the probable result.⁸ Where persons combine to

⁴ *Evans v. P.*, 90 Ill. 384; *S. v. Tom*, 2 Dev. (N. C.) 569; *P. v. Olcott*, 2 Johns. Cas. (N. Y.) 301, 1 Am. D. 168; *Com. v. Irwin*, 8 Phila. (Pa.) 380. See *P. v. Richards*, 67 Cal. 412, 6 Am. C. R. 121, 7 Pac. 828; *Reg. v. Bunn*, 12 Cox C. C. 316, 1 Green C. R. 73; *S. v. Adams*, *Houst. Cr. (Del.)* 361.

⁵ *Ochs v. P.*, 124 Ill. 399, 423, 16 N. E. 662; *Bannon v. U. S.*, 156 U. S. 464, 15 S. Ct. 467, 9 Am. C. R. 342; *S. v. Ormiston*, 66 Iowa 143, 23 N. W. 370, 5 Am. C. R. 115; *S. v. Noyes*, 25 Vt. 415; *Com. v. Warren*, 6 Mass. 74; *Com. v. McHale*, 97 Pa. St. 405; *U. S. v. Lancaster*, 44 Fed. 896, 10 L. R. A. 317; *S. v. Ripley*, 31 Me. 386; *U. S. v. Newton*, 52 Fed. 275; *P. v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. D. 122; *Heine v. Com.*, 91 Pa. St. 145; *U. S. v. Wilson*, 60 Fed. 890; *Isaacs v. S.*, 48 Miss. 234; *Miller v. S.*, 79 Ind. 198; *Johnson v. S.*, 3 Tex. App. 590; *Musgrave v. S.*, 133 Ind. 297, 306, 32 N.

E. 885; *Adams v. P.*, 9 Hun (N. Y.) 89; *S. v. Hickling*, 41 N. J. L. 208, 32 Am. D. 198; *P. v. Arnold*, 46 Mich. 268, 9 N. W. 406; *S. v. Straw*, 42 N. H. 393.

⁶ *S. v. Hickling*, 41 N. J. L. 208, 32 Am. D. 198; *U. S. v. Hutchins*, 26 Fed. Cas. No. 15,430; *U. S. v. Reichert*, 32 Fed. 142, 12 Sawy. 643.

⁷ *Ochs v. P.*, 124 Ill. 426, 16 N. E. 662; *S. v. Crowley*, 41 Wis. 271, 2 Am. C. R. 38; *Reg. v. Whitchurch*, 24 Q. B. D. 420, 8 Am. C. R. 1; *S. v. Bruner*, 135 Ind. 419, 35 N. E. 22; *Isaac v. S.*, 48 Miss. 234; *S. v. Ripley*, 31 Me. 386. See *P. v. Gilman*, 121 Mich. 187, 80 N. W. 4, 46 L. R. A. 218.

⁸ *Butler v. P.*, 125 Ill. 641, 18 N. E. 338; *Spies v. P.*, 122 Ill. 225, 12 N. E. 865, 17 N. E. 898; *Williams v. S.*, 81 Ala. 1, 1 So. 179, 7 Am. C. R. 446; *Weston v. Com.*, 111 Pa. St. 251, 6 Am. C. R. 451, 2 Atl. 191; *U. S. v. Sweeney*, 95 Fed. 434; *Brennan v. P.*, 15 Ill. 511; *Wharton*

stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of that design a murder is committed, all are equally principals, though some are absent from the place of the killing.⁹

§ 1192. Each conspirator liable.—Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any of the co-conspirators in accomplishing the purpose in which they are all at the time engaged.¹⁰

§ 1193. Probable result, when.—If the crime was committed under the influence and advice of another, and the event, though possibly falling out beyond the original intention of the person so advising, was nevertheless in the ordinary course of things a probable consequence of that crime, he is guilty of being accessory to the crime actually committed. But if the principal, following his own designs, commit a different offense, on a different subject, he alone is guilty.¹¹ If several persons combine to assault a certain person, each of them will be criminally liable for any act of the others which is a probable or natural consequence of the execution of their common design or purpose, though the particular act done was not expressly agreed upon in advance.¹²

§ 1194. Different result.—The law is that when parties are engaged in the commission of a crime with malicious intent, and in the execution thereof perpetrate another criminal act not originally intended, the unintended act derives its character from the intended crime and the original malicious intent affects both acts.¹³

Homicide (2d ed.), § 201; 1 Hale P. C. 441; Reg. v. Bernard, 1 F. & F. 240. See S. v. Dyer, 67 Vt. 690, 32 Atl. 814.

⁹ Spies v. P., 122 Ill. 178, 12 N. E. 865, 17 N. E. 898; Williams v. P., 54 Ill. 426.

¹⁰ S. v. McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; Pettibone v. U. S., 148 U. S. 197, 13 S. Ct. 542; Spies v. P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; Lamb v. P., 96 Ill. 73.

¹¹ Watts v. S., 5 W. Va. 532; 3 Greenl. Ev., § 50; 4 Bl. Com. 37;

Lusk v. S., 64 Miss. 845, 2 So. 256. See Reg. v. Bernard, 1 F. & F. 240.

¹² Jolly v. S., 94 Ala. 19, 10 So. 606; P. v. Olsen, 80 Cal. 122, 22 Pac. 125; Com. v. Glover, 111 Mass. 395; S. v. Johnson, 7 Or. 210; U. S. v. Boyd, 45 Fed. 851; Green v. S., 51 Ark. 189, 10 S. W. 266.

¹³ S. v. Vines, 34 La. 1079, 4 Am. C. R. 396; Goins v. S., 46 Ohio St. 457, 21 N. E. 476, 8 Am. C. R. 29. See Lowery v. S., 30 Tex. 402; Com. v. Murphy, 165 Mass. 66, 42 N. E. 504.

§ 1195. **Departure from request.**—Two men were requested by the defendant to enter a certain dwelling-house and beat a certain man, but the man was not there. One of the two men while there assaulted the owner of the house and the other ravished his wife. The defendant could not be held responsible for the criminal conduct of the two men, being a total departure from his request.¹⁴ Where the unlawful act agreed to be done is not of a dangerous or homicidal character, and its accomplishment does not necessarily or probably require the use of force or violence which may result in the taking of life unlawfully, no such criminal liability will attach merely from the fact of having been a party to such an agreement.¹⁵

§ 1196. **Conspiracy merged.**—A conspiracy to commit a felony is merged in the consummated act: as, where the conspiracy was to commit arson, and the crime is actually committed, the offense is arson only.¹⁶ But a conspiracy to commit a misdemeanor is not merged in the consummated act.¹⁷

§ 1197. **Conspiracy to extort.**—A conspiracy to extort money from a person who has committed a criminal offense by threatening to prosecute him for such offense unless he pays the money demanded, is a criminal conspiracy.¹⁸ An agreement to injure a person by charging him with the crime of larceny or other offense, is a criminal conspiracy.¹⁹

§ 1198. **Conspiracy to injure person.**—Where persons confederated and agreed to injure a certain man and prevent him from contracting a marriage, and with that end in view falsely caused it to appear of record that the man was married to one of the conspirators, and, in proof of such marriage, produced a false marriage certificate, they were guilty of criminal conspiracy.²⁰

¹⁴ *Watts v. S.*, 5 W. Va. 532, 2 Green C. R. 676; 3 Greenl. Ev., § 40.

¹⁵ *Lamb v. P.*, 96 Ill. 84; *S. v. Furney*, 41 Kan. 115, 21 Pac. 213, 8 Am. C. R. 136; *Spies v. P.*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; *Watts v. S.*, 5 W. Va. 532.

¹⁶ *Hoyt v. P.*, 140 Ill. 591, 30 N. E. 315; *Shannon v. Com.*, 14 Pa. St. 226; *S. v. Mayberry*, 48 Me. 218; *Elsey v. S.*, 47 Ark. 572, 2 S. W. 337; *Com. v. Blackburn*, 62 Ky. 4; 3 Greenl. Ev., § 90. *Contra*, *S. v. Wilson*, 30 Conn. 500; *P. v. Summers*, 115 Mich. 537, 73 N. W. 818.

See *S. v. Grant*, 86 Iowa 216, 53 N. W. 120.

¹⁷ *S. v. Murphy*, 6 Ala. 765, 41 Am. D. 79; *S. v. Mayberry*, 48 Me. 218; *S. v. Setter*, 57 Conn. 461, 18 Atl. 782, 14 Am. R. 121; *S. v. Noyes*, 25 Vt. 415.

¹⁸ *Patterson v. S.*, 62 N. J. L. 82, 40 Atl. 773.

¹⁹ *S. v. Hickling*, 41 N. J. L. 208, 32 Am. D. 198; *In re Emmanuel*, 6 City H. R. (N. Y.) 33; *S. v. Ripley*, 31 Me. 386; *Com. v. McClean*, 2 Parson Eq. Cas. (Pa.) 367.

²⁰ *Com. v. Waterman*, 122 Mass.

§ 1199. **Conspiracy to seduce.**—A conspiracy to seduce a female, whether the means to be used be unlawful or criminal or not, is a crime at common law and punishable, although seduction is not indictable as a crime.²¹

§ 1200. **Conspiracy to injure property or business.**—Where persons confederate and agree to injure the property or business of another they are guilty of criminal conspiracy.²² Persons who combine together for the purpose of preventing their employer from taking in his employ certain persons, or for the purpose of driving out of his employ certain other persons, are guilty of a criminal conspiracy.²³

§ 1201. **Conspiracy to compel an act.**—A conspiracy to commit any criminal offense, either felony or misdemeanor, is an indictable offense: as, a conspiracy to compel a person to sign a bank check and take it from him by force.²⁴

§ 1202. **Conspiracy to commit offense.**—A conspiracy to obtain the money or property of any person, company, corporation or of the public by means of false pretenses, or by any fraudulent scheme, trick or device, is a criminal offense.²⁵

§ 1203. **Partner defrauding partner.**—If a partner of a firm conspires with a stranger to the firm to make and put in circulation partnership notes with intent to defraud the other partner, it is a

43. See *S. v. Murphy*, 6 Ala. 765, 41 Am. D. 79.

²¹ *Smith v. P.*, 25 Ill. 14, 76 Am. D. 786; *Reg. v. Mears*, 2 Den. C. C. 79; *Rex v. Grey*, 1 East P. C. 460; *Anderson v. Com.*, 5 Rand. (Va.) 627, 16 Am. D. 776; *S. v. Wilson*, 121 N. C. 650, 28 S. E. 416; *S. v. Powell*, 121 N. C. 635, 28 S. E. 525.

²² *P. v. Petheram*, 64 Mich. 252, 31 N. W. 188; *S. v. Hewett*, 31 Me. 396. See *S. v. Straw*, 42 N. H. 393; *Crump v. Com.*, 84 Va. 927, 6 S. E. 620, 10 Am. R. 895 (boycott); *P. v. Wilzig*, 4 N. Y. Cr. 403 (boycott).

²³ *S. v. Stewart*, 59 Vt. 273, 9 Atl. 559, 59 Am. R. 710; *S. v. Glidden*, 55 Conn. 46, 8 Atl. 890; *P. v. Walsh*, 15 N. Y. Supp. 17; *P. v. Smith*, 10 N. Y. Supp. 730; *S. v. Donaldson*, 32 N. J. L. 151, 90 Am. D. 649. See

Com. v. Hunt, Thacher Cr. C. (Mass.) 609; *Com. v. Sheriff*, 15 Phila. (Pa.) 393.

²⁴ *P. v. Richards*, 67 Cal. 412, 7 Pac. 828, 56 Am. R. 716; *Thompson v. S.*, 106 Ala. 67, 17 So. 512; *Com. v. Tibbetts*, 2 Mass. 536; *P. v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. D. 122; *Com. v. Putnam*, 29 Pa. St. 296.

²⁵ *Johnson v. P.*, 22 Ill. 314; *Ochs v. P.*, 124 Ill. 399, 16 N. E. 662; *Rhoads v. Com.*, 15 Pa. St. 272; *P. v. Watson*, 75 Mich. 582, 42 N. W. 1005; *Musgrave v. S.*, 133 Ind. 297, 32 N. E. 885; *S. v. Mayberry*, 48 Me. 218; *P. v. Clark*, 10 Mich. 310; *Lambert v. P.*, 7 Cow. (N. Y.) 166; *Com. v. Eastman*, 55 Mass. 189, 48 Am. D. 596; *Ellzey v. S.*, 57 Miss. 827; *In re Wolf*, 27 Fed. 606.

criminal conspiracy, the notes being foreign to the business of the firm.²⁶

§ 1204. Obstructing public justice.—A conspiracy to pervert and obstruct the administration of the election laws, with intent to unlawfully affect the result of an election, is a violation of the statute relating to conspiracy which provides that, "if any two or more persons shall conspire to commit any act for the perversion or obstruction of justice or the due administration of the laws," they shall be punished.²⁷

§ 1205. "Citizen," "alien," "inhabitant," "resident."—The statute makes it a criminal act to "conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States." The word "citizen" in this statute is used in its strict sense as contrasted with "alien"; it is not synonymous with "inhabitant," "person" or "resident."²⁸

§ 1206. Obstructing mails.—Under a statute punishing any person for willfully and knowingly obstructing or retarding the passage of the mails, it is an unlawful conspiracy for workmen to effect such obstruction intentionally by quitting their employment.²⁹

§ 1207. Inducing sale of liquor.—Persons acting together to enforce the Sunday liquor law, who by means of artifice or persuasion attempt to induce a tavern or saloonkeeper to sell intoxicating liquor on Sunday, are guilty of a criminal conspiracy.³⁰

ARTICLE II. MATTERS OF DEFENSE.

§ 1208. Defrauding another.—Where persons combine and agree together to cheat and defraud another by false statements as to the

²⁶ *S. v. Cole*, 39 N. J. L. 324, 3 Am. C. R. 54; 2 McClain Cr. L., § 960.

²⁷ *Moschell v. S.*, 54 N. J. L. 390, 25 Atl. 964. See *S. v. Ripley*, 31 Me. 386; *S. v. Dewitt*, 2 Hill (S. C.) 282, 27 Am. D. 371.

²⁸ *Baldwin v. Franks*, 120 U. S. 678, 7 S. Ct. 656, 763.

²⁹ *Thomas v. Cincinnati, etc., R. Co.*, 62 Fed. 803.

³⁰ *Com. v. Leeds*, 9 Phila. (Pa.) 569. See *P. v. Saunders*, 25 Mich. 119. *Contra Com. v. Kostenbauder* (Pa.), 20 Atl. 995.

title of land they offer to sell to him, they are guilty of a criminal conspiracy, even though the falsity of their statements as to the title can be detected by an inspection of an abstract of title to the land.³¹

§ 1209. Consenting to be robbed.—The offense of a conspiracy to commit the crime of robbery can not be committed where the owner consents to be robbed in order to entrap others to commit crime. If the property be taken with the consent of the owner it is not robbery, and therefore any act done by the alleged conspirators towards consummating the intended robbery is not criminal.³²

§ 1210. Strikes by workmen.—It is not criminal for workmen to enter into an agreement not to work for persons who employ laborers not members of some society or labor organization. Each person has a right to determine for himself for whom he will work or when he will not work.³³

§ 1211. Detective not accessory.—One who joins a criminal organization in good faith for the purpose of detection and to expose the criminals connected with it, and honestly carries out his intention, is not an accessory although he may have advised and counseled the parties to commit crime.³⁴

§ 1212. Parent procuring child.—It is not a conspiracy for a parent to enter into an agreement with others to get possession of his child where no unlawful means are used to accomplish their purpose.³⁵

§ 1213. Consent to commit adultery.—If a man and woman consent to live together in adultery they, by their adulterous conduct, are not guilty of conspiracy.³⁶

³¹ *Miller v. P.*, 22 Colo. 530, 45 Pac. 408.

³² *Connor v. P.*, 18 Colo. 373, 33 Pac. 159, 36 Am. R. 295. See *Johnson v. S.*, 3 Tex. App. 590; *S. v. Porter*, 25 W. Va. 685.

³³ *Com. v. Hunt*, 45 Mass. 111. See *Reg. v. Bunn*, 12 Cox C. C. 316, 1 Green C. R. 52; *Com. v. Dyer*, 128 Mass. 70; *S. v. Dyer*, 67 Vt. 690, 32

Atl. 814, 10 Am. C. R. 231; *U. S. v. Debs*, 63 Fed. 436; *U. S. v. Stevens*, 2 Hask. (U. S.) 164; *P. v. Smith*, 10 N. Y. Supp. 730.

³⁴ *Com. v. Hollister*, 157 Pa. St. 13, 27 Atl. 386; *S. v. Brownlee*, 84 Iowa 473, 51 N. W. 25.

³⁵ *Com. v. Myers*, 146 Pa. St. 24, 23 Atl. 164.

³⁶ *Miles v. S.*, 58 Ala. 390.

§ 1214. **Misapplying bank funds.**—The officers of a banking association by procuring a dividend when there are no net profits to pay the same, are not guilty of a conspiracy to willfully misapply the money of the bank, such act not being a “willful misapplication” of the funds of the bank.³⁷

§ 1215. **Defrauding by “salting” mine.**—On a charge of conspiracy to cheat and defraud by “salting” a gold mine, the prosecution is not required to show that the defendant knew how to salt a mine.³⁸

§ 1216. **One pleads guilty, another acquitted.**—Where two persons are indicted for conspiracy with other persons unknown, the trial and acquittal of one will not affect a plea of guilty entered by the other.³⁹

§ 1217. **Dismissal as to one of two.**—When two persons are charged with a conspiracy, and both are present in court after plea filed by each, a *nolle prosequi* entered as to one before verdict, leaves the verdict inoperative and without effect as to the other, because in that event no conspiracy is alleged against either.⁴⁰

§ 1218. **Officer de facto sufficient.**—On a charge of unlawful conspiracy to bribe an officer it is no defense that the officer was only an officer *de facto*.⁴¹

ARTICLE III. INDICTMENT.

§ 1219. **Means immaterial.**—The means by which a conspiracy was to be accomplished need not be alleged in the indictment where the conspiracy is to do an unlawful act.⁴² But where the conspiracy con-

³⁷ U. S. v. Britton, 108 U. S. 199, 2 S. Ct. 531.

³⁸ S. v. Brady, 107 N. C. 822, 12 S. E. 325.

³⁹ Com. v. Edwards, 135 Pa. St. 474, 19 Atl. 1064. See Casper v. S., 47 Wis. 535, 2 N. W. 1117; P. v. Olcott, 2 Johns. Cas. (N. Y.) 301, 1 Am. D. 168.

⁴⁰ S. v. Jackson, 7 Rich. (S. C.) 283, 3 Am. C. R. 52.

⁴¹ S. v. Ray, 153 Ind. 334, 54 N. E. 1067.

⁴² Thomas v. P., 113 Ill. 531, 5 Am.

C. R. 127; Johnson v. P., 22 Ill. 317; Cole v. P., 84 Ill. 216; Smith v. P., 25 Ill. 9; Cowen v. P., 14 Ill. 348; S. v. Crowley, 41 Wis. 271, 22 Am. R. 719, 2 Am. C. R. 38; S. v. Ormiston, 66 Iowa 143, 23 N. W. 370; S. v. Ripley, 31 Me. 386; S. v. Grant, 86 Iowa 216, 53 N. W. 120; P. v. Clark, 10 Mich. 310; S. v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. R. 710; S. v. Buchanan, 5 Har. & J. 317, 9 Am. D. 534. See Crump v. Com., 84 Va. 927, 6 S. E. 620, 10 Am. R. 895; S. v. Hewett, 31 Me.

sists in the unlawful means used to accomplish an act the unlawful means must be set out in the indictment.⁴³ A conspiracy to cheat a municipal corporation is a crime *per se*, and it is sufficient to charge the conspiracy in general terms in the indictment without specifying the means by which the cheat was to be accomplished.⁴⁴ If the conspiracy charged is an unlawful combination and agreement by two or more persons to commit a deed which, if done, would be an offense or criminal act, well known and acknowledged, the nature of which is perfectly understood by the name by which it is designated, no further description of the crime is required. Nor is it necessary to set out the means by which the unlawful act was intended to be accomplished.⁴⁵

§ 1220. **Facts of conspiracy essential.**—An indictment charging that the defendants conspired to commit the offense of corruptly endeavoring to influence a jury of a certain court named in the discharge of its duty, is defective in not alleging facts showing a conspiracy.⁴⁶ In some jurisdictions, on a charge of conspiracy to commit a felony, the averments in the indictment should be as specific and full as in charging the felony itself.⁴⁷

§ 1221. **Cheating and defrauding.**—An indictment charging a conspiracy to cheat and defraud must set out the means agreed upon by the conspirators to accomplish the fraud.⁴⁸ An indictment charg-

396; *Com. v. Hunt*, 45 Mass. 111; *Arthur v. Oakes*, 63 Fed. 310, 9 Am. C. R. 169.

⁴³ *Smith v. P.*, 25 Ill. 15; *S. v. Stevens*, 30 Iowa 391; *S. v. Mayberry*, 48 Me. 218; *Alderman v. P.*, 4 Mich. 414, 69 Am. D. 321; *Pettibone v. U. S.*, 148 U. S. 197, 13 S. Ct. 542; *S. v. Potter*, 28 Iowa 554; *S. v. Burnham*, 15 N. H. 396; *Com. v. Hunt*, 45 Mass. 111, 38 Am. D. 346; *Com. v. Eastman*, 55 Mass. 189, 48 Am. D. 596; *P. v. Richards*, 1 Mich. 216, 51 Am. D. 75; *P. v. Barkelow*, 37 Mich. 455.

⁴⁴ *S. v. Young*, 37 N. J. L. 184; *Ochs v. P.*, 124 Ill. 399, 16 N. E. 662; *S. v. Cardoza*, 11 S. C. 195.

⁴⁵ *S. v. Ripley*, 31 Me. 386; *S. v. Crowley*, 41 Wis. 271, 2 Am. C. R. 381; *S. v. Grant*, 86 Iowa 216, 53 N. W. 120; *P. v. Arnold*, 46 Mich. 268, 9 N. W. 406; *S. v. Burnham*, 15 N.

H. 396; *P. v. Dyer*, 79 Mich. 480, 44 N. W. 937; *Smith v. P.*, 25 Ill. 13.

⁴⁶ *U. S. v. Taffe*, 86 Fed. 113.

⁴⁷ *Landringham v. S.*, 49 Ind. 186, 1 Am. C. R. 106; *Reinhold v. S.*, 130 Ind. 467, 30 N. E. 306; *Smith v. S.*, 93 Ind. 68; *S. v. Savoye*, 48 Iowa 562; *Titus v. S.*, 49 N. J. L. 36, 7 Atl. 621, 7 Am. C. R. 255; *Com. v. Galbraith*, 6 Phila. (Pa.) 281. *Contra*, *McDonald v. P.*, 126 Ill. 150, 18 N. E. 817, 9 Am. C. R. 574; *Thomas v. P.*, 113 Ill. 531, 5 Am. C. R. 127; *P. v. Dyer*, 79 Mich. 480, 44 N. W. 937. See *Lipschitz v. P.*, 25 Colo. 261, 53 Pac. 1111.

⁴⁸ *S. v. Parker*, 43 N. H. 83; *S. v. Mayberry*, 48 Me. 218; *S. v. Keach*, 40 Vt. 113; *Com. v. Shedd*, 61 Mass. 514; *P. v. Eckford*, 7 Cow. (N. Y.) 535; *S. v. Roberts*, 34 Me. 320; *Com. v. Prius*, 75 Mass. 127; *March v. P.*, 7 Barb. (N. Y.) 391.

ing that the defendants combined "to cheat and defraud" another is not sufficient. The words "to cheat and defraud" import no offense at common law.⁴⁹

§ 1222. **Persons intended to be defrauded.**—In a charge of conspiracy to defraud in general it is not necessary to allege in the indictment the names of the persons intended to be defrauded.⁵⁰

§ 1223. **One may be indicted.**—The information or indictment is sufficient even though it is against but one defendant, if it states the name or names of the person or persons with whom he is charged to have conspired.⁵¹

§ 1224. **Accusing one of adultery.**—An indictment charging a conspiracy against a man and woman, alleging that they falsely and maliciously conspired "to charge and accuse" a certain person named that he had committed the crime of adultery, "with intent thereby then and there unjustly and unlawfully to obtain and acquire to them divers sums of money from the said person, for compounding the said pretended adultery so falsely and maliciously charged on him as aforesaid," sufficiently charges an offense.⁵²

§ 1225. **Conspiracy to arrest another.**—An indictment alleging that the defendant conspired with another to unlawfully and maliciously procure a third person to be arrested for larceny, well knowing that such person was not guilty, is sufficient under the statute.⁵³ But it is not necessary to allege the innocence of the person against whom the conspiracy is directed.⁵⁴

§ 1226. **Allegation of overt act.**—An indictment alleging a conspiracy to defraud the United States by charging an unlawful combination and agreement as actually having been made, and also, by

Contra, S. v. Young, 37 N. J. L. 184; P. v. Scholtz, 2 Wheeler Cr. Cas. (N. Y.) 617; U. S. v. Gordon, 22 Fed. 250; Com. v. Hadley, 13 Pa. Co. Ct. 188; Com. v. Wilson, 1 Chester Co. R. (Pa.) 538.

⁴⁹ Alderman v. P., 4 Mich. 414, 69 Am. D. 321. See Hartmann v. Com., 55 Pa. St. 60; S. v. Parker, 43 N. H. 83.

⁵⁰ Com. v. Judd, 2 Mass. 329; Reg.

v. King, 7 Q. B. 782; P. v. Arnold, 46 Mich. 268, 9 N. W. 406.

⁵¹ P. v. Richards, 67 Cal. 412, 7 Pac. 828, 6 Am. C. R. 121; Heine v. Com., 91 Pa. St. 145; P. v. Mather, 4 Wend. (N. Y.) 229, 21 Am. D. 122.

⁵² Com. v. Andrews, 132 Mass. 263; S. v. Lynch, 7 N. J. L. 153.

⁵³ Elkin v. P., 28 N. Y. 177.

⁵⁴ Johnson v. S., 26 N. J. L. 313.

describing some act by one of the parties to the conspiracy as having been done in pursuance of the agreement, is sufficient without averring how such act would tend to effect the object of the conspiracy.⁵⁵

§ 1227. Deterring from employing.—In charging a conspiracy to deter a corporation from taking certain persons into its employ the indictment need not allege that the corporation desired or intended to employ the persons whom the conspirators prevented it from employing.⁵⁶

§ 1228. To commit several offenses.—A conspiracy to commit several crimes is but a single offense. No matter how many violations of law may be concerted by the conspirators, if the concert takes place at one time the offense is a single conspiracy, and the indictment may so charge without being bad for duplicity: as, a conspiracy to commit robbery and larceny.⁵⁷ But charging a conspiracy in one count to commit a certain crime and in another count of the same indictment, with the actual commission of the crime, is bad for duplicity.⁵⁸

§ 1229. Knowledge or belief immaterial.—An indictment charging substantially in the words of the statute that the defendants did conspire “with intent falsely, fraudulently and maliciously” to cause a certain person to be prosecuted for an attempt to kill and murder, “of which crime” the said person “was innocent,” sufficiently charges conspiracy without averring that the defendant knew or believed said person to be innocent.⁵⁹

§ 1230. Conspiracy to obtain divorce.—An indictment alleging that the defendants “unlawfully, feloniously, willfully and fraudu-

⁵⁵ U. S. v. Benson, 70 Fed. 591, 44 U. S. App. 219, 17 C. C. A. 293; U. S. v. Donau, 25 Fed. Cas. No. 14, 983, 11 Blatchf. 168. As to the sufficiency of the indictment for conspiracy to defraud the United States, see the following cases: Dealy v. U. S., 152 U. S. 539, 14 S. Ct. 680; U. S. v. Gardner, 42 Fed. 829; U. S. v. Milner, 36 Fed. 890.

⁵⁶ S. v. Stewart, 59 Vt. 273, 9 Atl. 559, 59 Am. R. 700.

⁵⁷ Noyes v. S., 41 N. J. L. 418; S.

v. Grant, 86 Iowa 216, 53 N. W. 120; S. v. Ormiston, 66 Iowa 143, 23 N. W. 370; S. v. Kennedy, 63 Iowa 197, 18 N. W. 885; P. v. Everest, 51 Hun (N. Y.) 19, 3 N. Y. Supp. 612; U. S. v. Gardner, 42 Fed. 829.

⁵⁸ S. v. Kennedy, 63 Iowa 197, 18 N. W. 885. See Com. v. O'Brien, 66 Mass. 84; U. S. v. Lancaster, 44 Fed. 885.

⁵⁹ S. v. Locklin, 81 Me. 251, 16 Atl. 895.

lently did conspire and agree together, with the fraudulent intent wrongfully and wickedly to injure the administration of public justice by then and there unlawfully, willfully and fraudulently attempting to obtain and procure a decree of divorce" in a certain court named, is sufficient.⁶⁰

§ 1231. **Bill of particulars.**—Where there is merely a general charge of conspiracy alleged in the indictment, the contemplated means not being set out, the court on motion will require the prosecution to furnish a specification of particulars giving the needed information.⁶¹ And the prosecution on the trial will be limited to the means set forth in the bill of particulars.^{61a}

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1232. **Evidence generally circumstantial.**—The evidence in proof of a conspiracy will generally, from the nature of the case, be circumstantial. It is not necessary to prove that the defendants came together and actually agreed in terms, to have the common design and to pursue it by common means. Nor is it necessary to prove that the defendants originated the conspiracy.⁶²

§ 1233. **Foundation to be laid.**—A foundation must first be laid by proof, sufficient in the opinion of the judge, to establish, *prima facie*, the fact of conspiracy between the parties, or proper to be laid before the jury, as tending to establish such fact, before evidence as to the acts and declarations of the conspirators can be introduced.⁶³ Sometimes, for the sake of convenience, the acts or declara-

⁶⁰ *Cole v. P.*, 84 Ill. 216; *S. v. Ormiston*, 66 Iowa 143, 23 N. W. 370. See *S. v. Dyer*, 67 Vt. 690, 32 Atl. 814.

⁶¹ *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *Com. v. Wilson*, 1 Chester Co. R. (Pa.) 538; *S. v. Brady*, 107 N. C. 822, 12 S. E. 325.

^{61a} *McDonald v. P.*, 126 Ill. 150, 18 N. E. 817, 9 Am. R. 574.

⁶² *Ochs v. P.*, 124 Ill. 422, 16 N. E. 662; 3 Greenl. Ev. (Redf. ed.), § 93; *Spies v. P.*, 122 Ill. 213, 12 N. E. 865, 17 N. E. 898; 2 Bish. Cr. L., § 199; *S. v. Sterling*, 34 Iowa 443; *U. S. v. Cassidy*, 67 Fed. 698; *Reg. v. Murphy*, 8 C. & P. 297; *Com. v. Warren*, 6 Mass. 74; *McKee v. S.*,

111 Ind. 378, 12 N. E. 510; *Hunter v. S.*, 112 Ala. 77, 21 So. 65; *Underhill Cr. Ev.*, § 493; *Com. v. Hunton*, 168 Mass. 130, 46 N. E. 404; *Archer v. S.*, 106 Ind. 426, 7 N. E. 225; *S. v. Bingham*, 42 W. Va. 234, 24 S. E. 883; *S. v. Lewis*, 96 Iowa 286, 65 N. W. 295.

⁶³ 1 Greenl. Ev. (Redf. ed.), § 111; *Spies v. P.*, 122 Ill. 238, 12 N. E. 865, 17 N. E. 898; *Underhill Cr. Ev.*, § 494; 1 Roscoe Cr. Ev. (8th ed.), § 428; *Winslow v. S.*, 76 Ala. 42, 5 Am. C. R. 45; *Bloomer v. S.*, 48 Md. 521, 3 Am. C. R. 42; *Amos v. S.*, 96 Ala. 120, 11 So. 424; *McGraw v. Com.*, 14 Ky. L. 344, 20 S. W. 279; *Belcher v. S.*, 125 Ind. 419, 25 N.

tions of the conspirators are admitted in evidence before sufficient proof is given of the conspiracy on the promise of the prosecution to furnish such proof in a subsequent stage of the cause.⁶⁴

§ 1234. Declarations of each.—There being evidence of a conspiracy or common purpose, the declarations of one are competent evidence against all.⁶⁵ The acts and declarations of one conspirator are the acts of all persons to the conspiracy, if done according to the common plan, though the result be not the particular result intended.⁶⁶

§ 1235. Evidence when conspiracy is over.—When the conspiracy is over, individual declarations, confessions, and acts are, of course, not in execution of the common purpose; therefore they are competent only against those from whom they proceed.⁶⁷

El. 545; Gillett Indirect & Col. Ev., § 29. See *P. v. Smith*, 162 N. Y. 520, 56 N. E. 1001.

⁶⁴ 1 Greenl. Ev. (Redf. ed.), § 11; *S. v. Winner*, 17 Kan. 298; *Spies v. P.*, 122 Ill. 238, 12 N. E. 865, 17 N. E. 898; 1 Roscoe Cr. Ev., 429; *P. v. Brotherton*, 47 Cal. 388, 2 Green C. R. 450; *S. v. Cardoza*, 11 S. C. 195; *S. v. Mushrush*, 97 Iowa 444, 66 N. W. 746; *Bloomer v. S.*, 48 Md. 521; *Hall v. S.*, 31 Fla. 176, 12 So. 449; *S. v. Grant*, 86 Iowa 216, 53 N. W. 120.

⁶⁵ *S. v. Adams*, 40 La. 213, 3 So. 733; *Goins v. S.*, 46 Ohio St. 457, 21 N. E. 476; *Seville v. S.*, 49 Ohio St. 117, 30 N. E. 621; *U. S. v. Gooding*, 12 Wheat. (U. S.) 469; *P. v. Bently*, 77 Cal. 7, 18 Pac. 799; *Whar. Cr. Ev.*, §§ 698-701; *Com. v. O'Brien*, 140 Pa. St. 555, 21 Atl. 385; *Wilson v. P.*, 94 Ill. 299; *Underhill Cr. Ev.*, § 335; *Gillett Indirect & Col. Ev.*, § 28. See also *P. v. Parker*, 67 Mich. 222, 34 N. W. 720; *Cox v. S.*, 8 Tex. App. 254; *Logan v. U. S.*, 144 U. S. 263, 12 S. Ct. 617; *S. v. Corcoran* (Idaho), 61 Pac. 1034; *Segrent v. S.* (Tex. Cr.), 57 S. W. 845; *Roberts v. S.*, 109 Ga. 546, 35 S. E. 658; *S. v. Jacobs*, 7 Ohio N. P. 261, 10 Ohio Dec. 252. See *Fitzpatrick v. U. S.*, 178 U. S. 304, 20 S. Ct. 944.

⁶⁶ *McMahon v. P.*, 189 Ill. 222, 59 N. E. 584; *Carr v. S.*, 43 Ark. 99, 5 Am. C. R. 438; *S. v. Dyer*, 67 Vt.

690, 32 Atl. 814; *Samples v. P.*, 121 Ill. 547, 13 N. E. 536; *Wilson v. P.*, 94 Ill. 300; *Brennan v. P.*, 15 Ill. 511; 1 Roscoe Cr. Ev., 95; *Nudd v. Burrows*, 91 U. S. 426; 1 Greenl. Ev., § 94; 1 Bish. Cr. L., 636; *Hamilton v. P.*, 113 Ill. 38; *Bloomer v. S.*, 48 Md. 521, 3 Am. C. R. 42; *Bannon v. U. S.*, 156 U. S. 464, 9 Am. C. R. 342, 15 S. Ct. 467; *S. v. Gooch*, 105 Mo. 392, 16 S. W. 892; *Underhill Cr. Ev.*, § 492.

⁶⁷ 2 Bish. Cr. Proc., § 230; *Whar. Cr. Ev.* (8th ed.), § 699; 1 Greenl. Ev. (Redf. ed.), § 111; *Underhill Cr. Ev.*, § 493; *S. v. Westfall*, 49 Iowa 328, 3 Am. C. R. 347; *Lamb v. P.*, 96 Ill. 73; *Jenkins v. S.*, 35 Fla. 737, 18 So. 182; *Sparf v. U. S.*, 156 U. S. 51, 10 Am. C. R. 172, 15 S. Ct. 273; *P. v. Oldham*, 111 Cal. 648, 44 Pac. 312; *Brown v. U. S.*, 150 U. S. 93, 14 S. Ct. 37; 1 Greenl. Ev., § 233; *S. v. Tice*, 30 Or. 457, 48 Pac. 367; *P. v. Stanley*, 47 Cal. 113, 2 Green C. R. 439; *Bennett v. S.*, 62 Ark. 516, 36 S. W. 947; *Everage v. S.*, 113 Ala. 102, 21 So. 404; *S. v. Duffy*, 124 Mo. 1, 27 S. W. 358; *Logan v. U. S.*, 144 U. S. 263, 12 S. Ct. 617; *P. v. McQuade*, 110 N. Y. 284, 18 N. E. 156; *P. v. Arnold*, 46 Mich. 268, 9 N. W. 406; *U. S. v. Gunnell*, 5 Mackey 196, 8 Cr. L. Mag. 614; *S. v. Stair*, 87 Mo. 268, 56 Am. R. 452; *S. v. Palmer*, 79 Minn. 428, 82 N. W. 685.

§ 1236. **Act must be probable result.**—The act done must be the ordinary and probable effect of the wrongful act specifically agreed upon, so that the connection between them may be reasonably apparent, and not a fresh, independent product of the mind of one of the conspirators, outside of and foreign to the common design.⁶⁸

§ 1237. **Act of each in escaping.**—There can be no liability of one of the parties to a conspiracy to break jail for the acts done by the others in escaping, which were not within the joint purpose or combination. The parties may possibly combine to make their escape effectual, but no such an agreement can lawfully be inferred from a combination to do the original wrong.⁶⁹

§ 1238. **Not in furtherance of common design.**—A mere narrative to a stranger, related during the pendency of the enterprise, but of a past event or occurrence and not in furtherance of the common design, is quite as objectionable as if related after the criminal enterprise has terminated. It is no part of the *res gestae*.⁷⁰ The evidence tended to show that the defendant and others acting together took the deceased—a woman—to a room for the purpose of having sexual intercourse with her; and it further tended to show that some person other than the defendant pushed the woman out of the window, breaking her leg, from which injury she died. The defendant had jumped out of the window first. The evidence failing to show that the defendant was a party to a conspiracy or agreement to thus put the deceased out of the window, he could not be held responsible for the act resulting in the death of the woman.⁷¹

§ 1239. **Acts committed out of state.**—Evidence of any acts of any of the conspirators committed in another state, or out of the jurisdiction of the court, relating to the conspiracy, is not competent of itself to prove the conspiracy charged, but may be considered as

⁶⁸ *Bowers v. S.*, 24 Tex. App. 542, 7 S. W. 247; *Watts v. S.*, 5 W. Va. 532, 2 Green C. R. 679 [citing 3 Greenl. Ev., § 50]; *Lamb v. P.*, 96 Ill. 73; *Ruloff v. P.*, 45 N. Y. 213; *Williams v. S.*, 47 Ark. 230, 9 Cr. L. Mag. 480, 1 S. W. 149; *Kirby v. S.*, 23 Tex. App. 13, 5 S. W. 165; *Thompson v. S.*, 25 Ala. 41; *S. v. Johnson*, 7 Or. 210; *Frank v. S.*, 27 Ala. 37.

⁶⁹ *P. v. Knapp*, 26 Mich. 112, 1 Green C. R. 254; *Reg. v. Howell*, 9 C. & P. 437; *Rex v. White, R. & R.* 99; 3 Greenl. Ev., § 40.

⁷⁰ *Samples v. P.*, 121 Ill. 551, 13 N. E. 536; *Patton v. S.*, 6 Ohio St. 470; 1 Greenl. Ev., § 111.

⁷¹ *P. v. Knapp*, 26 Mich. 112, 1 Green C. R. 253. See 3 Greenl. Ev., § 40; 4 Bl. Com. 37.

showing the nature, extent, plan, and operations of the conspiracy if one existed.⁷²

§ 1240. **Defrauding several counties.**—On a charge of a conspiracy to defraud several counties out of a fund called wolf bounty, by filing fraudulent claims, evidence of the auditors of each of the counties is competent to show that the defendants filed such claims in their offices, claiming bounty for wolves killed.⁷³

§ 1241. **Showing overt act.**—An overt act in a conspiracy to maintain a suit, may be shown by introducing the complaint filed in the suit contemplated by the conspiracy, though none of the defendants was a party to the suit so instituted.⁷⁴

§ 1242. **Overt acts—to prove conspiracy.**—To prove a general conspiracy, distinct overt acts of conspiracy may be given in evidence; and when the issue is whether a party is guilty of a specific overt act of conspiracy, it is competent to give in evidence other overt acts of conspiracy which include or are dependent upon or constitute part of the *res gestae* of the act.⁷⁵

§ 1243. **General conspiracy, competent.**—Where the specific conspiracy is the outgrowth and product of a general conspiracy, and the specific conspiracy could be understood only by showing the nature and character of the general conspiracy, then evidence of such general conspiracy is competent.⁷⁶

§ 1244. **Evidence proving other offenses.**—Any evidence which tends to prove any element of the conspiracy charged in the indictment is competent, though it may tend to connect the defendants with other different offenses or conspiracies not alleged in the indictment.⁷⁷

⁷² U. S. v. Newton, 52 Fed. 275; Bloomer v. S., 48 Md. 521. See Com. v. Parker (Ky.), 57 S. W. 484. See § 1252.

⁷³ S. v. McIntosh, 109 Iowa 209, 80 N. W. 349.

⁷⁴ P. v. Daniels, 105 Cal. 262, 38 Pac. 720. See S. v. Burnham, 15 N. H. 396.

⁷⁵ McDonald v. P., 126 Ill. 150, 162, 18 N. E. 817; Spies v. P., 122 Ill. 230, 12 N. E. 865, 17 N. E. 898. See

Carroll v. Com., 84 Pa. St. 107, 2 Am. C. R. 290; S. v. Mayberry, 48 Me. 218.

⁷⁶ Spies v. P., 122 Ill. 230, 12 N. E. 865, 17 N. E. 898; S. v. McCahill, 72 Iowa 111, 30 N. W. 553, 33 N. W. 599; Carroll v. Com., 84 Pa. St. 107; Card v. S., 109 Ind. 415, 9 N. E. 591.

⁷⁷ McDonald v. P., 126 Ill. 150, 18 N. E. 817; S. v. Glidden, 55 Conn. 46, 8 Atl. 890; Card v. S., 109 Ind.

§ 1245. **Acts barred by limitation.**—Acts of the conspirators, though barred by the statute of limitation, may be shown in evidence, where the same conspiracy continued to exist to a time not so barred.⁷⁸

§ 1246. **Variance—Person or public.**—The object of a conspiracy must be proved as charged. If the conspiracy charged be to obtain the money of and from a person named, proof that the design was to defraud the public generally is not sufficient.⁷⁹

§ 1247. **Conspiracy—With one or two.**—An indictment charging the defendant with conspiracy with two other persons named will be sustained if the proof shows he conspired with only one of them. The allegation as to the other will be regarded as surplusage.⁸⁰

§ 1248. **Inflicting injury.**—An indictment which charges a conspiracy "with intent to inflict a great bodily injury" is sustained by proof of a conspiracy to tar and feather the prosecuting witness.⁸¹

§ 1249. **One of several acts sufficient.**—An indictment charging a conspiracy to obtain goods by various false pretenses is sustained by proof of any one of the several false pretenses alleged.⁸²

§ 1250. **Different act—Is variance.**—An indictment charging a conspiracy to assault a woman with intent to ravish and carnally know her is not sustained by proof of a conspiracy to seduce and commit adultery with her.⁸³

§ 1251. **Variance as to owner.**—Where an indictment charges a conspiracy to commit robbery, alleging the possession of the property

415, 9 N. E. 591; *S. v. Lewis*, 96 Iowa 286, 65 N. W. 295; *P. v. Bleeker*, 2 Wheeler Cr. Cas. (N. Y.) 256. See *P. v. Saunders*, 25 Mich. 119.

⁷⁸*Ochs v. P.*, 124 Ill. 399, 16 N. E. 662. The evidence in the following cases was held sufficient to sustain convictions: *Ochs v. P.*, 124 Ill. 399, 16 N. E. 662; *Com. v. Smith*, 163 Mass. 411, 40 N. E. 189; *O'Donnell v. P.*, 41 Ill. App. 23; *P. v. Petheram*, 64 Mich. 252, 31 N. W. 188; *P. v. Hall*, 64 N. Y. Supp. 433, 15 N. Y. Cr. 29. But not sufficient in the following: *S. v. Simons*, 4 Strob. (S. C.) 266; *U. S. v. Lancaster*, 44 Fed. 896; *P. v. Keys*, 1

Wheeler Cr. Cas. (N. Y.) 275; *U. S. v. Barrett*, 65 Fed. 62.

⁷⁹*Evans v. P.*, 90 Ill. 389; *Com. v. Harley*, 7 Metc. (Mass.) 506; 2 Russell Crimes (7th Am. ed.), 702; *Com. v. Kellogg*, 7 Cush. (Mass.) 473.

⁸⁰*Woodworth v. S.*, 20 Tex. App. 375; *Reg. v. Quinn*, 19 Cox C. C. 78. See *Clary v. Com.*, 4 Pa. St. 210.

⁸¹*S. v. Ormiston*, 66 Iowa 143, 23 N. W. 370.

⁸²*Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997; *U. S. v. Cassidy*, 67 Fed. 698.

⁸³*S. v. Hadley*, 54 N. H. 224. Evidence not sufficient: *S. v. May*, 142 Mo. 135, 43 S. W. 637.

to be stolen in one person, and the title thereto in another, the proof must sustain both allegations.⁸⁴

§ 1252. **Venue.**—If the overt act, that is, the act charged in the indictment as having been committed in furtherance of the conspiracy, was committed within the district, then it does not matter where the conspiracy was formed or the unlawful agreement entered into, for it is continued or renewed in the district where such overt act was performed.⁸⁵

§ 1253. **New trial must be for all.**—A new trial can not be granted to one conspirator without granting it to all who stand convicted, although there may be no grounds for disturbing the verdict so far as it affects one of them. The defendants can not be separated. A new trial must, therefore, be granted to all.⁸⁶

§ 1254. **Penalty for attempt.**—An attempt to commit an offense shall never be punished more severely than the perpetration of it. A conspiracy is even less than an attempt, and it is error to impose on it a greater punishment than the statute has annexed to the offense itself.⁸⁷

⁸⁴ Ward v. S. (Tex. Cr.), 21 S. W. 250.

⁸⁵ U. S. v. Newton, 52 Fed. 275, 283; Com. v. Gillespie, 7 Serg. & R. (Pa.) 469. The overt act in the last case was putting a quantity of old newspapers in the mail for the purpose of fraudulently increasing the weight of the mail matter. See § 1239; Com. v. Parker (Ky.), 57 S. W. 484.

⁸⁶ Reg. v. Gompertz, 9 Q. B. 823, 841, 58 Eng. Com. L. R. 841; Com. v. McGowan, 2 Pars. Eq. Cas. (Pa.) 341; Isaacs v. S., 48 Miss. 234, 1 Am. C. R. 104.

⁸⁷ Hartmann v. Com., 5 Pa. St. 60, 67; Scott v. Com., 6 S. & R. (Pa.) 224; S. v. Jackson, 82 N. C. 565; S. v. Dyer, 67 Vt. 690, 32 Atl. 814.

CHAPTER XXVIII.

LIBEL.

ART.	I. Definition and Elements,	§§ 1255-1262
	II. Matters of Defense,	§§ 1263-1270
	III. Indictment,	§§ 1271-1282
	IV. Evidence; Variance,	§§ 1283-1296

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1255. **Libel defined.**—Libel is the malicious defamation of any person, and especially a magistrate, made public either by printing, writing, signs or pictures, in order to provoke him to wrath, or expose him to public hatred, contempt, and ridicule.¹ In such prosecutions the only points to be inquired into are, first, the making or publishing of the book or writing; and, second, whether the matter be criminal. If both these points are against the defendant, the offense is complete.² A libel is a false and malicious publication against an individual, either in print or writing, or by pictures, with intent to injure the reputation of the individual and expose him to public hatred, contempt, or ridicule.³ Words written or printed and published, imputing to another any act, the tendency of which is to disgrace him or deprive him of the confidence and good-will of society, or lessen its esteem for him, are actionable *per se*.⁴ Any written or printed publication concerning one, which has a tendency to injure

¹ 4 Bl. Com. 150; 3 Greenl. Ev., § 164.

² 4 Bl. Com. 151. Indictment sufficient: Crowe v. P., 92 Ill. 232.

³ S. v. Smily, 37 Ohio St. 30; Underhill Cr. Ev., § 361 [citing Baker v. S., 50 Neb. 202, 69 N. W. 749; P. v. Crowell, 3 Johns. Cas. (N. Y.) 337; P. v. Ritchie, 12 Utah 180, 42

Pac. 209]; S. v. Shaffner, 2 Pen. (Del.) 171, 44 Atl. 620.

⁴ S. v. Smily, 37 Ohio St. 30; S. v. Spear, 13 R. I. 324; Hartford v. S., 96 Ind. 461, 49 Am. R. 185; S. v. Schmitt, 49 N. J. L. 579, 9 Atl. 774; P. v. Jackman, 96 Mich. 269, 55 N. W. 809; Com. v. Wright, 1 Cush. (Mass.) 46; Crowe v. P., 92 Ill. 231.

his reputation or character, or to bring him into contempt, hatred, or ridicule, is a libel.⁵

§ 1256. Newspaper publication.—A newspaper publication falsely charging a public officer with extortion by collecting more money from a person than he is entitled to collect, and appropriating the difference, is a libel.⁶ A newspaper publication charging the superintendent of schools with receiving money as a consideration for his influence to induce the board of education to change school-books is libelous.⁷

§ 1257. Facts constituting libel.—A publication charging that a person had become insane in the persecution of his political opponent; that his insane prejudice and hatred would become contagious and result in murder, amounts to criminal libel.⁸

§ 1258. Aiding, abetting.—A person who furnishes the libelous matter for publication is equally liable with the editor who publishes the same, though he may not see what was actually written until after it is published.⁹

§ 1259. Liable for agent's acts.—The owner or principal will be held criminally liable for defamatory or libelous matter published or put in circulation by his agents, servants, or employes, even though done without his knowledge or consent, unless it shall be made to further appear that the publication did not occur through his negligence or want of ordinary care.¹⁰

§ 1260. Sending through mail.—A collection agency, in attempting to collect claims by sending envelopes to the debtor through the mail, with the words, "Bad Debt Collecting Agency," printed on them, is guilty of libel, such envelopes tending and being intended to expose

⁵ *Raker v. S.*, 50 Neb. 202, 69 N. W. 749.

⁶ *Benton v. S.*, 59 N. J. L. 551, 36 Atl. 1041. See *S. v. Mott*, 45 N. J. L. 494; *Com. v. Swallow*, 8 Pa. Sup. 539.

⁷ *Hartford v. S.*, 96 Ind. 461, 49 Am. R. 185; *Com. v. Wright*, 1 Cush. (Mass.) 46.

⁸ *S. v. Roberts*, 2 Marv. (Del.) 450, 43 Atl. 252.

⁹ *Clay v. P.*, 86 Ill. 151; *S. v. Osborn*, 54 Kan. 473, 38 Pac. 572; *Reg. v. Cooper*, 8 Q. B. 533; 3 Greenl. Ev., § 172; *Com. v. Wolfinger*, 16 Pa. Co. R. 257. See *Com. v. Murphy*, 8 Pa. Co. R. 399; *S. v. Shaffner*, 2 Pen. (Del.) 171, 44 Atl. 620.

¹⁰ *S. v. Mason*, 26 Or. 273, 38 Pac. 130; *Reg. v. Holbrook*, L. R. 4 Q. B. D. 42, 47; 3 Greenl. Ev., § 171.

the persons to whom sent to contempt and bring them into disrepute with their employers and the public.¹¹

§ 1261. Publication defaming character.—The following newspaper publication was held libelous: "Against what man is the deputy sheriff now plotting by the employment of a needy man who shall act as a spotter, that some one who has incurred the liquor deputy's displeasure may be punished? Who will be the next young man to lay himself liable to the state prison for a term of years by taking a false oath by direction of this guardian of our laws?"¹²

§ 1262. Publication defaming several.—Where a person commits the offense of libeling several persons by a single publication in writing, it is but one criminal offense, though the persons so libeled were not associated in business together.¹³

ARTICLE II. MATTERS OF DEFENSE.

§ 1263. Truth of publication.—The defendant, in his defense to a charge of libel, may prove the truth of the publication alleged to be libelous, and it matters not what motive prompted him to make the publication.¹⁴ But the defendant must prove the entire publication to be true to sustain his defense of justification.¹⁵

§ 1264. Slandering unchaste woman.—An unchaste woman can not be regarded the subject of slander by charging her with having sexual intercourse. The defendant may show on his defense to such charge, that the woman was guilty of previous acts of sexual intercourse.¹⁶

§ 1265. Slandering "innocent woman."—Although a woman may have had sexual intercourse with a man, she may repent of her immoral conduct and become virtuous and an "innocent woman," within

¹¹ *S. v. Armstrong*, 106 Mo. 414, 16 S. W. 604. Extortion by sending a threatening letter: *Moore v. P.*, 69 Ill. App. 399. See 3 Greenl. Ev., § 171.

¹² *S. v. Norton*, 89 Me. 290, 36 Atl. 394.

¹³ *S. v. Hoskins*, 60 Minn. 168, 62 N. W. 270.

¹⁴ *Underhill Cr. Ev.*, § 365; *S. v.*

Bush, 122 Ind. 42, 23 N. E. 677. But see *Com. v. Damon*, 136 Mass. 441. *Contra*, *S. v. Haskins*, 109 Iowa 656, 80 N. W. 1063, 47 L. R. A. 223.

¹⁵ *S. v. Lyon*, 89 N. C. 568. See *Underhill Cr. Ev.*, § 365.

¹⁶ *Wood v. S.*, 32 Tex. Cr. 476, 24 S. W. 284.

the meaning and protection of the statute for slandering an "innocent woman."¹⁷

§ 1266. **Can not compel female to be examined.**—On a charge of slander in which the chastity of a female is made an issue, it is not error for the court to refuse to require the female to submit to inspection of her private parts.¹⁸

§ 1267. **Circulating hearsay—Slandorous reports.**—The defendant can not justify on the ground that the writing charged to be libelous was merely a repetition of previous oral publications, and that the conduct or acts of the person to whom the writing refers induced him to make the written publication.¹⁹ It is no defense to a charge of libel that the subject-matter of the libel had for a long time been currently reported in the community and generally believed to be true.²⁰

§ 1268. **Publication—When not.**—The reception of a libelous letter, though sent through the mail, which has not been read or heard by some third person, is no publication of a libel.²¹

§ 1269. **Defaming judge—When not.**—A newspaper article entitled, "Political Pull," contained among other things the following: "There is no reason why the public prosecutor should not handle these liquor cases. Does he hold back because he has made a bargain? We shall never have our laws enforced till the public servants in the court-house cease to bargain with the dive-keepers." This article was held not to be a libel on the judge trying such cases at the court-house, and could not by innuendo be made to apply to him.²²

§ 1270. **Provocation, competent in defense.**—The defendant may show in mitigation of punishment that he was provoked to the publication of the libel charged by the prosecuting witness publishing a libel upon him a short time before.²³

¹⁷ S. v. Grigg, 104 N. C. 882, 10 S. E. 684.

¹⁸ Whitehead v. S., 39 Tex. Cr. 89, 45 S. W. 10.

¹⁹ Vallery v. S., 42 Neb. 123, 60 N. W. 347.

²⁰ Com. v. Place, 153 Pa. St. 314, 26 Atl. 620.

²¹ Hodges v. S., 5 Humph. (Tenn.)

113; S. v. Hollon, 12 Lea (Tenn.) 482; S. v. Barnes, 32 Me. 530. See 3 Greenl. Ev., § 169; Haase v. S., 53 N. J. L. 34, 20 Atl. 751.

²² Avirett v. S., 76 Md. 510, 25 Atl. 676, 987.

²³ Hartford v. S., 96 Ind. 461, 49 Am. R. 185.

ARTICLE III. INDICTMENT.

§ 1271. **Libelous matter must be set out.**—According to the authorities, beginning with the oldest and extending to the latest, and almost wholly unbroken, libel belongs to that class of cases in which it is held to be absolutely necessary to set out in the indictment the alleged libelous matter, according to its tenor.²⁴ But where the defamatory publication is found in a book, it is not necessary to set out the whole of the book.²⁵ Under a statute providing that “whoever speaks of and concerning any woman, married or unmarried, falsely and maliciously imputing to her a want of chastity,” shall be punished, an indictment should set out the words constituting the slander and also that they were spoken in the presence of some person.²⁶

§ 1272. **Matter too obscene to allege.**—It can never be required that an obscene book or picture should be displayed upon the records of the court, by setting the same out in the indictment.²⁷

§ 1273. **Innuendoes, not required.**—An indictment need not set out the libelous or slanderous matter with innuendoes where the meaning of the libelous matter is perfectly plain to an intelligent person.²⁸ An indictment charging the defendant with telling to another that he had seen a certain woman and man “getting there” does not impute a want of chastity to the woman; but the expression “getting there,” by proper innuendo, is susceptible of such meaning.²⁹

§ 1274. **Manner of publication unnecessary.**—An indictment averred that the defendant did “unlawfully and maliciously compose, write and cause to be printed and published” the libelous matter, stating it, of and concerning the person alleged to be libeled. These facts, with the ordinary averments following, constituted a complete offense, either at common law or under the statute, without stating the particular manner in which the printing and publication were made.³⁰

²⁴ *S. v. Townsend*, 86 N. C. 676; *S. v. Bildstein*, 44 La. 778, 11 So. 37. See 3 Greenl. Ev., §§ 166, 167.

²⁵ *S. v. Barnes*, 32 Me. 533.

²⁶ *Burnham v. S.*, 37 Fla. 327, 20 So. 548.

²⁷ *Com. v. Holmes*, 17 Mass. 336; *McNair v. P.*, 89 Ill. 443. But see *Reg. v. Bradlaugh*, L. R. 2 Q. B. D. 569. The indictment should contain an averment that the language is

too obscene to be spread on the records of the court.

²⁸ *Jones v. S.*, 38 Tex. Cr. 364, 43 S. W. 78; *Benton v. S.*, 59 N. J. L. 551, 36 Atl. 1041. See *S. v. Nichols*, 15 Wash. 1, 45 Pac. 647; *P. v. Collins*, 102 Cal. 345, 36 Pac. 669.

²⁹ *Whitehead v. S.*, 39 Tex. Cr. 89, 45 S. W. 10.

³⁰ *Tracy v. Com.*, 87 Ky. 578, 10 Ky. L. 611, 9 S. W. 872; *Rattray*

§ 1275. "Maliciously" not essential.—The statute provides that if any person shall maliciously publish any defamatory libel, every such person, on conviction, shall be liable to fine or imprisonment, or both, as the court may award. This statute does not create a new offense. It is merely an application to that which is an offense at common law of the punishment which is to take place upon a conviction for the common law offense. The word "maliciously" is not, therefore, essential to the validity of the indictment for libel.³¹

§ 1276. Defaming by charging adultery.—Under a statute making it a criminal offense for any person to falsely and maliciously charge any female with "incest, fornication, adultery, or whoredom," an information stating that the defendant charged a certain female with pregnancy, with the intent to falsely and maliciously charge her with incest, fornication, adultery, and whoredom, is sufficient.³²

§ 1277. Libel by charging degrading act.—Under a statute making it a criminal offense to charge another, by word or writing, with having committed an infamous or degrading act, an information charging that the defendant published in a newspaper that a certain named person's arm was broken while being ejected from a house of ill fame sufficiently states an offense.³³

§ 1278. Defaming woman.—An indictment alleging that the defendant "did falsely and maliciously impute to" a certain woman named "a want of chastity," by saying that a certain man, naming him, was "monkeying" with the woman, "and doing what he pleased with her," meaning that he was having carnal knowledge of her, sufficiently states an offense.³⁴

§ 1279. Disgraceful conduct—Innuendoes.—An indictment merely setting out the publication or words claimed to be libelous, and then alleging in general terms that such publication charging a person named with dishonesty or disgraceful conduct, tends to bring him into contempt or disgrace, is not sufficient. The indictment should

v. S., 61 Miss. 377. But see P. v. Stark, 136 N. Y. 538, 32 N. E. 1046.

³¹ Reg. v. Munslow, 18 Cox C. C. 112, 10 Am. C. R. 483.

³² S. v. Buck, 43 Mo. App. 443.

³³ P. v. Jackman, 96 Mich. 269, 55 N. W. 809; S. v. Roberts, 2 Marv. (Del.) 450, 43 Atl. 252.

³⁴ Dickson v. S., 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807.

point out by proper innuendo some particular act disgraceful to the person alleged to be slandered.³⁵

§ 1280. Must charge libel was in writing.—The statute of New York defines libel as a malicious publication by writing, printing, picture, effigy, sign, or otherwise than by mere speech. An indictment failing to state that the alleged libel was written is defective.³⁶

§ 1281. Statutory words essential.—The words “which tends to provoke a breach of the peace” are descriptive of the offense of libel, and an indictment charging libel is defective in omitting to allege that the publication tended to provoke a breach of the peace.³⁷

§ 1282. Duplicity, when and when not.—An indictment charging two different publications in the same count, as a libel, is bad for duplicity. Each publication is a separate offense.³⁸ An indictment charging the defendant with writing, publishing, and circulating a libelous communication of and concerning a certain person named “and others,” and it clearly appearing from the face of the indictment that the libel was intended for the person named, the words “and others” may be regarded as surplusage, and the indictment will be sufficient.³⁹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1283. Weight of evidence.—Where the defendant relies upon the truth of the words charged as slander as his defense, the prosecution must prove beyond a reasonable doubt that the slanderous words

³⁵ *McKee v. S.*, 37 Tex. Cr. 544, 40 S. W. 305; *Nordhaus v. S.* (Tex. Cr.), 40 S. W. 804.

³⁶ *P. v. Stark*, 12 N. Y. Supp. 688, 59 Hun 51.

³⁷ *Moody v. S.*, 94 Ala. 42, 10 So. 670. See *Lawton v. Ter.*, 9 Okla. 456, 60 Pac. 93.

³⁸ *S. v. Healy*, 50 Mo. App. 243; *P. v. Jackman*, 96 Mich. 269, 55 N. W. 809.

³⁹ *S. v. Heacock*, 106 Iowa 191, 76 N. W. 654. See *England v. S.* (Tex. Cr.), 49 S. W. 379; *Lefever v. S.* (Tex. Cr.), 49 S. W. 383; *Collins v. S.*, 39 Tex. Cr. 30, 44 S. W. 846. Indictment held sufficient:

Smith v. S., 39 Tex. Cr. 320, 45 S. W. 1013; *Squires v. S.*, 39 Tex. Cr. 96, 45 S. W. 147 (political); *Barnum v. S.*, 92 Wis. 586, 66 N. W. 617; *Bonney v. S.*, 2 Idaho 1015, 29 Pac. 185; *S. v. Haddock*, 109 N. C. 873, 13 S. E. 714; *S. v. Matheis*, 44 Mo. App. 294. See *S. v. Conable*, 81 Iowa 60, 46 N. W. 759. Indictment held defective: *Barnes v. S.*, 88 Md. 347, 41 Atl. 781; *Byrd v. S.*, 38 Tex. Cr. 630, 44 S. W. 521; *Neely v. S.*, 32 Tex. Cr. 370, 23 S. W. 798; *P. v. Stark*, 136 N. Y. 538, 32 N. E. 1046; *Berry v. S.*, 27 Tex. App. 483, 11 S. W. 521; *Lawton v. Ter.*, 9 Okla. 456, 60 Pac. 93.

were false.⁴⁰ Where the defendant relies upon the truth of the publication as his defense against a charge of libel, he is not bound to establish his defense by a preponderance of the evidence, but is only required to raise a reasonable doubt of the truth of such publication.⁴¹

§ 1284. Woman's chastity not presumed.—Under the law, the defendant is presumed to be innocent; and on a trial for slander by charging a woman with committing fornication, there can be no presumption in favor of the chastity of the woman.⁴²

§ 1285. Proving publication—One copy.—The publication of libelous matter in a newspaper is sufficiently established by proof that one copy of the paper was sent into the county where the trial of the accused occurred. The prosecution is not required to show that the paper had a general circulation.⁴³

§ 1286. Admissions of defendant.—Admissions made by the defendant after the alleged libel was published in a newspaper, which tended to connect him with the management of the paper at the time of the publication of the libel, are competent.⁴⁴ Where the defendant published hand-bills or dodgers calling attention to a newspaper article, which is charged as libel, such dodgers, though not mentioned in the indictment, may be admitted in evidence.⁴⁵

§ 1287. Witness testifying to slanderous words.—A witness who heard the alleged slanderous words should not be allowed to give his understanding of their meaning; unless they were ambiguous, such as slang phrases.⁴⁶ Where the article alleged to be libelous does not name the person to whom it refers, witnesses, on reading the article, may testify from their knowledge of the circumstances and acquaintance with the person alleged to be slandered, that they understood the article referred to him.⁴⁷

⁴⁰ *McArthur v. S.*, 59 Ark. 431, 27 S. W. 628. See *S. v. Malloy*, 115 N. C. 737, 20 S. E. 461; *Beal v. S.*, 99 Ala. 234, 13 So. 783.

⁴¹ *S. v. Bush*, 122 Ind. 42, 23 N. E. 677; *S. v. Wait*, 44 Kan. 310, 24 Pac. 354.

⁴² *McArthur v. S.*, 59 Ark. 431, 27 S. W. 628.

⁴³ *Baker v. S.*, 97 Ga. 453, 25 S. E. 341; *Underhill Cr. Ev.*, § 362, citing *Com. v. Morgan*, 107 Mass. 199.

⁴⁴ *Boyle v. S.*, 6 Ohio C. C. 163.

⁴⁵ *Com. v. Place*, 153 Pa. St. 314, 26 Atl. 620.

⁴⁶ *Dickson v. S.*, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807; *S. v. Fitzgerald*, 20 Mo. App. 408.

⁴⁷ *S. v. Mason*, 26 Or. 273, 38 Pac. 130; *Com. v. Morgan*, 107 Mass. 199. *Contra*, *Dickson v. S.*, 34 Tex. Cr. 1, 28 S. W. 815, 30 S. W. 807; *P. v. McDowell*, 71 Cal. 194, 11 Pac. 868.

§ 1288. **Impeaching witness.**—The only defense on a charge for slandering a woman was that the defendant without any harmful motive innocently repeated a rumor he had heard. For the purpose of disproving an innocent motive the prosecution may introduce the affidavit of the defendant, made at a previous term of the court, for a continuance of the cause on the ground of an absent witness by whom he expected to prove the unchastity of the woman.⁴⁸

§ 1289. **Other publications competent.**—Evidence of other libelous publications than the one alleged in the indictment is competent to prove malice (if so connected in point of time and circumstances as to establish intent).⁴⁹ For the purpose of showing the motive or intent of the defendant in publishing the article alleged to be libelous, other publications may be shown in evidence.⁵⁰

§ 1290. **Defense—Disproving malice.**—The defendant on a charge of libelous publication of a candidate for a public office has the right to show the evidence upon which the publication was made by him, as tending to disprove malice.⁵¹ In his defense it is competent for the defendant to show that he did not participate in the publication; or if it was done by his servant, that it was against his express orders, or out of the course of the servant's employment.⁵²

§ 1291. **All said is competent.**—On a charge of using slanderous words concerning the chastity of a woman, the defendant is entitled to show all that was said at the time of the alleged slander, and he may also show that he used similar words to other persons concerning the woman, on other occasions.⁵³

⁴⁸ S. v. Mills, 116 N. C. 1051, 21 S. E. 563.

⁴⁹ S. v. Riggs, 39 Conn. 498; Com. v. Place, 153 Pa. St. 314, 26 Atl. 620; Eldridge v. S., 27 Fla. 162, 9 So. 448; S. v. Conable, 81 Iowa 60, 46 N. W. 759; 3 Greenl. Ev., § 168. Malice may be inferred from the willful doing of any unlawful act which is calculated to injure the person alluded to: Underhill Cr. Ev., § 364, citing S. v. Brady, 44 Kan. 435, 24 Pac. 948; Fitzpatrick

v. Daily States Pub. Co., 48 La. 1116, 20 So. 173.

⁵⁰ S. v. Heacock, 106 Iowa 191, 76 N. W. 654; S. v. Conable, 81 Iowa 60, 46 N. W. 759; Manning v. S., 37 Tex. Cr. 180, 39 S. W. 118.

⁵¹ P. v. Glassman, 12 Utah 238, 42 Pac. 956; Benton v. S., 59 N. J. L. 551, 36 Atl. 1041; Duke v. S., 19 Tex. App. 14; Com. v. Snelling, 32 Mass. 337.

⁵² 3 Greenl. Ev., § 178.

⁵³ Whitehead v. S., 39 Tex. Cr. 89, 45 S. W. 10.

§ 1292. **Trial by society incompetent.**—On the trial of a person charged with slander, evidence that he had been tried and expelled from a church for the same slander is incompetent.⁵⁴

§ 1293. **Identical words essential.**—The identical words set out in the indictment alleged to be slanderous must be proved; it is not sufficient to prove words of similar import.⁵⁵

§ 1294. **No variance.**—Where the indictment charges the defendant with using the slanderous words, “to and of” a person named, it is sustained by proof of using the word “of” such person, though not “to” him.⁵⁶

§ 1295. **Publishing in presence of several.**—Where an indictment charges the defendant with publishing a libel in the presence of more than one person, naming them, the proof must show the presence of all so alleged to be present.⁵⁷ An information charging the defendant with using slanderous words of and concerning another, in the presence of two persons named, is not supported by proof that the words were used in the presence and hearing of one of them alone at one time, and the other alone at another time.⁵⁸

§ 1296. **Proving other slanderous words.**—The fact that the proof shows the defendant used other slanderous words, together with the words alleged in the indictment, can not be urged as a variance.⁵⁹

⁵⁴ *Tippens v. S.* (Tex. Cr.), 43 S. W. 1000. Evidence sufficient to sustain convictions: *England v. S.* (Tex. Cr.), 49 S. W. 379. See *P. v. Miller*, 122 Cal. 84, 54 Pac. 523; *Bowen v. S.* (Tex. Cr.), 18 S. W. 464; *S. v. Ford* (Minn.), 85 N. W. 217. Evidence not sufficient to sustain convictions: *Lefever v. S.* (Tex. Cr.), 49 S. W. 383; *Laskey v. S.* (Tex. Cr.), 18 S. W. 465; *P. v. Carroll*, 62 N. Y. Supp. 790, 14 N. Y. Cr. 402.

⁵⁵ *Barnett v. S.*, 35 Tex. Cr. 280,

33 S. W. 340; *Story v. Jones*, 52 Ill. App. 112; *S. v. Armstrong*, 106 Mo. 395, 16 S. W. 604; *Berry v. S.*, 27 Tex. App. 483, 11 S. W. 521; *Underhill Cr. Ev.*, § 363.

⁵⁶ *Lecroy v. S.*, 89 Ga. 335, 15 S. E. 463.

⁵⁷ *Neely v. S.*, 32 Tex. Cr. 370, 23 S. W. 798. See *Davis v. S.* (Tex. Cr.), 22 S. W. 979.

⁵⁸ *Knight v. S.* (Tex. Cr.), 49 S. W. 385.

⁵⁹ *Lefever v. S.* (Tex. Cr.), 49 S. W. 383.

CHAPTER XXIX.

RIOT.

ART. I. Definition and Elements,	§§ 1297-1298
II. Matters of Defense,	§§ 1299-1302
III. Indictment,	§§ 1303-1306
IV. Evidence,	§§ 1307-1308.

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1297. **Riot defined.**—A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel; as if they beat a man, or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.¹ The offense of riot consists in three or more persons doing an unlawful act in a violent and tumultuous manner. Or where three or more persons do any act in a violent and tumultuous manner, it is a riot.² It must appear that the persons charged had a common purpose to do the act alleged.³

§ 1298. **Assault and battery included.**—Riot may embrace an assault and battery, and the necessary difference consists in this, that (under the statute) two or more persons must engage in the unlawful

¹ 4 Bl. Com. 146; Underhill Cr. Ev., § 489; 1 Hawk. P. C., ch. 65, § 1; 2 McClain Cr. L., § 992; 3 Greenl. Ev., § 216; Com. v. Runnells, 10 Mass. 518, 6 Am. D. 148. See Whitesides v. P., Breese (Ill.) 21; Kiphart v. S., 42 Ind. 273; S. v. Snow, 18 Me. 346.

² Kiphart v. S., 42 Ind. 275. See S. v. Brooks, 1 Hill (S. C.) 361.

³ Aron v. City of Wausau, 98 Wis. 592, 74 N. W. 354. See Stafford v. S., 93 Ga. 207, 19 S. E. 50.

act to constitute a riot, while but one need be to constitute assault and battery. The two offenses are not necessarily the same.⁴ In order to constitute a riot at common law, an unlawful assembly is necessary, and if, when thus assembled, they concoct a breach of the peace and in pursuance thereof execute it, this is sufficient to make a riot.⁵

ARTICLE II. MATTERS OF DEFENSE.

§ 1299. Terrifying not essential.—It is clear there may be a riot without terrifying any one. An unlawful assembly riotously and tumultuously disturbing the selectmen of a town, in the exercise of their duty, on a public day and in a public place, and obstructing the inhabitants of the town in the use of their constitutional privilege of election, is an aggravated riot.⁶

§ 1300. One person alone can not commit riot.—One person alone can not be guilty of riot unless others jointly indicted with him acted together in the unlawful act charged, such as entering a house, or other unlawful act.⁷

§ 1301. Two or more convicted.—Eight persons were indicted for riot, five of whom were arraigned; and two of the five plead not guilty and were tried and convicted. The conviction was sustained, though the others were not tried.⁸

§ 1302. Noise and boisterousness not essential.—To disturb another in the enjoyment of a lawful right is a trespass, and if done by members unlawfully combined it is riot, although they were neither boisterous nor noisy: as, where the members of a union marched through the streets on a strike.⁹

⁴ *Ferguson v. P.*, 90 Ill. 512; *Free-land v. P.*, 16 Ill. 380; *S. v. Russell*, 45 N. H. 83. *Contra*, *S. v. Ham*, 54 Me. 194; *Com. v. Hall*, 142 Mass. 454, 8 N. E. 324.

⁵ *Dougherty v. P.*, 4 Scam. (Ill.) 180; 4 Bl. Com. 164; 1 Hawk. P. C. 514.

⁶ *Com. v. Runnells*, 10 Mass. 518; 3 Greenl. Ev., § 219. See *Darst v. P.*, 51 Ill. 286; *S. v. York*, 70 N. C. 66.

⁷ *Hardebeck v. S.*, 10 Ind. 460; *S.*

v. Bailey, 3 Blackf. (Ind.) 209; *Com. v. Berry*, 5 Gray (Mass.) 93; *Dixon v. S.*, 105 Ga. 787, 31 S. E. 750. See *Turpin v. S.*, 4 Blackf. (Ind.) 72.

⁸ *S. v. Bailey*, 3 Blackf. (Ind.) 209; *Rex v. Scott*, 3 Burr. 1262.

⁹ *P. v. O'Loughlin*, 3 Utah 133, 1 Pac. 653, 4 Am. C. R. 550; 3 Greenl. Ev., § 219; *S. v. Straw*, 33 Me. 554. See *Bell v. Mallory*, 61 Ill. 167; *Baptist v. S.*, 109 Ga. 546, 35 S. E. 658.

ARTICLE III. INDICTMENT.

§ 1303. "To terror of people"—"Unlawful assembly."—The indictment need not allege that the unlawful act was done to the terror of the people, nor need the proof show the same.¹⁰ An indictment for riot, under the statute, need not allege an unlawful assembly; but under the common law it is necessary.¹¹

§ 1304. *Interfering with officer.*—Charging in an indictment that the defendants "did in a violent and tumultuous manner prevent the sheriff from removing from the jail a certain prisoner confined therein," sufficiently charges the offense of riot, without alleging any particular act done in a violent and tumultuous manner.¹²

§ 1305. *Indictment sufficient.*—An indictment alleging that the defendants on the first day of September, 1888, at and within the county of Pope, then and there being together, did riotously and with force and violence assault, beat, wound, and ill-treat a certain person named, sufficiently charges a riot, and the time and place of its commission.¹³ An information alleging that the defendants did "in a riotous, tumultuous, and violent manner assemble themselves together and then and there in a riotous, tumultuous, and violent manner, having then and there the present ability so to do, unlawfully attempt to commit a violent injury on the person of affiant, by then and there violently and unlawfully threatening to beat, cut, and shoot said affiant," sufficiently charges riot, under the statute.¹⁴

§ 1306. *Indictment as to employment of persons.*—In charging an unlawful assembly to prevent a person from employing certain persons as laborers, an indictment, though in other respects correct, will be defective if it fails to allege that such person had or was about to have in his employ such persons as laborers.¹⁵

¹⁰ 3 Greenl. Ev., § 219.

¹¹ Dougherty v. P., 4 Scam. (Ill.) 180; S. v. Boies, 34 Me. 235; S. v. Russell, 45 N. H. 83; Thayer v. S., 11 Ind. 287; Com. v. Runnells, 10 Mass. 518, 6 Am. D. 148. See S. v. Kutter, 59 Ind. 572; S. v. Dean, 71 Wis. 678, 33 N. W. 341; 4 Bl. Com. 164.

¹² Green v. S., 139 Ga. 536, 35 S. E. 97.

¹³ Lambert v. P., 34 Ill. App. 637.

¹⁴ S. v. Acra, 2 Ind. App. 384, 28 N. E. 570. When not sufficient,—see Blackwell v. S., 30 Tex. App. 672, 18 S. W. 676.

¹⁵ Bradford v. S., 40 Tex. Cr. 632, 51 S. W. 379.

ARTICLE IV. EVIDENCE.

§ 1307. **Members of society.**—On the trial of several persons jointly indicted and tried for riot, it is proper to show that they were members of a secret society.¹⁶

§ 1308. **Bar, when not.**—A conviction for assault and battery is no bar to a prosecution for riot growing out of the same transaction.¹⁷

¹⁶ S. v. Johnson, 43 S. C. 123, 20 S. E. 988. sufficient to sustain conviction: Green v. S., 109 Ga. 536, 35 S. E. 97.

¹⁷ Freeland v. P., 16 Ill. 380; Cameron Cr. L., 291. Evidence held Not sufficient: Tripp v. S., 109 Ga. 489, 34 S. E. 1021.

CHAPTER XXX.

OBSTRUCTING HIGHWAYS.

ART. I.	Definition and Elements,	§§ 1308-1319
II.	Matters of Defense,	§§ 1320-1326
III.	Indictment,	§§ 1327-1334
IV.	Evidence; Variance,	§§ 1335-1341

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1309. **What constitutes highway.**—The use of land by the public as a highway for a long period of time, with the knowledge or consent of the owner, either express or implied, creates a public highway by prescription, within the meaning of the law.¹

§ 1310. **Created by dedication.**—To constitute a dedication of a road as a public highway, there must not only be an intent by the owner to dedicate but also an acceptance by the public.²

§ 1311. **Obstruction essential.**—Before a charge can be maintained against a railroad company of obstructing a highway by stopping its trains on the road, public travel must be impeded by the obstruction.³

§ 1312. **Obstructing turnpike.**—A turnpike road is a public highway and an indictment will lie for an obstruction thereon as a public nuisance, although constructed by and under the control of private parties.⁴

¹ S. v. Stewart, 91 N. C. 566; Sul-livan v. S., 52 Ind. 309; Mauck v. S., 66 Ind. 177; Lensing v. S. (Tex. Cr.), 45 S. W. 572. Lumber Co., 84 Wis. 205, 54 N. W. 503; S. v. Tyler, 54 S. C. 294, 32 S. E. 422.

² Mansur v. S., 60 Ind. 357; S. v. Proctor, 90 Mo. 334, 2 S. W. 472; S. v. Wilson, 42 Me. 9; P. v. Loehfelm, 102 N. Y. 1, 5 N. E. 783; S. v. Paine App. 540. ³ Illinois, etc., R. Co. v. P., 49 Ill. 422. ⁴ Com. v. Wilkinson, 16 Pick. (Mass.) 175. See Railroad Co. v. Com., 90 Pa. St. 300.

§ 1313. **Public grounds.**—So much of a public square as is around and about the court-house and devoted to the purpose of a highway becomes a part of the highway. The court-house is erected upon it, and so much of it as is used for the moving about of people, constitutes and is a highway.⁵

§ 1314. **Structures projecting.**—The front steps leading to a dwelling-house are clearly a part of the building, and when they project into the highway the building is in the highway and is an obstruction thereof within the meaning of the statute.⁶

§ 1315. **Railroad obstructing.**—A railroad company obstructing travel on a highway by a failure to keep its tracks or bridges in repair at crossings will be liable to criminal prosecution.⁷ A railroad company is liable for the acts of its servants in obstructing public streets or highways, notwithstanding its instructions to its servants to conform to the law.⁸

§ 1316. **Road as laid out.**—In a criminal prosecution, the road to be considered is the one actually laid out by the public authorities and not as laid out on paper.⁹

§ 1317. **Intent, immaterial.**—Intent is not an essential element of the offense of obstructing a highway, unless made so by statute. Therefore, if a person obstructs a highway, in good faith, believing the obstruction to be on his own land, it is no defense.¹⁰

§ 1318. **Obstruction not on traveled part.**—Obstructing a public highway which had been traveled for many years is a violation of the law, though such obstruction may not be on that portion of the road

⁵ S. v. Eastman, 109 N. C. 785, 13 S. E. 1019; S. v. Atkinson, 24 Vt. 448. See 4 Bl. Com. 167.

⁶ Com. v. Blaisdell, 107 Mass. 234; Hyde v. Middlesex, 2 Gray (Mass.) 267; Com. v. Milliman, 13 S. & R. (Pa.) 403; S. v. Kean, 69 N. H. 122, 45 Atl. 256, 48 L. R. A. 102.

⁷ New York, etc., R. Co. v. S., 53 N. J. L. 244, 23 Atl. 168; S. v. Louisville, etc., R. Co., 91 Tenn. 445, 19

S. W. 229; Memphis, etc., R. Co. v. S., 87 Tenn. 746, 11 S. W. 946. See Com. v. Illinois, etc., R. Co., 20 Ky. L. 606, 47 S. W. 258.

⁸ Com. v. New York, etc., R. Co., 112 Mass. 412.

⁹ Com. v. Jackson, 10 Sup. Ct. (Pa.) 524.

¹⁰ Com. v. Dicken, 145 Pa. St. 453, 22 Atl. 1043; S. v. Gould, 40 Iowa 372.

as laid out by the road viewers.¹¹ An obstruction in a public highway, to constitute a nuisance, is not to be limited to the traveled part of the road.¹²

§ 1319. Obstruction is nuisance.—A public highway at common law is a common way, “free to all the king’s subjects to pass and repass at liberty,” and an unauthorized obstruction is a nuisance and punishable.¹³ Whoever obstructs the full enjoyment of the easement of a public highway by making deposits within the limits of the highway, of timber, stones, or other things, to remain there and occupy a portion of such highway, is guilty of a nuisance, at common law.¹⁴

ARTICLE II. MATTERS OF DEFENSE.

§ 1320. Road never highway.—It is a good defense to a charge of obstructing a highway that the road in question never had been a highway by law, prescription, or otherwise.¹⁵

§ 1321. Disproving user.—On a charge of obstructing a public road which was claimed by the prosecution to have been established by user, it is proper, in defense, to show that a proceeding had been commenced along the line in question, to establish such road, and that the witness against him had signed a petition to establish it.¹⁶

§ 1322. Road not highway.—The prosecution relied on user to establish the existence of a public highway. The defendant offered to prove the road had been changed; that there were different lines of travel; that the road authorities did not exercise control over or repair the road in question, and that he expressly denied the right of the public to use the road. Held a good defense.¹⁷

¹¹ *Com. v. Dicken*, 145 Pa. St. 453, 22 Atl. 1043.

¹² *S. v. Merrit*, 35 Conn. 314; *Com. v. King*, 13 Metc. (Mass.) 115, 118. See *S. v. Beal*, 94 Me. 520, 48 Atl. 124.

¹³ *S. v. Berdetta*, 73 Ind. 185, 38 Am. R. 117.

¹⁴ *Com. v. King*, 13 Metc. (Mass.) 115; *S. v. Merrit*, 35 Conn. 314.

¹⁵ *S. v. Trove*, 1 Ind. App. 553, 27 N. E. 878; *Com. v. Noxon*, 121 Mass. 42; *Laroe v. S.*, 30 Tex. App. 374, 17 S. W. 934; *S. v. Moore*, 23 Ark. 550; *Kennedy v. S.* (Tex. Cr.), 40 S. W. 590.

¹⁶ *S. v. Macy*, 67 Mo. App. 326.

¹⁷ *Houston v. P.*, 63 Ill. 186; *Martin v. P.*, 23 Ill. 342.

§ 1323. **Stopping train.**—The defendant was convicted for obstructing a train of cars by pulling the signal rope attached to a bell on the engine, whereby the train was stopped, endangering the passengers. The defendant was a passenger at the time of the act charged. Held not a violation of the statute providing that “whoever obstructs any engine or carriage passing upon any railroad or endangers the safety of persons conveyed in or upon the same,” shall be guilty of a nuisance.¹⁸

§ 1324. **Nuisance—Benefit no defense.**—If the obstruction complained of amounts to a nuisance then the court will not inquire how the public good may be affected, but will interpose and order the nuisance abated.¹⁹

§ 1325. **Removing obstruction.**—Any person desiring to use the highway may remove the obstruction and may even, for that purpose, enter upon the land of the party erecting or continuing it, doing as little damage as possible.²⁰

§ 1326. **Taking advice, no defense.**—The fact that the defendant on whose land a public road had been established was advised by his attorney that the order establishing the road was void is no defense to obstructing the road by putting a gate therein.²¹

ARTICLE III. INDICTMENT.

§ 1327. **Description of highway.**—In charging the obstruction of a highway in a town, the indictment may aver generally the obstruction of the streets, of the town without designating what particular streets; nor is it necessary to allege the incorporation of the town.²²

§ 1328. **Statutory words, insufficient.**—In charging the offense of driving on a public bicycle path, an indictment, though in the words of the statute was defective, in that it failed to aver that the bicycle path was in or was a part of the public highway.²³

¹⁸ *Com. v. Killian*, 109 Mass. 345, Me. 435; *S. v. Brumfield*, 83 Ind. 136.

¹⁹ *Green C. R.* 193.

²⁰ *P. v. City of St. Louis*, 5 Gilm. (Ill.) 374; *P. v. Vanderbilt*, 28 N. Y. 396.

²¹ *S. v. Smith*, 52 Wis. 135, 8 N. W. 870; *Com. v. Ruddle*, 142 Pa. St. 144, 21 Atl. 814; *S. v. Anthoine*, 40

45 S. W. 578.

²² *Crouch v. S.*, 39 Tex. Cr. 145, 45 S. W. 578.

²³ *S. v. Finney*, 99 Iowa 43, 68 N. W. 568.

²⁴ *S. v. Bradford*, 78 Minn. 387, 81 N. W. 202, 47 L. R. A. 144.

§ 1329. **Obstructing—Stating offense.**—By statute it is declared to be a misdemeanor to willfully obstruct any highway or road leading from or to any church. An indictment based on such statute charging that the defendant (with other proper averments) did willfully and unlawfully obstruct a certain road leading to and from a certain church by putting a fence in said road, sufficiently states the offense.²⁴

§ 1330. **Averment of obstruction.**—An indictment charging the obstruction of a highway by placing a plank in and across it, without showing how or in what manner the plank caused the obstruction or whether the highway was out of repair, is defective.²⁵

§ 1331. **Description of obstruction.**—An indictment for obstructing a river was held defective in not definitely locating the obstruction. To charge the obstruction of the "Little Kanawha river at the district of West Virginia," is bad, although in the words of the statute.²⁶

§ 1332. **One offense only.**—Under a statute relating to the obstruction of "any public road or highway," an indictment charging the defendant with obstructing a certain road and highway, is not bad for duplicity.²⁷

§ 1333. **Indictment sufficient.**—Charging in an indictment, with other proper averments, that the defendant did obstruct a certain public road, designating it by the name by which it was known, without further description, by filling up the ditches on said road without authority, sufficiently states an offense.²⁸

§ 1334. **How road became highway.**—It is not necessary to allege in an indictment how the road in question became a public highway.²⁹

²⁴ S. v. Lucas, 124 N. C. 804, 32 S. E. 553.

²⁵ S. v. Roanoke R. & L. Co., 109 N. C. 860, 31 S. E. 719.

²⁶ U. S. v. Burns, 54 Fed. 351; Cox v. S., 3 Blackf. (Ind.) 193.

²⁷ Laroe v. S., 30 Tex. App. 374,

17 S. W. 934; S. v. Eastman, 109 N. C. 785, 13 S. E. 1019.

²⁸ Alexander v. S., 117 Ala. 220, 23 So. 48.

²⁹ S. v. Madison, 63 Me. 546; Nichols v. S., 89 Ind. 298.

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1335. **Proof by long use.**—Twenty years of uninterrupted use of a road by the public is abundantly sufficient to establish it as a public highway.³⁰ The public use of a road and its recognition by the proper authorities by working and repairing it, with the express or implied assent of the owner of the land through which it passes, establishes it as a public highway.³¹

§ 1336. **Proof of highway.**—Where the indictment charging the offense is general in its terms, the existence of the highway may be shown by prescription or dedication.³²

§ 1337. **Proving highway by records.**—The proceedings of highway commissioners for laying out a public road are competent evidence to prove the existence of such highway, though irregular.³³ But it may be shown that the proceedings were had without jurisdiction.³⁴ Record evidence is not essential to establish the existence of a public highway.³⁵

§ 1338. **Other obstruction of same road.**—Evidence that the defendant had, several years before, obstructed the same public highway, for the obstruction of which he is charged, is competent as tending to show intention.³⁶

§ 1339. **Obstruction in or near town.**—Evidence that the obstruction of a highway was within a certain town does not support an indictment charging the obstruction to be near the town, where the laws governing obstructions are different outside of the town from those within.³⁷

§ 1340. **Two distinct offenses.**—“Continuing an obstruction” of a highway is a distinct offense from “obstructing a highway,” and evi-

³⁰ Daniels v. P., 21 Ill. 442.

³¹ Dimon v. P., 17 Ill. 421; Daniels v. P., 21 Ill. 442; S. v. Kendall, 54 S. C. 192, 32 S. E. 300.

³² S. v. Teeters, 97 Iowa 458, 66 N. W. 754.

³³ S. v. Smith, 100 N. C. 550, 6 S. E. 251.

³⁴ S. v. Logue, 73 Wis. 598, 41 N. W. 1061.

³⁵ Zimmerman v. S., 4 Ind. App. 583, 31 N. E. 550.

³⁶ Dodson v. S. (Tex. Cr.), 49 S. W. 78.

³⁷ Illinois, etc., R. Co. v. Com., 20 Ky. L. 990, 47 S. W. 255.

dence of one will not support a charge of the other. The offenses are made distinct by statute.³⁸

§ 1341. **Variance, as to description.**—When a local description of the road sufficient to identify and fix the precise point of obstruction is given, as well as the termini of the road, the latter may be disregarded as surplusage, and proof that a public road existed at the place of obstruction is sufficient. It is not necessary to state the termini of the road. But if the termini be stated and the allegation is general describing a road leading from one place to another as having been obstructed, then its existence between the points named must be proved as a matter of essential description.³⁹

³⁸ *Lowe v. P.*, 28 Ill. 518; *Burke v. P.*, 23 Ill. App. 36. See *P. v. Young*, 72 Ill. 411. *346; Houston v. P.*, 63 Ill. 185; *Martin v. P.*, 23 Ill. 342; *S. v. Hume*, 12 Or. 133, 6 Pac. 427.

³⁹ *S. v. Harsh*, 6 Blackf. (Ind.)

CHAPTER XXXI.

SUNDAY VIOLATIONS.

ART. I.	Definition and Elements,	§§ 1342-1351.
	II. Matters of Defense,	§§ 1352-1362
	III. Indictment,	§§ 1363-1368
	IV. Evidence,	§§ 1369-1372

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1342. **Sunday laws constitutional.**—Statutes prohibiting labor on Sunday are police regulations and are not in conflict with the constitutional provisions of the state and federal governments relating to religion.¹

§ 1343. **Several violations—One offense.**—Several acts of violating the Sunday law on the same Sunday are regarded as but one offense.²

§ 1344. **Keeping open for sports.**—The statute of Iowa provides that every person who shall, on Sunday, keep open any place “in which sports or games are at any time carried on or allowed” shall be fined. The game of “billiards” comes within the meaning of this statute; and base-ball is included in “sports.”³ And fishing on Sun-

¹ P. v. Bellet, 99 Mich. 151, 57 N. W. 1094; S. v. Judge, 39 La. 132, 1 So. 437; S. v. Nesbit, 8 Kan. App. 104, 54 Pac. 326; S. v. Powell, 58 Ohio St. 324, 50 N. E. 900; Soon Hing v. Crowley, 113 U. S. 703, 15 S. Ct. 730; Scales v. S., 47 Ark. 476, 58 Am. R. 768, 1 S. W. 769; Gunn v. S., 89 Ga. 341, 15 S. E. 458; Ex parte Burke, 59 Cal. 6; 1 Dillon Munic. Corp., § 397; Cooley Const. Lim., 471; S. v. Hogreiver, 152 Ind. 652, 53 N. E. 921.

² Freideborn v. Com., 113 Pa. St. 242, 57 Am. R. 464, 6 Atl. 160; Rucker v. S., 67 Miss. 328, 7 So. 223; P. v. Cox, 70 Mich. 247, 38 N. W. 235. *Contra*, Albrecht v. S., 8 Tex. App. 313.

³ S. v. Miller, 68 Conn. 373, 36 Atl. 795; S. v. O'Rourke, 35 Neb. 614, 53 N. W. 591 (sports).

day, though on private grounds, without disturbing the peace, is within the statute prohibiting "sports" on that day.⁴

§ 1345. **Keeping open.**—Keeping open a place of business on Sunday and selling ice cream and meals to be eaten on the premises, is a violation of the statute forbidding the keeping open of any shop, restaurant, or place for the reception of company or for the sale or exposure of any merchandise on Sunday.⁵

§ 1346. **Base-ball included.**—A statute punishing "horse-racing, cock-fighting, or playing at cards or games of any kind" on Sunday includes base-ball, although that game is not of like kind with those enumerated in the statute. The object of the statute is to prevent a desecration of the Sabbath.⁶

§ 1347. **Theatre on Sunday.**—Conducting a theatre or any business connected therewith on Sunday is a violation of the Sunday law prohibiting persons engaging in their "usual vocation" on that day.⁷

§ 1348. **Tippling house, open.**—Where a house is so kept that access may be had thereto on the Sabbath day and facility afforded for the obtaining of intoxicating drinks, it is a tippling house. It is not necessary that the house should be kept open in all respects—its front door and windows open, as on week days—to be a violation.⁸ If the proprietor of a saloon or dram-shop enters his place of business on Sunday and invites others to go in, and they drink intoxicating liquors while there, he is guilty of keeping a tippling house on Sunday.⁹

⁴ *P. v. Moses*, 140 N. Y. 214, 35 N. E. 499.

⁵ *S. v. Jacques*, 69 N. H. 220, 40 Atl. 398.

⁶ *S. v. Williams*, 35 Mo. App. 541; *In re Rupp*, 53 N. Y. Supp. 927, 23 App. Div. 468.

⁷ *Ross v. S.*, 9 Ind. App. 35, 36 N. E. 167; *Quarles v. S.*, 55 Ark. 10, 17 S. W. 269; *St. Joseph v. Elliott*, 47 Mo. App. 418.

⁸ *Krover v. P.*, 78 Ill. 298; *Koop v. P.*, 47 Ill. 329; *Whitcomb v. S.*, 30 Tex. App. 269, 17 S. W. 258; *P. v. Schottey*, 116 Mich. 1, 74 N. W.

209. See *P. v. Hughes*, 90 Mich. 368, 51 N. W. 518; *P. v. Crowley*, 90 Mich. 366, 51 N. W. 517; *Cooper v. S.*, 88 Ga. 441, 14 S. E. 592; *Com. v. McNeese*, 156 Mass. 231, 30 N. E. 1021; *Williams v. S.*, 100 Ga. 511, 28 S. E. 624; *Morganstern v. Com.*, 94 Va. 787, 26 S. E. 402; *S. v. Binnard*, 21 Wash. 349, 58 Pac. 210.

⁹ *Johnson v. City of Chattanooga*, 97 Tenn. 247, 36 S. W. 1092. But see *Purefoy v. P.*, 65 Ill. App. 167; *Hall v. S. (Tex. Cr.)*, 55 S. W. 173.

§ 1349. **Tippling house—Bar-room; social club.**—Rooms connected with a bar-room, such as a restaurant or billiard hall, in which liquors are served to persons, are regarded as parts of the saloon (access being had from one to the other) and such is a violation of the Sunday law.¹⁰ A social club furnishing intoxicating liquors on Sunday to its own members only, to be drunk on the premises where delivered, is guilty of keeping open a tippling house.¹¹

§ 1350. **Barber-shops.**—In some of the states it is held that the keeping open of a barber-shop and shaving persons on Sunday may, in some respects, be a necessity, but it is not so within the meaning of the Sunday law.¹²

§ 1351. **Excursions on Sunday.**—The statute of Georgia against running excursions on Sunday relates only to the superintendent of transportation or officer having charge of the business of that department of the railroad company, and does not include others in making up trains, etc., working under the direction of the person so in charge.¹³

ARTICLE II. MATTERS OF DEFENSE.

§ 1352. **Barber-shops.**—A statute prohibiting barber-shops opening and doing business on Sunday is unconstitutional and void as being class legislation.¹⁴

§ 1353. **Drug stores opening.**—*Prima facie*, the selling of pepper-mint lozenges on Sunday by a druggist who deals in medicines, comes

¹⁰ P. v. Ringsted, 90 Mich. 371, 51 N. W. 519; Harmon v. S., 92 Ga. 455, 17 S. E. 666; Warwick v. S., 48 Ark. 27, 2 S. W. 253; P. v. Cox, 70 Mich. 247, 38 N. W. 235; Pierce v. S., 109 Ind. 535, 10 N. E. 302. Encouraging idleness forms no part of the offense of keeping open a tippling house on Sunday: Fant v. P., 45 Ill. 262.

¹¹ Mohrman v. S., 105 Ga. 709, 32 S. E. 143; S. v. Gelpi, 48 La. 520, 19 So. 468.

¹² Com. v. Waldman, 140 Pa. St. 89, 21 Atl. 248; Com. v. Dextra, 143 Mass. 28, 8 N. E. 756; Ungericht v. S., 119 Ind. 379, 21 N. E. 1082. But see P. v. Havnor, 149 N. Y. 195, 43 N. E. 541; S. v. Granneman, 132 Mo.

326, 33 S. W. 784; S. v. Wellott, 54 Mo. App. 310; S. v. Frederick, 45 Ark. 347, 55 Am. R. 555; Eden v. P., 161 Ill. 306, 43 N. E. 1108. See § 1352.

¹³ Craven v. S., 109 Ga. 266, 34 S. E. 561.

¹⁴ Eden v. P., 161 Ill. 309, 43 N. E. 1108; S. v. Krech, 10 Wash. 166, 38 Pac. 1001. *Contra*, Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803; P. v. Bellet, 99 Mich. 151, 57 N. W. 1094; S. v. Petit, 74 Minn. 376, 77 N. W. 225. See also P. v. Havnor, 149 N. Y. 195, 43 N. E. 541; Com. v. Waldman, 140 Pa. St. 89, 21 Atl. 248; Com. v. Dextra, 143 Mass. 28, 8 N. E. 756; Ungericht v. S., 119 Ind. 379, 21 N. E. 1082; S. v. Frede-

within the meaning of the exception to the act, even though the purchaser did not ask for it as medicine, or the seller inquire of the purchaser if he wishes it as a medicine.¹⁵ But the exception allowing drug stores to keep open on Sunday does not allow the sale of other articles than medicines, such as tobacco, cigars, soda water and the like.¹⁶

§ 1354. **Mining operations.**—Operating the pumps and fans of a coal mine on Sunday is a violation of the law. It is no defense that such work was done to prevent the mine from flooding, in the absence of proof that some other device could not have been employed without unreasonable loss of time and expense.¹⁷

§ 1355. **Selling newspapers.**—Selling newspapers on Sunday is not a work of "necessity or charity" under the statute prohibiting "worldly employment or business" on Sunday.¹⁸

§ 1356. **Conveying picnics.**—Conveying persons to a picnic on Sunday is not a work of "necessity or charity" within the meaning of the Sunday law.¹⁹ But running an excursion train on Sunday was held not to be a violation under a statute containing an exception of "necessity or charity."²⁰

§ 1357. **Hotels selling cigars.**—The sale of cigars and tobacco by hotel-keepers to their transient guests is not a violation of the Sunday law when sold on Sunday.²¹

rick, 45 Ark. 347, 55 Am. R. 555; S. v. Granneman, 132 Mo. 326, 33 S. W. 784. See "Constitutional Law."

¹⁵ Reg. v. Howarth, 33 U. C. Q. B. 537, 2 Green C. R. 76.

¹⁶ Com. v. Goldsmith, 176 Mass. 104, 57 N. E. 212; S. v. Ohmer, 34 Mo. App. 115, 11 Cr. L. Mag. 378; Com. v. Marzynski, 149 Mass. 68, 21 N. E. 228; Splane v. Com. (Pa.), 12 Atl. 431. See Com. v. Ryan, 15 Pa. Co. Ct. R. 223; P. v. Scranton, 61 Mich. 244, 28 N. W. 81. *Contra*, Todd v. S., 30 Tex. App. 667, 18 S. W. 642.

¹⁷ Shipley v. S., 61 Ark. 216, 32 S. W. 489, 33 S. W. 107. See Cleary v. S., 56 Ark. 124, 19 S. W. 313; Hennersdorf v. S., 25 Tex. App. 597,

8 S. W. 926; Nelson v. S., 25 Tex. App. 599, 8 S. W. 927.

¹⁸ Com. v. Matthews, 152 Pa. St. 166, 25 Atl. 548.

¹⁹ Dugan v. S., 125 Ind. 130, 25 N. E. 171; Dorsey v. S., 125 Ind. 600, 25 N. E. 350.

²⁰ Louisville, etc., R. Co. v. Com., 17 Ky. L. 223, 30 S. W. 878. See Sullivan v. Maine, etc., R. Co., 82 Me. 196, 19 Atl. 169; Horton v. Norwalk Tramway Co., 66 Conn. 272, 33 Atl. 914. *Contra*, Com. v. Rees, 10 Pa. Co. Ct. 545.

²¹ Wilkinson v. S., 59 Ind. 416, 26 Am. R. 84; Com. v. Moore, 145 Mass. 244, 13 N. E. 893; Mueller v. S., 76 Ind. 310, 40 Am. R. 245.

§ 1358. **Bakers, milk dealers.**—Bakers *bona fide* engaged in their business of baking on Sunday come within the statutory exception, their work being regarded as a work of necessity; and so is the selling of milk a work of necessity.²²

§ 1359. **Feed farm stock.**—Hauling corn to feed hogs or other farm animals on Sunday is a work of necessity and not a violation of the Sunday law. Horses, hogs, cows and other domestic or farm animals must of necessity be fed on Sunday.²³

§ 1360. **Harvesting grain; preserving melons.**—The defendant's wheat was "dead ripe" and a rain upon it would have seriously injured it. Cutting it on Sunday in that condition was clearly a work of necessity and not an offense.²⁴ Under a statute forbidding persons to engage at common labor or in their usual vocations on the first day of the week, commonly called Sunday (works of charity and necessity only excepted), one engaged in raising watermelons for the market may work on that day when necessary to preserve the fruits of his toil from waste and decay, without incurring the penalty of the law.²⁵

§ 1361. **Labor disturbing peace.**—The statute of Illinois provides that "whoever disturbs the peace and good order of society by labor, amusement or diversion on Sunday, shall be fined." No offense is committed under this statute unless the labor is of a character to disturb the peace and good order of society.²⁶

§ 1362. **Religious belief.**—It is no defense to a charge of violating the Sunday law that the defendant conscientiously believes in observing, and does observe, the seventh day, instead of the first day of the week, as Sunday.²⁷

ARTICLE III. INDICTMENT.

§ 1363. **To whom goods sold.**—An information alleging that the defendant unlawfully followed "his usual avocation on Sunday, to

²² Com. v. Crowley, 145 Mass. 430, 14 N. E. 459; City of Topeka v. Hempstead, 58 Kan. 328, 49 Pac. 87.

²³ Edgerton v. S., 67 Ind. 588.

²⁴ Turner v. S., 67 Ind. 595; S. v. Goff, 20 Ark. 289; Johnson v. P., 42 Ill. App. 594.

²⁵ Wilkinson v. S., 59 Ind. 416, 2 Am. C. R. 596, 26 Am. R. 84.

²⁶ Foll v. P., 66 Ill. App. 405. See Johnson v. P., 42 Ill. App. 549.

²⁷ Parker v. S., 16 Lea (Tenn.) 476, 1 S. W. 202; Liberman v. S., 26 Neb. 464, 42 N. W. 419.

wit: selling and delivering merchandise to sundry persons and waiting on customers," sufficiently charges an offense, without stating to whom sold or the kind of merchandise.²⁸

§ 1364. Exceptions in statute.—Under the statute of Massachusetts prohibiting certain kinds of work on Sunday, in drawing an indictment or complaint it is not necessary to negative the exceptions contained in the statute.²⁹

§ 1365. Keeping open for sports.—Under a statute providing against the keeping open any place on Sunday "in which any sports or games of chance are at any time carried on or allowed," a complaint alleging that the defendant kept open on Sunday a place in which certain sports known as billiards are carried on sufficiently charges an offense under the statute.³⁰

§ 1366. Indictment sufficient—Base-ball.—Charging in an information that the defendant, on a day named, commonly called Sunday, unlawfully engaged in playing a game of base-ball where an admittance fee was charged and was paid by the spectators, sufficiently states an offense as defined by a statute prohibiting persons from playing base-ball on Sunday, where a fee is charged.³¹

§ 1367. Date alleged not Sunday.—An indictment alleging that the offense was committed on June 20, 1883, the same being the first day of the week, commonly called Sunday, whereas in fact the said June 20 was Wednesday, is not defective; stating the wrong day is immaterial.³²

§ 1368. Information sufficient—Selling liquor.—An information alleging that the defendant sold drinks of whiskey on Sunday, he "being then and there a liquor dealer," is sufficient, under the Sunday law prohibiting any "dealer in merchandise" from bartering or selling

²⁸ S. v. Saurbaugh, 122 Ind. 208, 23 N. E. 720; S. v. Meyer, 1 Speer (S. C.) 305.

²⁹ Com. v. De Voe, 159 Mass. 101, 34 N. E. 85; Com. v. Shannihan, 145 Mass. 99. See Cleary v. S., 56 Ark. 124, 19 S. W. 313.

³⁰ S. v. Miller, 68 Conn. 373, 36 Atl. 795.

³¹ S. v. Hogleiver, 152 Ind. 652, 53 N. E. 921, 45 L. R. A. 504.

³² Roy v. S., 91 Ind. 417; S. v. Drake, 64 N. C. 589; 1 Bish. Cr. Proc. (3d ed.), § 399; Whar. Cr. Pl. & Pr. (8th ed.), § 121.

goods or merchandise on Sunday; and it need not allege that the defendant was a "retail liquor dealer" or "trader in lawful business."³³

ARTICLE IV. EVIDENCE.

§ 1369. **Tippling house—Evidence of any Sunday.**—In the proof of keeping open a tippling house on the Sabbath day, the prosecution is not confined to the Sunday mentioned in the indictment, but may give evidence of any Sunday within the statute of limitations.³⁴

§ 1370. **Burden of proof.**—The burden is on the defendant to show that the operating of a pump and fan on Sunday in a mine to prevent overflow of water and gas was a work of "necessity."³⁵

§ 1371. **Other sales.**—On a charge of selling goods on Sunday, evidence of other sales to other persons than that charged in the indictment is admissible.³⁶

§ 1372. **Jurisdiction—State or city.**—The state does not surrender its jurisdiction over the offense of keeping open a tippling house on the Sabbath day, by conferring jurisdiction of such offenses on the city authorities, unless exclusive jurisdiction was given the city.³⁷

³³ Day v. S., 21 Tex. App. 213, 17 S. W. 262.

³⁴ Koop v. P., 47 Ill. 330; Robinson v. S., 38 Ark. 548, 4 Am. C. R. 571; Lucas v. S., 92 Ga. 454, 17 S. E. 668. See Frasier v. S., 5 Mo. 536; S. v. Eskridge, 1 Swan (Tenn.) 413.

³⁵ Shipley v. S., 61 Ark. 216, 32 S. W. 489, 33 S. W. 107; Com. v. Gillespie, 146 Pa. St. 546, 10 Pa. Co. Ct. 89, 23 Atl. 393.

³⁶ Clements v. S. (Tex. Cr.), 34 S. W. 111; Brown v. S., 38 Tex. Cr. 597, 44 S. W. 176.

³⁷ Seibold v. P., 86 Ill. 34.

CHAPTER XXXII.

INTOXICATING LIQUORS.

ART. I.	Definition and Elements,	§§ 1373-1385
II.	Persons Liable,	§§ 1386-1397
III.	Matters of Defense,	§§ 1398-1412
IV.	Power to Regulate Sale,	§§ 1413-1429
V.	Indictments,	§§ 1430-1446
VI.	Evidence; Variance,	§§ 1447-1476
VII.	Jurisdiction; Venue,	§§ 1477-1480

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1373. **Statutory definition.**—The statute of Illinois is as follows: "Whoever not having a license to keep a dram-shop, shall, by himself or another, either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity, to be drunk upon the premises, or in or upon any adjacent room, building, yard, premises, or place of public resort," shall be fined or imprisoned, or both.¹

§ 1374. **What is included.**—The words "intoxicating liquors" include a larger class of cases than "spirituous liquors." All spirituous liquors are intoxicating, but all intoxicating liquors are not spirituous. Fermented liquors are not, in common parlance, spirituous liquors.²

§ 1375. **Whiskey, beer, ale, cider, wine.**—No proof is required to show that whiskey, wine, brandy, lager beer and the like are intoxicat-

¹ Ill. Stat., ch. 413, § 2.

² S. v. Adams, 51 N. H. 568; Com. v. Herrick, 6 Cush. (Mass.) 465; Com. v. Livermore, 4 Gray (Mass.) 18, 20; S. v. Moore, 5 Blackf. (Ind.)

118; Smith v. S., 19 Conn. 493; Allred v. S., 89 Ala. 112, 8 So. 56; Weisbrodt v. S., 50 Ohio St. 192, 33 N. E. 603; Bell v. S., 91 Ga. 227, 18 S. E. 288; 2 McClain Cr. L., § 1221.

ing. The court will take judicial notice that they are intoxicating.³ But other articles, such as rice-beer and cider, are not so regarded; they must be shown to be intoxicating.⁴ Ale and cider are included in the term "intoxicating liquors," if they produce intoxication when used as a beverage. But whether they are intoxicating or not is a question of fact for the jury, and not a question of law.⁵ If the proof shows that the liquor sold was "lager beer," that is sufficient, without further proof, that it is an intoxicating liquor.⁶ If the evidence proves that "beer" was sold by the accused, that is sufficient on a charge of selling intoxicating liquors unlawfully.⁷

§ 1376. **Name of liquor immaterial.**—It matters not by what name the liquor is called. The unlawful sale by any name is sufficient to sustain a conviction; selling beer under the name of "pop," or whiskey by the name of "bitters," and the like, is a violation.⁸

§ 1377. **Selling as medicine.**—One authorized to sell medicine ought not to be held guilty of violating the laws relating to retailing because the purchaser of a medicine containing alcohol misuses it and becomes intoxicated; but, on the other hand, these laws can not be evaded by selling as a beverage intoxicating liquors containing drugs, barks, or seeds which have medical qualities.⁹

§ 1378. **Drinking on premises—Street.**—The street or alley adjacent to the place of sales, where persons are in the habit of meeting to drink beer, comes within the meaning of "place of public re-

³ S. v. Tisdale, 54 Minn. 105, 55 N. W. 903; Briffitt v. S., 58 Wis. 39, 16 N. W. 39; Freiberg v. S., 94 Ala. 91, 10 So. 703; Fenton v. S., 100 Ind. 598; S. v. Packer, 80 N. C. 439; Maddox v. S. (Tex. Cr.), 55 S. W. 832.

⁴ Bell v. S., 91 Ga. 227, 18 S. E. 288; 2 McClain Cr. L., § 1221; S. v. Biddle, 54 N. H. 379; S. v. Giersch, 98 N. C. 720, 4 S. E. 193; S. v. Colwell, 3 R. I. 284; Hewitt v. P., 87 Ill. App. 367, 186 Ill. 336, 57 N. E. 1077 (farmer selling cider).

⁵ Hertel v. P., 78 Ill. App. 109; S. v. Biddle, 54 N. H. 379; 1 Am. C. R. 490; Lunenberger v. S., 74 Miss. 379, 21 So. 134; Hewitt v. P., 186 Ill. 336, 57 N. E. 1077; S. v. Starr, 67 Me. 242, 2 Am. C. R. 391; Com. v. Bloss, 116 Mass. 56. See Gregory v. S., 110 Iowa 624, 82 N. W. 335.

⁶ Bandalow v. P., 90 Ill. 218; Godfreidson v. P., 88 Ill. 286; S. v. Goyette, 11 R. I. 592, 3 Am. C. R. 282; Hansberg v. P., 120 Ill. 21, 8 N. E. 857. *Contra*, Briffitt v. S., 58 Wis. 39, 16 N. W. 39; S. v. Cloughly, 73 Iowa 626, 35 N. W. 652; S. v. May, 52 Kan. 53, 34 Pac. 407; Welsh v. S., 126 Ind. 71, 25 N. E. 883.

⁷ S. v. Currie, 8 N. D. 545, 80 N. W. 475; S. v. Jenkins, 32 Kan. 477, 4 Pac. 809. *Contra*, Hansberg v. P., 120 Ill. 23, 8 N. E. 857.

⁸ Godfriedson v. P., 88 Ill. 286; S. v. Hickman, 54 Kan. 225, 38 Pac. 256. See Malone v. S. (Tex. Cr.), 51 S. W. 381.

⁹ Carl v. S., 87 Ala. 17, 6 So. 118, 8 Am. C. R. 407; King v. S., 58 Miss. 737; Chapman v. S., 100 Ga. 311, 27 S. E. 789.

sort.”¹⁰ If sales of intoxicating liquor be made “to be drunk on the premises” where sold, it is a violation, although the liquors be not actually drunk on the premises; the intent is the gist of the offense.¹¹ A druggist obtained a license to sell intoxicating liquors, which provided that he should not sell to be drunk on the premises where sold. Such license is no defense if he sells to be drunk on the premises where sold.¹²

§ 1379. Continuing offense—Time.—Where the offense of being a common seller is set out in the indictment, with a *continuendo*, time is material, and the evidence must be confined to the acts which occurred within the days alleged.¹³

§ 1380. Shift or other evasion.—A boy went to a saloon and called for some whiskey and the accused said he could not let him have it. The boy afterwards went to a barn which was near the saloon, where he found a half-pint bottle of whiskey on a rock. He took it and left twenty-five cents in its place. The circumstances were sufficient to prove this to be a mere shift to evade the law, and it was held to be a violation.¹⁴ A witness testified that he had purchased cigarettes from the accused and was given a drink of whiskey; that he was invited in another room and took the drink of whiskey and came out; that he never bought any whiskey from the accused. He further testified, on being pressed to answer, that the actions of others at accused's place of business induced him to think that he could get whiskey if he bought cigarettes, as they had done, and gotten whiskey. It was a fact for the jury to determine whether the accused was guilty of unlawfully selling whiskey to the witness, and the mere declaration of the witness that he did not buy it was not conclusive that a sale of whiskey was not made.¹⁵

§ 1381. Shift, by giving away.—The defendant offered to prove that during the month of May, before the finding of the indictment, witnesses had bought from him various articles in which he dealt,

¹⁰ Bandalow v. P., 90 Ill. 220. See Eisenman v. S., 49 Ind. 511, 1 Am. C. R. 483; 2 McClain Cr. L., § 1247; Whaley v. S., 87 Ala. 83, 6 So. 380.

¹¹ Com. v. Luddy, 143 Mass. 563, 10 N. E. 448; Rater v. S., 49 Ind. 507.

¹² Spake v. P., 89 Ill. 620.

¹³ S. v. Small, 80 Me. 452, 14 Atl. 942; S. v. Ingalls, 59 N. H. 88; 2 McClain Cr. L., § 1244.

¹⁴ Stultz v. S., 96 Ind. 456.

¹⁵ Archer v. S., 45 Md. 33, 2 Am. C. R. 406.

such as tobacco, cigars and snuff, paying full value and receiving full value in return, and upon these occasions they were invited by the defendant to take a drink with him; that others, when settling bills, were so invited; that this custom extended over a period of several years; that a doctor attempted to purchase whiskey from him about the time he was charged with making unlawful sales and that he refused to sell to him at any price; that he also refused to sell to other persons. Held not competent as a defense, the evidence showing that the defendant resorted to a shift to evade the law, by selling cigarettes at ten cents and giving the purchaser a drink of whiskey.¹⁶

§ 1382. Disorderly house—One sale sufficient.—Under a statute which provides that if any person shall sell any of the liquors mentioned, including lager beer, without a license, such person shall be held as a keeper of a disorderly house, a single sale of such liquors without a license constitutes an offense.¹⁷

§ 1383. Sales to minor, intent.—A sale of intoxicating liquor made to a minor without authority is an illegal sale, although the seller does not know or believe him to be a minor.¹⁸ Any and all persons having or not having a license to keep a dram-shop can not lawfully sell intoxicating liquors to minors, without the written order of the parent or guardian of the minor.¹⁹

§ 1384. Furnishing to minor.—One who furnishes intoxicating liquors to a minor or to a person who is in the habit of getting intoxicated violates the law, whether he is engaged in the business of selling such liquors or not.²⁰ The mother sent her minor child with money to a saloon to buy intoxicating liquor for the mother's use, which was sold to the minor by the keeper of the saloon, and the child delivered the liquor to her mother. Held not a sale to the minor within the meaning of the statute.²¹

¹⁶ *Archer v. S.*, 45 Md. 33, 2 Am. R. 407; *Com. v. Shayer*, 8 Metc. (Mass.) 525.

¹⁷ *S. v. Fay*, 44 N. J. L. 474, 4 Am. R. 30; *Abel v. S.*, 90 Ala. 631, 8 S. W. 760; *Com. v. Tay*, 146 Mass. 6, 15 N. E. 503. But see *S. v. Drorff*, 64 N. J. L. 412, 45 Atl. 786.

¹⁸ *Com. v. Hays*, 150 Mass. 506, 23 E. 216; *Com. v. Julius*, 143 Mass. 2, 8 N. E. 898; *Com. v. Murray*, 13 Mass. 508; *Fielding v. La*

Grange, 104 Iowa 530, 73 N. W. 1038. See *Fielding v. S.* (Tex. Cr.), 52 S. W. 69.

¹⁹ *Johnson v. P.*, 83 Ill. 434.

²⁰ *S. v. Best*, 108 N. C. 747, 12 S. E. 907; *Burnett v. S.*, 92 Ga. 474, 17 S. E. 858; *S. v. Hubbard*, 60 Iowa 466, 15 N. W. 287; *Foster v. S.*, 45 Ark. 361.

²¹ *Com. v. Lattinville*, 120 Mass. 385; *Wallace v. S.*, 54 Ark. 542, 16 S. W. 571; *S. v. Walker*, 103 N. C.

§ 1385. **Sales on election day.**—The law forbidding the sale of intoxicating liquors on election day is not confined to the time from the opening to the closing of the polls of the election, but includes the twenty-four hours of that day.²² The giving away of intoxicating liquors on election day, though only as an act of hospitality, is a violation.²³

ARTICLE II. PERSONS LIABLE.

§ 1386. **Principal liable for clerk's acts.**—The principal is liable for unlawful sales made by his clerk, agent or servant, although such sales were made without his knowledge, and in violation of his instructions.²⁴

§ 1387. **Principal liable with clerk.**—Every sale of intoxicating liquor by an agent is a sale by the principal, and is also a sale by the agent, making both liable. This will include the wife of the accused who sells for him.²⁵ It is not necessary to prove that the clerk had no license to sell intoxicating liquors, in order to hold his principal liable for such sales.²⁶

§ 1388. **Principal, when not liable.**—The clerk of the defendant made a sale of intoxicating liquor to an habitual drunkard at the defendant's saloon, when the defendant was not present. It can not be

413, 9 S. E. 582. *Contra*, P. v. Garrett, 68 Mich. 487, 36 N. W. 234, 8 Am. C. R. 399.

²² Com. v. Murphy, 95 Ky. 38, 23 S. W. 655; Kane v. Com., 89 Pa. St. 522; Schuck v. S., 50 Ohio St. 493, 34 N. E. 663; 2 McClain Cr. L., § 1265; Rose v. S., 107 Ga. 697, 33 S. E. 439.

²³ Cearfoss v. S., 42 Md. 403, 1 Am. C. R. 461.

²⁴ Mullinix v. P., 76 Ill. 213; McCutcheon v. P., 69 Ill. 608; Banks v. City of Sullivan, 78 Ill. App. 298; P. v. Longwell, 120 Mich. 311, 79 N. W. 484; S. v. Curtiss, 69 Conn. 86, 36 Atl. 1014; S. v. Dow, 21 Vt. 484; Schmidt v. S., 14 Mo. 137; S. v. Kittelle, 110 N. C. 560, 15 S. E. 103; Mogler v. S., 47 Ark. 110, 14 S. W. 473; P. v. Blake, 52 Mich. 566, 18 N. W. 360; Noecker v. P., 91 Ill. 494; Carroll v. S., 63 Md. 551, 3 Atl. 29; Fahey v. S., 62 Miss. 402; Loeb v.

S., 75 Ga. 258. *Contra*, Lathrope v. S., 51 Ind. 192, 1 Am. C. R. 468; S. v. Hayes, 67 Iowa 27, 24 N. W. 575, 6 Am. C. R. 337; S. v. Priestler, 43 Minn. 373, 45 N. W. 712; P. v. Hughes, 86 Mich. 180, 48 N. W. 945; Anderson v. S., 22 Ohio St. 305; S. v. Findley, 45 Iowa 435; Johnson v. S., 83 Ga. 553, 10 S. E. 207; S. v. Mahoney, 23 Minn. 181.

²⁵ S. v. Haines, 35 N. H. 207-209; Rex v. Crofts, 2 Strange 1120; Com. v. Sinclair, 138 Mass. 493; S. v. Kriechbaum, 81 Iowa 633, 47 N. W. 872; P. v. Barnes, 113 Mich. 213, 71 N. W. 504; S. v. O'Connor, 65 Mo. App. 324.

²⁶ S. v. Skinner, 34 Kan. 256, 8 Pac. 420, 6 Am. C. R. 307; S. v. Denoon, 31 W. Va. 122, 5 S. E. 315; Carroll v. S., 63 Md. 551, 3 Atl. 29; S. v. Kittelle, 110 N. C. 560, 15 S. E. 103.

presumed from a single unlawful sale that the clerk was authorized by his principal to thus violate the law; the presumption would be that the clerk was authorized to make none but lawful sales.²⁷

§ 1389. Sales by wife.—The wife sold whiskey in the absence of her husband, and there was no evidence to show that her husband authorized her to sell. Held insufficient to sustain a conviction of the husband. The wife alone would be responsible.²⁸ But for the acts of the wife, done in the presence of her husband, he is presumed to be liable.²⁹

§ 1390. Partners liable for sales by each other.—The unlawful sale of intoxicating liquor by one partner of a firm will make the other liable, though the latter be absent when such sale is made, and had no knowledge of and did not give his consent to such sale.³⁰

§ 1391. Clerk or manager liable.—A clerk selling intoxicating liquors for his employer, who has no license, is liable, whether he knew or did not know that his employer had no license.³¹ The superintendent or general manager of the place where liquors are sold is liable, as well as the principal, where he has supervision.³²

§ 1392. Aiding and abetting.—A person employed at making change for others who were selling beer was acting in conjunction with them, and aiding in making the sales.³³

§ 1393. Druggists and physicians liable.—Druggists and physicians are not excepted from the provisions of the law making it a criminal offense to sell intoxicating liquors without a license. They stand on the same footing with other dealers.³⁴ A statute permitting

²⁷ *S. v. Mahoney*, 23 Minn. 181, 2 Am. C. R. 408; *Parker v. S.*, 4 Ohio St. 563.

²⁸ *Pennybaker v. S.*, 2 Blackf. (Ind.) 484; *Com. v. Lafayette*, 148 Mass. 130, 19 N. E. 26.

²⁹ *Com. v. Walsh*, 165 Mass. 62, 10 Am. C. R. 337, 42 N. E. 500; *U. S. v. Bonham*, 31 Fed. 808; *S. v. Ekan-ger*, 8 N. Dak. 559, 80 N. W. 482.

³⁰ *Whitton v. S.*, 37 Miss. 379; *Sellers v. S.*, 98 Ala. 72, 13 So. 530; *Waller v. S.*, 38 Ark. 656. But see *Acree v. Com.*, 13 Bush (Ky.) 353.

³¹ *P. v. Price*, 74 Mich. 37, 41 N. W. 853.

³² *Stevens v. P.*, 67 Ill. 590; *S. v. Dow*, 21 Vt. 484; *Jacobi v. S.*, 59 Ala. 71, 3 Am. C. R. 157.

³³ *Johnson v. P.*, 83 Ill. 434; *Cruse v. Aden*, 127 Ill. 238, 20 N. E. 73; *S. v. Murdoch*, 71 Me. 454; *Com. v. Ahearn*, 160 Mass. 300, 35 N. E. 853; *Zeller v. S.*, 46 Ind. 304.

³⁴ *Wright v. P.*, 101 Ill. 137; *Barton v. S.*, 99 Ind. 89; *U. S. v. Smith*, 45 Fed. 115; *S. v. McBrayer*, 98 N. C. 619, 2 S. E. 755; *Stormes v.*

druggists to sell intoxicating liquors when the same are prescribed by an authorized physician will not warrant a druggist who is a registered physician to sell such liquors on his own prescription.³⁵ Sales of intoxicating liquors made by a practicing physician for medicine without a license or permit from the proper authorities, are violations of the dram-shop law.³⁶

§ 1394. Social clubs liable.—Persons who organize into a society or club for social enjoyment, by the election of officers and adoption of by-laws (their object being to sell tickets to persons who become members, to be punched when presented at the bar for drinks), violate the statute.³⁷ Where the evidence showed that a club was organized, and out of its common fund purchased intoxicating liquors in the name of the club for the use of its members; that such liquors were served to the members of the club by a steward, and were paid for when served, or charged to the member's account with the club, it was held to be a violation.³⁸

§ 1395. Club, when not liable.—If several persons unite in buying intoxicating liquors, by organizing themselves into a club or association, and distribute the liquor among themselves, they do not thus violate the statute, and the intent with which they do so is immaterial.³⁹ One representing his society at a picnic can not lawfully sell

Com., 20 Ky. L. 1434, 49 S. W. 451; Eastham v. Com., 20 Ky. L. 1639, 49 S. W. 795; S. v. Witty, 74 Mo. App. 550; Woods v. S., 36 Ark. 36; Carson v. S., 69 Ala. 235. See Com. v. Tate (Mass.), 59 N. E. 646.

³⁵ S. v. Anderson, 81 Mo. 78; Brinson v. S., 89 Ala. 105, 8 So. 527.

³⁶ Noecker v. P., 91 Ill. 496; Carl v. S., 87 Ala. 17, 6 So. 118, 8 Am. C. R. 406; S. v. Fleming, 32 Kan. 588, 5 Pac. 19, 5 Am. C. R. 326; Chapman v. S., 100 Ga. 311, 27 S. E. 789. *Contra*, Ball v. S., 50 Ind. 595, 1 Am. C. R. 477; S. v. Wray, 72 N. C. 253, 1 Am. C. R. 481; P. v. Hinchman, 75 Mich. 587, 42 N. W. 1006; S. v. Aulman, 76 Iowa 624, 41 N. W. 379; S. v. Huff, 76 Iowa 200, 40 N. W. 720; Nixon v. S., 76 Ind. 524; S. v. Larrimore, 19 Mo. 391.

³⁷ Rickart v. P., 79 Ill. 87, 2 Am. C. R. 385; S. v. Horacek, 41 Kan. 87, 21 Pac. 204; Town of Cantril

v. Sainer, 59 Iowa 26, 12 N. W. 753; Marmont v. S., 48 Ind. 21, 1 Am. C. R. 447; Martin v. S., 59 Ala. 34, 3 Am. C. R. 287; P. v. Andrews, 115 N. Y. 428, 22 N. E. 358; P. v. Soule, 74 Mich. 250, 41 N. W. 908; Com. v. Loesch, 153 Pa. St. 502, 26 Atl. 208; Com. v. Ryan, 152 Mass. 283, 25 N. E. 465; S. v. Bacon Club, 44 Mo. App. 86.

³⁸ Newark v. Essex Club, 53 N. J. L. 99, 20 Atl. 769; P. v. Soule, 74 Mich. 250, 41 N. W. 908; S. v. Farmers' Social, etc., Club, 73 Md. 97, 20 Atl. 783; S. v. St. Louis Club, 125 Mo. 308, 28 S. W. 604; 2 McClain Cr. L., § 1240.

³⁹ Com. v. Pomphret, 137 Mass. 564; S. v. St. Louis Club, 125 Mo. 308, 28 S. W. 604; Seim v. S., 55 Md. 566, 39 Am. R. 419; P. v. Adelphi Club, 149 N. Y. 5, 43 N. E. 410. *Contra*, S. v. Shumate, 44 W. Va. 490, 29 S. E. 1001.

intoxicating liquors to persons not members of the society. He must know who are entitled to buy.⁴⁰

§ 1396. Common seller.—It has been decided that proof of three different sales would be sufficient to authorize a conviction for being a common seller.⁴¹

§ 1397. Hotel-keeper making sales.—A statute which permits hotel-keepers to serve intoxicating liquors to their guests at meals, when meals are desired and in good faith ordered, will not protect a hotel-keeper who sells such liquors where no meal is ordered.⁴²

ARTICLE III. MATTERS OF DEFENSE.

§ 1398. Knowledge, intent immaterial.—The statute makes the sale to a person in the habit of getting intoxicated a crime, no matter whether the accused knew of such habit or not, or that the liquor was or was not intoxicating; and also the same rule governs as to sales to minors.⁴³ Guilty knowledge is not an essential element of the offense of unlawfully selling intoxicating liquors; and whoever has a license, whether he conducts the business personally, or by servants, is bound at his own peril to know the law and keep within its terms.⁴⁴

§ 1399. Purchasing for others: contributing; aiding.—One who purchases intoxicating liquors for another (unless for a minor or a person in the habit of getting intoxicated) and receives back only the amount of money he paid for the liquor commits no offense: he is merely the agent for the actual purchaser.⁴⁵ Where several persons to-

⁴⁰ *Com. v. Loesch*, 153 Pa. St. 502, 26 Atl. 208.

⁴¹ *S. v. Day*, 37 Me. 244, citing *Com. v. Odlin*, 23 Pick. (Mass.) 275.

⁴² *In re Kinzel*, 59 N. Y. Supp. 682, 28 Misc. 622.

⁴³ *Humpeler v. P.*, 92 Ill. 402; *Farmer v. P.*, 77 Ill. 324; *Ulrich v. Com.*, 6 Bush (Ky.) 400; *S. v. Hartfiel*, 24 Wis. 60; *Barnes v. S.*, 19 Conn. 398; *S. v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 6 Am. C. R. 328; *Pike v. S.*, 40 Tex. Cr. 613, 51 S. W. 395; *King v. S.*, 66 Miss. 502, 6 So. 188; *S. v. Ward*, 75 Iowa 637, 36 N. W. 765; *Com. v.*

Gould, 158 Mass. 499, 33 N. E. 656; *Com. v. Zelt*, 138 Pa. St. 615, 21 Atl. 7. *Contra*, *Hunter v. S.*, 101 Ind. 243, 5 Am. C. R. 338; *Moore v. S.*, 65 Ind. 382; *Falko v. P.*, 30 Mich. 200; *P. v. Garrett*, 68 Mich. 487, 36 N. W. 234, 8 Am. C. R. 401; 1 McClain Cr. L., § 128; *Farrell v. S.*, 32 Ohio St. 456.

⁴⁴ *Com. v. Sinclair*, 138 Mass. 493; *S. v. Downs*, 116 N. C. 1064, 21 S. E. 689; *McMillan v. S.*, 18 Tex. App. 375; *S. v. Chastain*, 19 Or. 176, 23 Pac. 963; *Com. v. Holstine*, 132 Pa. St. 357, 19 Atl. 273.

⁴⁵ *Du Bois v. S.*, 87 Ala. 101, 6 So.

gether make up a sum of money to purchase intoxicating liquors for their use, and one of them procures it with the money so contributed, he does not violate the law.⁴⁶ The person who purchases intoxicating liquors is not guilty of aiding or abetting in the sale of such liquors.⁴⁷

§ 1400. Prosecution urging violations—Permit unauthorized.—

Where a representative of a city, as, for instance, the city attorney, furnishes money and gives instructions to persons to purchase intoxicating liquors from a druggist not having a permit to sell such liquors, for the purpose of prosecuting him, the city can not recover a penalty for such violations.⁴⁸ A city or village will not be allowed to collect a penalty from one for selling liquors unlawfully, by insisting that a "permit" which the city or village had issued was not sufficient to authorize the defendant to sell liquors.⁴⁹

§ 1401. Giving, treating.—The giving of a glass of intoxicating liquor at one's own house or elsewhere to a friend, as a mere act of courtesy or hospitality, without a purpose of gain or profit, is not a violation of the dram-shop law.⁵⁰

§ 1402. Sale, to whom of several.—Where two or more persons drink together at a bar, one of them paying for the liquor, this is a sale to the person only who calls for the liquor. He merely "treats" the others in the transaction.⁵¹

§ 1403. Sale—Delivery of part.—If a sale of one gallon of intoxicating liquors be made, and the purchaser takes only a part of the gallon away at the time of making the purchase, leaving the residue in

381; *Morgan v. S.*, 81 Ala. 72, 1 So. 472; *Reed v. S.* (Tex. Cr.), 44 S. W. 1093; *Armstrong v. S.* (Tex. Cr.), 47 S. W. 981; *S. v. Thompas*, 13 W. Va. 848; *S. v. Taylor*, 89 N. C. 577; *Johnson v. S.*, 63 Miss. 228; *Skidmore v. Com.* (Ky.), 57 S. W. 468; *Vincent v. S.* (Tex. Cr.), 55 S. W. 819 (for minor).

⁴⁶ *Hogg v. P.*, 15 Ill. App. 238; *Jones v. S.*, 100 Ga. 579, 28 S. E. 396; *Evans v. S.*, 101 Ga. 780, 29 S. E. 40; *Graff v. Evans*, 8 Q. B. D. 373. But see *Hunter v. S.*, 60 Ark. 312, 30 S. W. 42.

⁴⁷ *S. v. Cullins*, 53 Kan. 100, 36 Pac. 56; *Wakeman v. Chambers*, 69 Iowa 169, 28 N. W. 498; *Anderson v. S.*, 32 Fla. 242, 13 So. 435; *S. v. Rand*, 51 N. H. 361; *Com. v. Willard*,

22 Pick. (Mass.) 476; 1 Bish. Cr. L., § 657; *Black Intox. Liquors*, § 381.

⁴⁸ *P. v. Braisted*, 13 Colo. App. 532, 58 Pac. 796; *Walton v. Canon City*, 14 Colo. App. 352, 59 Pac. 840.

⁴⁹ *Village of Genoa v. Van Alstine*, 108 Ill. 558.

⁵⁰ *Cruse v. Aden*, 127 Ill. 238, 20 N. E. 73; *Albrecht v. P.*, 78 Ill. 513; *S. v. Ball*, 27 Neb. 601, 43 N. W. 398; *Reynolds v. S.*, 73 Ala. 3; *S. v. Jones*, 39 Vt. 370.

⁵¹ *Siegel v. P.*, 106 Ill. 97; *S. v. Peo*, 1 Pen. (Del.) 525, 42 Atl. 622. *Contra*, *Page v. S.*, 84 Ala. 446, 4 So. 697, 7 Am. C. R. 297; *Hunter v. S.*, 101 Ind. 241; *S. v. Hubbard*, 60 Iowa 466, 15 N. W. 287.

the possession of the vendor and not separated from the bulk in the barrel from which the part delivered was taken, this is a sale only of the part so delivered, and is a violation by selling less than one gallon.⁵² But it would not be a violation if the whole gallon so purchased is separated from the bulk in barrel and only a part of the gallon delivered.⁵³

§ 1404. Ownership not material.—On a charge of unlawfully selling intoxicating liquors, the fact that the defendant did not own the liquor and had no authority to sell it, can be no defense.⁵⁴

§ 1405. Lessor of premises not liable.—Under a statute which punishes one who authorizes or permits premises to be used for the sale of intoxicating liquors, the lessor of the premises is not guilty if he rented the premises for a lawful purpose, not knowing they were to be used for the unlawful sale of intoxicating liquors, although he afterwards knew that they were so used, and took no steps to prevent their continued use for that purpose. The lessor would not be criminally liable, unless it be shown that after he became aware of the illegal use of the premises by the lessee, he did some act, or made some declaration affirmatively assenting thereto.⁵⁵

§ 1406. One general indictment bars others.—A trial and acquittal on one indictment charging the unlawful sale of intoxicating liquors is a bar to a second indictment, returned by the same grand jury, the indictments being alike and general, that is, without alleging any particular person to whom such liquors were sold.⁵⁶ The accused was tried and acquitted on a charge of illegal sales of intoxicating liquors, during the period of time from January 1, 1878, to May 1, 1878. This is a bar to any other charges during the period of time from January 1, 1878, to August 20, 1878. The complaint charged the defendant with keeping a tenement used for the illegal sale of intoxicating liquors during the period of time mentioned.⁵⁷

⁵² Thomas v. S., 37 Miss. 353; Armstrong v. S. (Tex. Cr.), 47 S. W. 1006; Richardson v. Com., 76 Va. 1007, 4 Am. C. R. 481; S. v. Poteet, 86 N. C. 612; P. v. Luders (Mich.), 85 N. W. 1081; Mahan v. Com., 21 Ky. L. 1807, 56 S. W. 529.

⁵³ Dobson v. S., 57 Ind. 69.

⁵⁴ Taylor v. S., 121 Ala. 39, 25 So. 701.

⁵⁵ S. v. Ballingall, 42 Iowa 87, 2 Am. C. R. 376; S. v. Stafford, 67 Me. 125.

⁵⁶ Craig v. S., 108 Ga. 776, 33 S. E. 653.

⁵⁷ Com. v. Robinson, 126 Mass. 259, 3 Am. C. R. 144; McWilliams v. S., 110 Ga. 290, 34 S. E. 1016.

§ 1407. **Same evidence proves two offenses.**—The same evidence used on a charge of keeping a nuisance by the unlawful sale of intoxicating liquors may be used on another charge of "keeping such liquors with intent to sell," they being different offenses.⁵⁸

§ 1408. **License, good from date.**—A license will afford no protection for sales made before its issue, and dating a license back at the time of its issue will not legalize the sales made before its issue.⁵⁹

§ 1409. **License not transferable; one place only.**—A license issued to one person to sell intoxicating liquors at a certain place affords no protection to another person who has purchased such place and sold intoxicating liquors there.⁶⁰ Nor will a license authorizing the sale at one place named protect a person in making sales at another place, though but a short distance between the two places.⁶¹

§ 1410. **License protects one purchasing partner's interest.**—Where a firm consisting of two partners have paid the special tax or license, and one of the firm afterwards purchases the interest belonging to the other, the one who becomes the sole owner may carry on the business at the same place for the balance of the term on the same license.⁶²

§ 1411. **License, lawful or unlawful; oral.**—The fact that a party has an unexpired license to keep a dram-shop when he takes out a new one can not affect the validity of the new one.⁶³ An oral permit to druggists by the village authorities, to sell for medicine, is sufficient where the ordinance does not contemplate a written permit, the druggist complying with the ordinance.⁶⁴ A license issued for a less sum than required by the statute is void, and can be no defense to a prose-

⁵⁸ *Com. v. McShane*, 110 Mass. 502, 2 Green C. R. 280; *Com. v. McCabe*, 163 Mass. 98, 39 N. E. 777; *S. v. Graham*, 73 Iowa 553, 35 N. W. 628; *S. v. Wheeler*, 62 Vt. 439, 20 Atl. 601; *Blair v. S.*, 81 Ga. 629, 7 S. E. 855; *S. v. Maher*, 35 Me. 225; *Arrington v. Com.*, 87 Va. 96, 12 S. E. 224, 10 Am. C. R. 242.

⁵⁹ *S. v. Lipscomb*, 52 Mo. 32, 1 Green C. R. 291; *Com. v. Welch*, 144 Mass. 356, 11 N. E. 423; *S. v. Hughes*, 24 Mo. 147; *Dudley v. S.*, 91 Ind. 312; *Wilson v. S.*, 35 Ark.

414; *Reese v. Atlanta*, 63 Ga. 344; *Bolduc v. Randall*, 107 Mass. 121.

⁶⁰ *Heath v. S.*, 105 Ind. 342, 4 N. E. 901, 6 Am. C. R. 331; *S. v. Lydick*, 11 Neb. 366, 9 N. W. 560.

⁶¹ *Com. v. Holland*, 20 Ky. L. 581, 47 S. W. 216; *Com. v. Asbury*, 20 Ky. L. 574, 47 S. W. 217.

⁶² *U. S. v. Glab*, 99 U. S. 225. *Contra*, *S. v. Zermuehlen*, 110 Iowa 1, 81 N. W. 154.

⁶³ *Swarth v. P.*, 109 Ill. 622.

⁶⁴ *Moore v. P.*, 109 Ill. 500.

cution under the statute.⁶⁵ The defendants filed their bond and paid the required amount for a license, strictly complying with the ordinance, but the village clerk neglected to issue the license. On an indictment, held sufficient defense.⁶⁶

§ 1412. Strict construction of statute.—The dram-shop act of Illinois is a statute of a highly penal character, and should receive a strict construction.⁶⁷

ARTICLE IV. POWER TO REGULATE SALES.

§ 1413. Granting and refusing license.—The city authorities can not arbitrarily refuse, without any excuse, to grant a license to sell intoxicating liquors to an applicant who, in every respect, is a suitable person to be licensed. They may perhaps limit the number of such licenses, but this must be done, if at all, by ordinance.⁶⁸ A license to sell intoxicating liquors may be granted or refused at the discretion of the person or persons authorized to issue licenses, where the statute so provides, and from whose decision there is no appeal.⁶⁹

§ 1414. City regulating by license.—Where the charter of a town gives the corporate authorities "complete and exclusive control over the selling of intoxicating liquors," this includes the right to license, as a reasonable and usual mode of controlling the sale of such liquors.⁷⁰

§ 1415. License is not property.—A license to sell intoxicating liquors is neither property nor a contract, within the meaning of the constitutional provisions. It is at all times subject to the police power, and may, for good cause, be revoked.⁷¹

⁶⁵ Spake v. P., 89 Ill. 621.

⁶⁶ Prather v. P., 85 Ill. 36. See Stormes v. Com., 20 Ky. L. 1434, 49 S. W. 451. *Contra*, Houser v. S., 18 Ind. 106; Wiles v. S., 33 Ind. 206; Com. v. Spring, 19 Pick. (Mass.) 396; S. v. Bach, 36 Minn. 234, 30 N. W. 764.

⁶⁷ Cruse v. Aden, 127 Ill. 239, 20 N. E. 73; Albrecht v. P., 78 Ill. 511; Brantigan v. White, 73 Ill. 562.

⁶⁸ Zanone v. Mound City, 103 Ill. 552; Prospect Brewing Co.'s Petition, 127 Pa. St. 523, 17 Atl. 1090; Sparrow's Petition, 138 Pa. St. 116, 20 Atl. 711; Papworth v. Goodnow, 104 Ga. 653, 30 S. E. 872.

⁶⁹ Toole's Appeal, 9 Pa. St. 376; Pierce v. Com., 10 Bush (Ky.) 6. See Berg's Petition, 139 Pa. St. 354, 21 Atl. 77; Hein v. Smith, 13 W. Va. 358. See P. v. Town of Thornton, 186 Ill. 162, 57 N. E. 841 (who authorized to issue license).

⁷⁰ Martin v. P., 88 Ill. 393. See Copeland v. Town of Sheridan, 152 Ind. 107, 51 N. E. 474.

⁷¹ McCoy v. Clark, 104 Iowa 491, 73 N. W. 1050; Hevren v. Reed, 126 Cal. 219, 58 Pac. 536. *Contra*, Matter of Lyman, 160 N. Y. 96, 54 N. E. 577; Frank v. Forgetston, 61 N. Y. Supp. 1118.

§ 1416. **Municipal power limited.**—The power given to municipal corporations to grant licenses to retailers of liquors, and to regulate the sale thereof, does not confer power to prohibit, either directly or by a prohibitory charge for a license.⁷² A statute authorizing a city council to license, regulate and prohibit the selling of intoxicating, malt, or fermented liquors, does not give the city authority to pass an ordinance prohibiting the sale of such liquors by merchants engaged in the dry goods, clothing, or other like business, such ordinance not being a proper exercise of the police power for the protection of the public from injurious effects arising from the sale of such liquors.⁷³

§ 1417. **Municipal control, near churches, schools.**—The legislature has the power to delegate to the municipal authorities the power to regulate, license or prohibit the sale of liquors, not only within the territory included within the limits of the towns, but also within certain distances beyond the outer boundaries thereof.⁷⁴ The legislature has constitutional power to prohibit the sale of liquors within a reasonable distance of schools, churches, colleges and polls of elections.⁷⁵

§ 1418. **Violating ordinance and statute.**—The fact that a city, under its charter, has passed an ordinance regulating or prohibiting the sale, is no bar to a prosecution under the statute.⁷⁶ The dealer in intoxicating liquors must comply with both the state law and city ordinances.⁷⁷

§ 1419. **Legislative power.**—Irrespective of the operation of the federal constitution and restrictions asserted to be inherent in the

⁷² *Miller v. Jones*, 80 Ala. 96; *S. v. Pamperin*, 42 Minn. 320, 44 N. W. 251; *Ex parte Reynolds*, 87 Ala. 138, 6 So. 335; *Mernaugh v. City of Orlando*, 41 Fla. 433, 27 So. 34. See *S. v. Fay*, 44 N. J. L. 474, 4 Am. C. R. 302; *Jacobs Phar. Co. v. Atlanta*, 89 Fed. 244.

⁷³ *City of Chicago v. Netcher*, 183 Ill. 104, 55 N. E. 707, 48 L. R. A. 261.

⁷⁴ *P. v. Raims*, 20 Colo. 489, 39 Pac. 341, 10 Am. C. R. 344; *S. v. Haines*, 35 Or. 379, 58 Pac. 39; *Chicago Packing Co. v. City of Chicago*, 88 Ill. 221; *Brown v. Town of Social Circle*, 105 Ga. 834, 32 S. E. 141; *Papworth v. City of Fitzgerald*, 106 Ga.

378, 32 S. E. 363; *Jacobs Phar. Co. v. Atlanta*, 89 Fed. 244.

⁷⁵ *Dingman v. P.*, 51 Ill. 282; *License Cases*, 5 How. (U. S.) 504; *Jones v. P.*, 14 Ill. 197; *S. v. Frost*, 103 Tenn. 685, 54 S. W. 986.

⁷⁶ *Fant v. P.*, 45 Ill. 263; *Kimball v. P.*, 20 Ill. 350; *Gardner v. P.*, 20 Ill. 434; *S. v. Stevens*, 114 N. C. 873, 19 S. E. 861; *S. v. Harris*, 50 Minn. 128, 52 N. W. 387, 531; *Sloan v. S.*, 8 Blackf. (Ind.) 361; *Hill v. Dalton*, 72 Ga. 314; *Sanders v. S.*, 34 Neb. 872, 52 N. W. 721.

⁷⁷ *S. v. Sherman*, 50 Mo. 265; *City of Elk Point v. Vaughn*, 1 Dak. 113, 46 N. W. 577.

nature of American institutions, the general rule is that there are no limitations upon the legislative power of the legislature of a state, except those imposed by its written constitution.⁷⁸

§ 1420. **States, power to regulate.**—The fact that congress, under the constitution of the United States, has the exclusive right to regulate commerce among the states, does not deprive the states of the right to regulate the traffic in intoxicating liquors and prevent the unlawful use of the same.⁷⁹ The federal constitution does not restrict the states in the exercise of their police powers.⁸⁰

§ 1421. **Power to seize liquors.**—Intoxicating liquors, like any other articles or property, when kept and intended for unlawful use, fall at once under the ban of the law, and become subject to seizure and confiscation by such methods as are provided by law in conformity with the constitution; and the methods and means of their seizure and condemnation are within the police powers delegated to the legislature by the constitution.⁸¹

§ 1422. **Statute valid—Police power: ordinance.**—A statute requiring druggists to report, under oath, sales of intoxicating liquor made by them, to the attorney for the county, is not invalid under any constitutional provision. It is a proper exercise of the police power of the state and in no manner invades the rights of the citizens of the state enumerated in the constitution.⁸² An ordinance of a city requiring dram-shops or places where intoxicating liquors are sold to be closed during certain stated hours of the night is valid, and is within the authority to “regulate” the sale of such liquors.⁸³

⁷⁸ *Giozza v. Tiernan*, 148 U. S. 657, 13 S. Ct. 721; *S. v. Hodgson*, 66 Vt. 134, 28 Atl. 1089; *Plumb v. Christie*, 103 Ga. 686, 30 S. E. 759. As to the effect and results flowing from the enactment of a prohibitory law see the following cases: *Kidd v. Pearson*, 128 U. S. 1, 9 S. Ct. 6; *S. v. Barringer*, 110 N. C. 527, 14 S. E. 781; *Com. v. Brennan*, 103 Mass. 70; *Kaufman v. Dostal*, 73 Iowa 691, 36 N. W. 643; *Prohib. Amend. Cases*, 24 Kan. 700; *S. v. Fairfield*, 37 Me. 517.

⁷⁹ *S. v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 6 Am. C. R. 326; *License Cases*,

5 How. 577; *In re Boyle*, 190 Pa. St. 577, 42 Atl. 1025, 45 L. R. A. 399.

⁸⁰ *Foster v. Kansas*, 112 U. S. 201, 5 S. Ct. 8, 97. See *In re Hoover*, 30 Fed. 51; *S. v. Gray*, 61 Conn. 39, 22 Atl. 675; *S. v. Allmond*, 2 Houst. 612, 1 Green C. R. 301; *Bartemeyer v. Iowa*, 18 Wall. 129.

⁸¹ *S. v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 6 Am. C. R. 325; *Cooley Const. Lim.* (4th ed.), 714-727.

⁸² *P. v. Henwood* (Mich., 1900), 82 N. W. 70.

⁸³ *Bennett v. Town of Pulaski* (Tenn., 1899), 52 S. W. 913.

§ 1423. **Nuisance, may be enjoined.**—Under the Iowa statute, keeping a place for the purpose of selling intoxicating liquors is a nuisance, and all persons engaged in keeping such house or place, as well as the owner of the premises, may be enjoined from maintaining such nuisance. Such statute is constitutional.⁸⁴

§ 1424. **Statute discriminating—Ordinance.**—A statute imposing a tax on persons engaged in the business of selling liquors or of soliciting or taking orders for such liquors, to be shipped into the state from places out of the state, not having their principal place of business in the state, without imposing a like tax on persons engaged in the same kind of business as to the manufacture of liquors in the state, is unconstitutional and void. It discriminates in favor of persons engaged in the business in the state, and interferes with interstate commerce.⁸⁵ An ordinance relating to the sale of intoxicating liquors, which unjustly discriminates between persons falling within the same class, is invalid.⁸⁶

§ 1425. **State prohibiting importation.**—A state can not, in the exercise of its police powers, prohibit the importation from abroad, or from another state, of intoxicating liquors in the so-called original package, being articles of commerce which are to be regulated by congress.⁸⁷

§ 1426. **Proceedings for forfeiture—Evidence.**—A proceeding, under a statute, for the forfeiture of intoxicating liquors, illegally kept and intended for sale, is of a criminal nature, and the allegations of the complaint must be proved beyond a reasonable doubt.⁸⁸

§ 1427. **Ordinance—Statute valid.**—An ordinance relating to dram-shops, providing that a "licensee shall not keep nor be in any way interested in any saloon or dram-shop at more than one place at the same time," is reasonable and valid.⁸⁹ A statute prohibiting the hand-

⁸⁴ *Martin v. Blattner*, 68 Iowa 286, 6 Am. C. R. 150, 25 N. W. 131, 27 N. W. 244.

⁸⁵ *Walling v. Michigan*, 116 U. S. 446, 6 S. Ct. 454; *S. v. Furbush*, 72 Me. 475; *Welton v. Mo.*, 91 U. S. 275; *McCreary v. S.*, 73 Ala. 480.

⁸⁶ *City of Monmouth v. Popel*, 183 Ill. 634, 53 N. E. 348.

⁸⁷ *Leisy v. Hardin*, 135 U. S. 100, 10 S. Ct. 631; *S. v. Coonan*, 82 Iowa 400, 48 N. W. 921.

⁸⁸ *Com. v. Intox. Liq.*, 115 Mass. 142, 2 Green C. R. 281.

⁸⁹ *Swift v. Klein*, 163 Ill. 269, 45 N. E. 219.

ling and hauling of intoxicating liquors in the night time by the owners, or regulating the transportation at any time, under a penalty of forfeiture, is valid, as a proper exercise of the police power.⁹⁰

§ 1428. **Minors frequenting saloons.**—By statutory provisions in some of the states it is made a criminal offense to permit minors to remain in saloons, dram-shops or billiard halls, or to play at any game in such places.⁹¹

§ 1429. **Statute constitutional.**—The dram shop act of Illinois was constitutionally enacted, the subject of the bill having been properly expressed in the title, though only in general terms.⁹²

ARTICLE V. INDICTMENT.

§ 1430. **Statutory words.**—An indictment not in the words of the statute will be sustained if it contains words of equivalent meaning: as, charging the sale of “whiskey” instead of the statutory words, “distilled liquors,” is sufficient.⁹³

§ 1431. **Different counts can be joined.**—Where a statute enumerates different ways of violating the law relating to the sale of intoxicating liquors, different counts may be joined in the same indictment, as, for example, one count charging an unlawful sale and another count charging the unlawful soliciting of orders to sell.⁹⁴

§ 1432. **Acting as agent.**—An indictment which charges that the defendant unlawfully acted as agent and assistant of the seller and purchaser in negotiating a sale of intoxicating liquor does not sufficiently state an offense under a statute which forbids any person from acting as agent or assistant of either the buyer or purchaser of such liquors without a license. It charges a violation by inference only.⁹⁵

⁹⁰ *S. v. Holleyman*, 55 S. C. 207, 31 S. E. 362, 33 S. E. 366; *Com. v. Intox. Liq.*, 172 Mass. 311, 52 N. E. 389.

⁹¹ *Conyers v. S.*, 50 Ga. 103; *Kiley v. S.*, 120 Ind. 65, 22 N. E. 99. See *P. v. Ewer*, 141 N. Y. 129, 36 N. E. 4 (dances).

⁹² *Johnson v. P.*, 83 Ill. 436; *Cruse v. Aden*, 127 Ill. 238, 20 N. E. 73.

⁹³ *S. v. Dengolensky*, 82 Mo. 45; *S. v. Heckler*, 81 Mo. 417; *S. v. Biddle*, 54 N. H. 379; 2 *McClain Cr. L.*, § 1273.

⁹⁴ *Williams v. S.*, 107 Ga. 693, 33 S. E. 641.

⁹⁵ *S. v. Stacks* (Miss., 1900), 26 So. 962.

§ 1433. **To whom sold—Kinds of liquor sold.**—The names of the persons to whom sold need not be alleged, for sales without a license; but if sales are made to minors or persons in the habit of getting intoxicated, the names should be stated in the indictment.⁹⁶ An indictment charging the unlawful sale of intoxicating liquors need not state the kind of liquor sold.⁹⁷

§ 1434. **Sale to principal or agent.**—If the purchaser was the agent of an undisclosed principal, the complaint should charge the sale as having been made to him; but if he was the agent of a disclosed principal, the complaint should charge the sale as having been made to the principal.⁹⁸

§ 1435. **Complaint on information.**—A complaint made on information and belief, charging a person with the unlawful sale of intoxicating liquor without a license, is sufficient on which to issue a warrant for an arrest.⁹⁹

§ 1436. **Indictment in alternative.**—An indictment alleging that the defendant “sold, gave away, or otherwise disposed of” intoxicating liquors, is good, though in the alternative, such mode of pleading being authorized by statute.¹⁰⁰

§ 1437. **Duplicity—Different liquors.**—The indictment is not bad for duplicity in charging that the accused sold wine, brandy, rum, whiskey, and other strong liquors.¹

§ 1438. **Duplicity—Different ways.**—Where the statute makes any of two or more distinct acts connected with the same general offense and subjected to the same measure and kind of punishment, indictable separately and as distinct offenses when each shall have been commit-

⁹⁶ *Myers v. P.*, 67 Ill. 510; *City of Lincoln Center v. Linker*, 5 Kan. App. 242, 47 Pac. 174; *Hornberger v. S.*, 47 Neb. 40, 66 N. W. 23.

⁹⁷ *Rice v. P.*, 38 Ill. 436; *Cannady v. P.*, 17 Ill. 159; *Newman v. S.*, 101 Ga. 534, 28 S. E. 1005; *Com. v. Odlin*, 23 Pick. (Mass.) 279; *S. v. Williams*, 11 S. Dak. 64, 75 N. W. 815; *S. v. Munger*, 15 Vt. 294; *P. v. Adams*, 17 Wend. (N. Y.) 476; *Com. v. Smith*, 1 Gratt. (Va.) 553; *P. v. Polhamus*, 40 N. Y. Supp. 491, 8 App. Div. 133. *Contra*, *Drechsel v. S.*, 35 Tex. Cr. 580, 34 S. W. 934.

⁹⁸ *Com. v. Fowler*, 145 Mass. 398, 14 N. E. 457; *Com. v. Kimball*, 7 Metc. (Mass.) 308; *S. v. Wentworth*, 35 N. H. 442.

⁹⁹ *City of Lincoln Center v. Linker*, 6 Kan. App. 369, 51 Pac. 807; *P. v. Cramer*, 47 N. Y. Supp. 1039, 12 N. Y. Cr. 469; *S. v. Tegder*, 6 Kan. App. 762, 50 Pac. 985.

¹⁰⁰ *McClellan v. S.*, 118 Ala. 122, 23 So. 732. See *S. v. Dixon*, 104 Iowa 741, 74 N. W. 692.

¹ *S. v. Cottle*, 15 Me. 473; *S. v. Rogers*, 39 Mo. 431; *P. v. Adams*, 17 Wend. 475; 2 McClain Cr. L., § 1273.

ted by different persons and at different times, they may, when committed by the same person and at the same time, be coupled in one count as constituting but one offense.² An indictment charging that the defendant did "sell, give, lend, and furnish spirituous liquors" is not bad for duplicity.³

§ 1439. Negating exception.—Under a statute providing that "no licensee shall sell or furnish to any person intoxicating liquors on the Lord's day, commonly called Sunday, except that if the licensee is a hotel-keeper, he may supply such liquors to be drunk in their rooms or with their meals, to *bona fide* guests," an indictment failing to negative the exception in the enacting clause of the statute is defective.⁴ But if the exception is in a subsequent clause of the same section defining the offense, or in a different section of the statute, then the indictment need not negative such exception.⁵

§ 1440. Defective as to time.—In charging the unlawful sale of intoxicating liquors, the omission of the words "then and there" in connection with each material fact will render the indictment bad, in not stating when and where the person was in the habit of getting drunk.⁶

§ 1441. Indictment stating nuisance.—The statute, among other things, provides: "All places used for the illegal sale or keeping of intoxicating liquors" are common nuisances. The indictment alleged that "the defendant did keep and maintain a common nuisance, to wit, a certain building occupied by him as a saloon and shop and resorted to for the illegal sale of intoxicating liquors." Held not sufficient to bring the offense within the law.⁷

² *S. v. Schweiter*, 27 Kan. 499, 506; *S. v. Kerr*, 3 N. Dak. 523, 58 N. W. 27.

³ *Throckmorton v. Com.*, 20 Ky. L. 1508, 49 S. W. 474; *Pettit v. P.*, 24 Colo. 517, 52 Pac. 676. See *P. v. Huffman*, 48 N. Y. Supp. 482, 12 N. Y. Cr. 553; *Jordan v. S.*, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110.

⁴ *Kiefer v. S.*, 37 Md. 562, 40 Atl. 377. See *S. v. Russell*, 69 Minn. 499, 72 N. W. 837; *Stovall v. S.*, 37 Tex. Cr. 337, 39 S. W. 934; *S. v. Jarvis*, 67 Minn. 10, 69 N. W. 474; *Metzker v. P.*, 14 Ill. 101; *S. v. Stamey*, 71 N. C. 202; *S. v. Moore*, 107 Mo. 78, 16 S. W. 937; *P. v.*

Decarie, 80 Mich. 578, 45 N. W. 491; *S. v. Buskirk*, 18 Ind. App. 629, 48 N. E. 872.

⁵ *P. v. Crotty*, 47 N. Y. Supp. 845, 22 App. Div. 77; *S. v. Corcoran*, 70 Minn. 12, 72 N. W. 732. See *P. v. Taylor*, 110 Mich. 491, 68 N. W. 303; *S. v. Mullins*, 67 Ark. 422, 55 S. W. 211.

⁶ *Wiedemann v. P.*, 92 Ill. 314; *Smith v. S. (Tex. Cr.)*, 49 S. W. 373; 2 McClain Cr. L., § 1262; *Ziezer v. S.*, 47 Ind. 129, 1 Am. C. R. 489.

⁷ *S. v. Dodge*, 78 Me. 439, 6 Atl. 875, 6 Am. C. R. 329.

§ 1442. **Legal holiday.**—An indictment alleged that the defendant, on or about the fourth day of July, 1876, unlawfully did then and there sell intoxicating liquors, the said fourth of July being then and there a legal holiday. Held defective; time being of the essence of the offense, it must be directly averred.⁸

§ 1443. **Contrary to law, essential.**—An indictment which fails to allege that the intoxicating liquors were sold or given away "contrary to law" is defective.⁹

§ 1444. **Indictment containing surplusage.**—An indictment charging the unlawful sale of intoxicating liquors to a person named "and to divers other persons to the grand jury unknown" sufficiently states an offense. The words "and to divers other persons to the grand jury unknown" may be regarded a surplusage.¹⁰

§ 1445. **On election day.**—On a charge of selling intoxicating liquor on a day on which an election is held, the indictment must aver the holding of the election on the day in question.¹¹

§ 1446. **Alleging election.**—An indictment charging a violation of the local option law, alleging that the "qualified voters of said county had, at a legal election, held for that purpose, in accordance with law, determined that the sale of intoxicating liquors should be prohibited," sufficiently avers the holding of a legal election, under the local option law, without showing the publication of an order for such election.¹²

ARTICLE VI. EVIDENCE; VARIANCE.

§ 1447. **Statutory rule of evidence.**—The power of the legislature to change or modify existing rules of evidence, or to establish new ones, is not a matter of doubt. The law providing that the mere delivery of intoxicating liquor shall be sufficient evidence of a sale of such liquor, without any proof of payment, is valid.¹³

⁸ Ruge v. S., 62 Ind. 388, 3 Am. C. R. 281.

⁹ Hubbard v. S., 109 Ala. 1, 19 So. 519; Tarkins v. S., 108 Ala. 17, 19 So. 24.

¹⁰ S. v. Jeffcoat, 54 S. C. 196, 32 S. E. 298; Com. v. Manning, 164 Mass. 547, 42 N. E. 95.

¹¹ S. v. Weaver, 83 Ind. 543; Hoskey v. S., 9 Tex. App. 202.

¹² Key v. S., 37 Tex. Cr. 77, 38 S. W. 773; Williams v. S., 37 Tex. Cr. 238, 39 S. W. 664; Hall v. S., 37 Tex. Cr. 219, 39 S. W. 117. See Gaines v. S., 37 Tex. Cr. 73, 38 S. W. 774.

¹³ Santo v. S., 2 Iowa 165; Board etc., of Auburn v. Merchant, 103 N. Y. 143, 8 N. E. 484; S. v. Hurley, 54 Me. 562. See § 3083.

§ 1448. **Several offense from one act.**—The evidence used to prove the selling of intoxicating liquors on Sunday may also be used on a charge of selling such liquors without having a license.¹⁴

§ 1449. **Detective evidence.**—The testimony of a detective should be received with the greatest caution in a liquor case and the jury should be so instructed. But such evidence is competent.¹⁵

§ 1450. **License—Burden on defendant.**—When a *prima facie* case is made out, the burden then shifts upon the accused to show that he had a license or authority to sell.¹⁶

§ 1451. **Consent of parent.**—Where the prosecution shows a sale of intoxicating liquor made to a minor the law requires nothing further on their part. The prosecution is not bound to prove that such sale was made without a written order, etc.¹⁷

§ 1452. **Proof of "habit."**—On a charge of selling intoxicating liquor to a person in the habit of becoming intoxicated, evidence had been introduced by the state showing that the person to whom the intoxicating liquor was sold was in the habit of getting intoxicated and that he resided in the neighborhood of the accused. Evidence of his reputation in that regard was, therefore, competent as a circumstance tending to prove knowledge of that habit on the part of the accused.¹⁸ Witnesses may testify as to the habits of a person getting intoxicated, that is, that such person was in the habit of getting intoxicated and that they have frequently seen the person in question intoxicated, or the witness may state his impression as to a person being intoxicated.¹⁹ It is not necessary to prove that the person

¹⁴ *Arrington v. Com.*, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242.

¹⁵ 1 Ros. Cr. Ev., star p. 132; *Com. v. Downing*, 4 Gray (Mass.) 29; *P. v. Barrick*, 49 Cal. 242; *S. v. McKean*, 36 Iowa 343; *P. v. Curtis*, 95 Mich. 212, 54 N. W. 767.

¹⁶ *Birr v. P.*, 113 Ill. 647; *S. v. Keggan*, 55 N. H. 19, 3 Am. C. R. 286; *S. v. Perkins*, 53 N. H. 435; *Com. v. Thurlow*, 24 Pick. (Mass.) 374; *S. v. Shelton*, 16 Wash. 590, 48 Pac. 258, 49 Pac. 1064; 1 Greenl. Ev., § 79; 2 McClain Cr. L., § 1278; *Orme v. Com.*, 21 Ky. L. 1412, 55

S. W. 195; *S. v. Sorrell*, 98 N. C. 738, 4 S. E. 630; *P. v. Curtis*, 95 Mich. 212, 54 N. W. 767; *Liggett v. P.*, 26 Colo. 364, 58 Pac. 144.

¹⁷ *Fairly v. S.*, 63 Miss. 333; *Monroe v. P.*, 113 Ill. 672; *Bowman v. S.*, 38 Tex. Cr. 14, 40 S. W. 796, 41 S. W. 635. *Contra*, *Berning v. S.*, 51 Ark. 550, 11 S. W. 882.

¹⁸ *Adams v. S.*, 25 Ohio St. 534, 2 Am. C. R. 394.

¹⁹ *Gallagher v. P.*, 120 Ill. 182, 11 N. E. 335; *S. v. Pratt*, 34 Vt. 323; *Stanley v. S.*, 26 Ala. 26; *White v. S.*, 103 Ala. 72, 16 So. 63.

alleged to be a person in the habit of getting intoxicated had a fixed habit.²⁰

§ 1453. **Proof of drunkenness.**—On the trial for selling intoxicating liquors to “one who is intoxicated,” it is not necessary to prove the person was drunk at the very moment of the sale of whiskey.²¹

§ 1454. **Proving intoxicating qualities.**—The intoxicating qualities of elixir or bitters may be proven by the experimental effect of its use. Or the same fact can be proved by any witness who is shown to have had an opportunity of personal observation, or of experience, such as to enable him to form a correct opinion. He need not be a technical expert to give his opinion.²²

§ 1455. **Evidence of expert as to “bitters.”**—A witness for the prosecution testified upon cross-examination that he knew the article known as “Sweet Bitters”; that it was a well-known article of medicine kept for sale by druggists and others; that he had known of these bitters for many years; that he was once employed by Dr. Sweet, the proprietor, in putting them up for sale. The defendant then asked him this question: “What proportion of intoxicating liquor did these bitters contain?” Held error to refuse an answer to the question.²³

§ 1456. **Owner of premises.**—It must be shown that the defendant was the owner or proprietor of the place where the intoxicating liquors were sold by another person before he can be held for the acts of another.²⁴

§ 1457. **Keeping place—Persons intoxicated.**—On a charge of keeping a place for the unlawful sale of intoxicating liquors it is competent to show that persons going in and out of the place were intoxicated at or about the time of the alleged violation.²⁵

²⁰ *Murphy v. P.*, 90 Ill. 60.

²¹ *Kammann v. P.*, 124 Ill. 482, 16 N. E. 661; 2 *McClain Cr. L.*, § 1262.

²² *Carl v. S.*, 87 Ala. 17, 6 So. 118, 8 Am. C. R. 404.

²³ *Com. v. Pease*, 110 Mass. 412, 2 Green C. R. 278.

²⁴ *Fisher v. P.*, 103 Ill. 101; *Henry*

v. S., 64 Ark. 662, 43 S. W. 499; *Gernstenkorn v. S.*, 38 Tex. Cr. 621, 44 S. W. 503. See *Jordan v. S.*, 37 Tex. Cr. 222, 38 S. W. 780, 39 S. W. 110.

²⁵ *P. v. Berry*, 107 Mich. 256, 65 N. W. 98; *Com. v. Vincent*, 165 Mass. 18, 42 N. E. 332.

§ 1458. **Drinking on premises.**—On a charge of selling intoxicating liquors without a license it is proper to show that persons drank liquor in the defendant's place of business, which he had ordered for them and which he kept in his place of business for their convenience.²⁶

§ 1459. **Carrying on business—Single act.**—The doing of a single act pertaining to a particular business will not be considered engaging in or carrying on the business, yet a series of such acts would be so considered, such as a series of sales of liquor.²⁷

§ 1460. **Evidence—As to nuisance.**—Where a person has a license to sell intoxicating liquors, one unlawful sale to a minor is not sufficient to sustain a conviction for keeping a nuisance.²⁸ Evidence that the defendant had control of the place where it is charged that intoxicating liquors were sold; that bottles containing whiskey were found in his possession; that the place contained a bar, and drinking and whiskey glasses were kept there, was sufficient to warrant a conviction for keeping a nuisance.²⁹

§ 1461. **Other sales by wife.**—Testimony relating to other sales of liquor by the wife in the presence of her husband is admissible, not for the purpose of convicting him of such other sales, but to "illustrate the character of the sale" charged in the indictment.³⁰

§ 1462. **Other violations competent.**—On a charge of keeping and maintaining a tenement from July 30, 1873, to January 30, 1874, for the illegal sale of intoxicating liquors, it is competent to show that during that same period of time the defendant pleaded guilty in the municipal court to a charge of keeping the same tenement open for business on Sunday.³¹

²⁶ Hartgraves v. S. (Tex. Cr.), 43 S. W. 331.

²⁷ Abel v. S., 90 Ala. 631, 8 So. 760. See Merritt v. S., 19 Tex. App. 435.

²⁸ Com. v. Patterson, 138 Mass. 498; Miller v. S., 3 Ohio St. 475; S. v. Fay, 44 N. J. L. 474; S. v. Hoxsie, 15 R. I. 1, 22 Atl. 1059; S. v. Reyelts, 74 Iowa 499, 38 N. W. 377.

²⁹ S. v. Wambold, 74 Iowa 605, 38 N. W. 429; Com. v. Sullivan, 156 Mass. 229, 30 N. E. 1023; Brown v.

S., 49 N. J. L. 61, 7 Atl. 340; S. v. Hoxsie, 15 R. I. 1, 22 Atl. 1059.

³⁰ Hensly v. S., 52 Ala. 10, 1 Am. C. R. 465; Com. v. Sinclair, 138 Mass. 493, 5 Am. C. R. 330; Bennett v. S., 40 Tex. Cr. 445, 50 S. W. 946; Pike v. S., 40 Tex. Cr. 613, 51 S. W. 395. *Contra*, Chipman v. P., 24 Colo. 520, 52 Pac. 677; Hans v. S., 50 Neb. 150, 69 N. W. 838.

³¹ Com. v. Ayers, 115 Mass. 137, 2 Green C. R. 280.

§ 1463. **Sales to other minors.**—On a charge of selling intoxicating liquors to a minor, where the sale is alleged to have been made by the defendant's clerk, evidence of other sales to other minors at other times by the defendant himself is incompetent.³²

§ 1464. **United States license.**—If the defendant had a government license to sell liquors it is material and competent on a charge of selling intoxicating liquors in violation of law, and the defendant on cross-examination may be required to answer whether he had such license, or the prosecution may prove the fact without producing such government license. It is competent to prove such license by a certified copy made from entries in books kept in the revenue office.³³

§ 1465. **Showing contents of kegs by revenue stamps.**—The fact that United States revenue stamps were seen on beer kegs in the warehouse of the defendant at the time of the offense charged may be shown as tending to prove the contents of the kegs to be malt liquor.³⁴

§ 1466. **Rebuttal evidence.**—Where the defendant sold liquor as cider at fifty cents a pint it is competent to show that other dealers sold cider at fifty cents a gallon.³⁵

§ 1467. **To whom sold is descriptive.**—Where the information or complaint alleges the unlawful sale of intoxicating liquors to certain persons named therein, though unnecessarily, the prosecution will not be permitted to show sales to other persons. Stating in the indictment the names of the persons to whom the liquors were sold, is descriptive of the offense and can not be rejected as surplusage.³⁶

§ 1468. **Sales, when made.**—A witness testified that he had purchased liquors from the defendant within the statute of limitations, and the defendant offered to prove in defense that the witness had not

³² *S. v. Austin*, 74 Minn. 463, 77 N. W. 301.

³³ *Throckmorton v. Com.*, 20 Ky. L. 1508, 49 S. W. 474; *Clark v. S.*, 40 Tex. Cr. 127, 49 S. W. 85. See *S. v. Howard*, 91 Me. 396, 40 Atl. 65; *Gernstenkorn v. S.*, 38 Tex. Cr. 621, 44 S. W. 503; *Treue v. S. (Tex. Cr.)*, 44 S. W. 829; *S. v. White*, 70 Vt. 225, 39 Atl. 1085; *Pitner v. S.*, 37 Tex. Cr. 268, 39 S. W. 662; *Burnett*

v. S., 72 Miss. 994, 18 So. 432; *Com. v. Uhrig*, 146 Mass. 132, 15 N. E. 156; *S. v. Wiggin*, 72 Me. 425; *Guy v. S.*, 90 Md. 29, 44 Atl. 997.

³⁴ *S. v. Wright*, 68 N. H. 351, 44 Atl. 519.

³⁵ *Sparks v. S. (Tex. Cr.)*, 45 S. W. 493.

³⁶ *Hudson v. S.*, 73 Miss. 784, 19 So. 965.

been in his place of business since a certain date, being the time of a difficulty between him and the witness, a date more than eighteen months since the indictment was returned: Held error to refuse the offered evidence.³⁷

§ 1469. **Variance—Keeping for sale.**—Where the charge in a complaint is “exposing and keeping intoxicating liquors for sale” illegally, a conviction will be sustained, if the proof shows only a “keeping for sale,” though there be no proof of exposing for sale.³⁸

§ 1470. **Variance—“Selling” or “giving.”**—A count for “selling” liquor can not be supported by proof of “giving.”³⁹

§ 1471. **Variance as to place.**—An information charged the defendant in the words of the statute with “keeping open a certain house, saloon and building” in which it was reputed spirituous or intoxicating liquors were exposed for sale. The proof showed that such liquors had been dispensed to individuals on a platform in a park of about four acres of ground; that the platform was used for dancing, but it had no covering at the top or sides except that there was a railing around the sides to prevent the dancers from slipping off. Held that this platform was not a building as contemplated by the statute.⁴⁰ An indictment alleging the unlawful sale of intoxicating liquors “in the city of Bridgeton, in the county of Cumberland,” is not supported by proof of sales outside the limits of the city named.⁴¹

§ 1472. **Variance as to persons.**—An indictment charging the defendant with making an unlawful sale of intoxicating liquors to two persons jointly is not sustained by proof of sales to each of the two persons separately at different times.⁴²

³⁷ Fisher v. P., 103 Ill. 104.

³⁸ Com. v. Tay, 146 Mass. 146, 15 N. E. 503; Paulk v. City of Sycamore, 104 Ga. 728, 31 S. E. 200.

³⁹ Siegel v. P., 106 Ill. 94; Birr v. P., 113 Ill. 649; Humpeler v. P., 92 Ill. 400; Goddard v. Burnham, 124 Mass. 578; Wood v. Ter., 1 Or. 223; William v. S., 91 Ala. 14, 8 So. 668; Thompson v. S., 37 Ark. 408.

⁴⁰ S. v. Barr, 39 Conn. 40, 1 Green C. R. 200.

⁴¹ Buck v. S., 61 N. J. L. 525, 39 Atl. 919; Bryant v. S., 62 Ark. 459, 36 S. W. 188; S. v. Ham, 64 N. J. L. 49, 44 Atl. 845.

⁴² P. v. Huffman, 48 N. Y. Supp. 482, 24 App. Div. 233; Sparks v. S. (Tex. Cr.), 45 S. W. 493; Poe v. S. (Tex. Cr.), 44 S. W. 493.

§ 1473. **Date of sales.**—An information contained one count charging the defendant with making a sale of intoxicating liquor on December 9, 1872. Held that the prosecution shall not be restricted to the particular day named. Evidence of sales made on any day within the statute of limitations is competent.⁴³ When the offense is alleged to have been committed on some one particular day it is well settled that testimony may be given to prove the offense on that or any other day within the statute of limitations before the finding of the indictment, but not to prove the commission of the offense on more than one day when there is but one offense charged.⁴⁴ If in such case the prosecutor begins by introducing testimony which directly tends to prove the charge on some particular day he will be held to have elected that day as the day on which he is to prove the offense, though he may prefer a different day.⁴⁵

§ 1474. **Date of sales—Limitation.**—On a charge of maintaining a nuisance by the unlawful sale of intoxicating liquors the prosecution may show illegal sales on any day within the statute of limitations.⁴⁶ Asking a conviction for an unlawful sale at any time within eighteen months (the statute of limitations) is error when the statute alleged to be violated was not in force during a part of that time.⁴⁷

§ 1475. **Variance as to name.**—The accused was indicted for selling intoxicating liquor unlawfully to J. T. Middlebrook, who appeared as a witness before the grand jury. He was not called as a witness on the trial, but A. T. Middlebrook was called instead. The district attorney, by leave of the court, amended the indictment. The amendment was improper: it was the sale to J. T. Middlebrook that the grand jury intended to present. The amendment made a different charge of a different sale to a different person.⁴⁸

§ 1476. **What offense liable on.**—On an information containing several distinct counts of selling intoxicating liquor contrary to the

⁴³ S. v. Munson, 40 Conn. 475, 2 Green C. R. 494; S. v. Carnahan, 63 Mo. App. 244; Koch v. S., 32 Ohio St. 353; Com. v. Carroll, 15 Gray (Mass.) 409; Fitzpatrick v. S., 37 Ark. 373.

⁴⁴ S. v. Nagle, 14 R. I. 331, 5 Am. C. R. 335; Com. v. Kelly, 10 Cush. (Mass.) 69; Wharton Cr. Ev., § 103.

⁴⁵ S. v. Nagle, 14 R. I. 331, 5 Am.

C. R. 335; P. v. Jenness, 5 Mich. 327; S. v. Bates, 10 Conn. 372.

⁴⁶ S. v. Arnold, 98 Iowa 253, 67 N. W. 252; P. v. Caldwell, 107 Mich. 374, 65 N. W. 213.

⁴⁷ Bennett v. P., 16 Ill. 160.

⁴⁸ Blumenberg v. S., 55 Miss. 528, 3 Am. C. R. 284; Richardson v. S., 63 Ind. 192, 3 Am. C. R. 303; Fields v. Ter., 1 Wyo. 78, 3 Am. C. R. 320.

law, the defendant can not be found guilty of any offense except some offense the complaining witness had in mind at the time of verifying the information.⁴⁹

ARTICLE VII. JURISDICTION; VENUE.

§ 1477. Sale is place of delivery.—Intoxicating liquors sent C. O. D. from one county or state to another for delivery are regarded as sold in the place where delivered; it would be otherwise if the goods were not sent C. O. D.⁵⁰ A license held by a liquor dealer authorizing him to sell in a certain county named, gives him no right to peddle his beer through other counties. The defendant as agent of the liquor dealer sold intoxicating liquors in another county, delivered the liquor and collected the money: Held to be a sale in the county where delivered.⁵¹

§ 1478. Selecting jury—Competency.—If a person is so prejudiced against one selling intoxicating liquors, or against any misdemeanor or crime, that he could not give the accused a fair and impartial trial, he would be an incompetent juror.⁵² Are you a member of any temperance society? or any league to prosecute for liquor violations? or contribute to the same? are proper questions to determine whether or not it be desirable to exercise a peremptory challenge to a juror.⁵³

§ 1479. Suit for penalty.—When an action of debt is provided for by statute as the mode to recover the penalty before a justice of the peace, no complaint under oath is required to give jurisdiction.⁵⁴

§ 1480. Dram-shop—Bond.—A druggist having a permit to sell intoxicating liquors for medicine is not required to give bond to keep a dram-shop, as is required by dram-shop keepers.⁵⁵

⁴⁹ *S. v. Brooks*, 33 Kan. 708, 7 Pac. 591, 6 Am. C. R. 306.

⁵⁰ *S. v. O'Neil*, 58 Vt. 140, 2 Atl. 586, 6 Am. C. R. 322; *Mason v. Thompson*, 18 Pick. (Mass.) 305; *Village of Coffeen v. Huber*, 78 Ill. App. 455; *Crabb v. S.*, 88 Ga. 384, 15 S. E. 455; *S. v. Goss*, 59 Vt. 266, 9 Atl. 829. *Contra*, *James v. Com.*, 19 Ky. L. 1045, 42 S. W. 1107.

⁵¹ *Com. v. Holstine*, 132 Pa. St. 357, 19 Atl. 273; *S. v. Colby*, 92 Iowa 463, 61 N. W. 187; *Dunn v. S.*, 82 Ga. 27, 8 S. E. 806; *U. S. v. Cline*,

26 Fed. 515; *Com. v. Shurn*, 145 Mass. 150, 13 N. E. 395; *Pearson v. S.*, 66 Miss. 510, 6 So. 243; *Shuster v. S.*, 62 N. J. L. 521, 41 Atl. 701; *P. v. De Groot*, 111 Mich. 245, 69 N. W. 248; *S. v. Shuster*, 63 N. J. L. 355, 46 Atl. 1101. See *Teal v. Com.* (Ky.), 57 S. W. 464.

⁵² *Carrow v. P.*, 113 Ill. 551.

⁵³ *Lavin v. P.*, 69 Ill. 305; *P. v. Reyes*, 5 Cal. 347; *Com. v. Eagan*, 4 Gray (Mass.) 18.

⁵⁴ *Ferguson v. P.*, 73 Ill. 559.

⁵⁵ *Moore v. P.*, 109 Ill. 503.

CHAPTER XXXIII.

BARRATRY, MAINTENANCE AND CHAMPERTY.

- ART. I. Definition; Elements; Matters of Defense, §§ 1481-1485
II. Indictment, §§ 1486-1487

ARTICLE I. DEFINITION; ELEMENTS; MATTERS OF DEFENSE.

§ 1481. **Barratry defined.**—Common barratry is the offense of frequently exciting and stirring up suits and quarrels between his majesty's subjects (the people), either at law or otherwise.¹

§ 1482. **Not barratry.**—If one of two heirs who are having a dispute about the appointment of an administrator of an estate enters into an agreement to pay a third person one-half of what he can save out of the interest of the other heir, such an arrangement is not a champertous contract.²

§ 1483. **Maintenance defined.**—Maintenance is an offense that bears a near relation to the former (barratry), being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it. This is an offense against public justice, as it keeps alive strife and contention and perverts the remedial process of the law into an engine of oppression.³

§ 1484. **Champerty defined.**—Champerty is a species of maintenance and punishable in the same manner, being a bargain with a

¹ 4 Bl. Com. 134; 3 Greenl. Ev., § 66; Com. v. McCulloch, 15 Mass. 227. ² Joy v. Metcalf, 161 Mass. 514, 37 N. E. 671. ³ 4 Bl. Com. 134; 3 Greenl. Ev. (Redf. ed.), § 180.

plaintiff or defendant (*campum partire*) to divide the land or other matter sued for between them, if they prevail at law, whereupon the champerter is to carry on the party's suit at his own expense.⁴

§ 1485. **Not champerty.**—Persons who furnish materials and labor for the construction of gravel roads may lawfully sell or assign their claims and not be guilty of champerty.⁵

ARTICLE II. INDICTMENT.

§ 1486. **Indictment for barratry.**—The indictment for barratry charges the accused, in general terms, with being a common barrator, without specifying any particular facts or instances; but the court will not suffer the trial to proceed unless the prosecutor has seasonably, if requested, given the accused a note of the particular acts of barratry intended to be proved against him.⁶

§ 1487. **Indictment for maintenance.**—The indictment for maintenance charges, in substance, that the defendant unjustly and unlawfully maintained and upheld a certain suit pending in such a court (describing it) to the manifest hindrance and disturbance of justice.⁷

⁴ 4 Bl. Com. 135.

⁵ Hart v. S., 120 Ind. 83, 21 N. E. 654, 24 N. E. 151.

⁶ 3 Greenl. Ev. (Redf. ed.), § 66; Rex v. Wylie, 1 New R. 95; Com. v.

Davis, 11 Pick. (Mass.) 432; Bish. New Cr. Proc., § 100.

⁷ 3 Greenl. Ev. (Redf. ed.), § 181; Bish. New Cr. Proc., § 154.

PART FOUR

OFFENSES AGAINST PUBLIC JUSTICE

CHAPTER XXXIV.

BRIBERY.

ART.	I. Definition and Elements,	§§ 1488-1500
	II. Matters of Defense,	§§ 1501-1508
	III. Indictment,	§§ 1509-1525
	IV. Evidence; Variance,	§§ 1526-1533

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1488. **Bribery defined.**—Bribery is when a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in his office.¹ Any article or thing taken by extortion must be something of value, otherwise there is no offense.²

§ 1489. **Soliciting a bribe is violation.**—By statute of California it is made bribery for any person to give or offer a bribe to any member of a political convention, and also for every member of such body who

¹ 4 Bl. Com. 139; 3 Greenl. Ev. (Redf. ed.), § 71; Walsh v. P., 65 Ill. 59; S. v. Miles, 89 Me. 142, 36 Atl. 70; Dishon v. Smith, 10 Iowa 212; Curran v. Taylor, 92 Ky. 537, 18 S. W. 232; Underhill Cr. Ev., § 451; P. v. Ah Fook, 62 Cal. 493. Bribery and attempts to influence voters at elections were indictable at common law, and this rule is

generally recognized in the United States: Underhill Cr. Ev., § 455, citing Russell on Crimes 154; S. v. Jackson, 73 Me. 91; Com. v. Hoxey, 16 Mass. 375; Com. v. McHale, 97 Pa. St. 397. See "Election Law Violations."

² Com. v. Cony, 2 Mass. 523; Underhill Cr. Ev., § 457.

receives or offers to receive a bribe. Under this statute a person who solicits a bribe is guilty, though no bribe was offered.³

§ 1490. Offense, when complete.—The offense is complete by the offer of the bribe, so far as the offer is concerned. If the offer is accepted both parties are guilty.⁴

§ 1491. Person bribed violating promise.—And though the person bribed does not perform his promise, but directly violates it, as, for example, if, in the case of an election, he votes for the opposing candidate or interest, the offense of the corrupter is still complete.⁵ One who delivers money to a magistrate, intending thereby to influence his decision in a matter pending before him, is guilty of giving a gift corruptly, although the magistrate receives the money in ignorance of what it is.⁶

§ 1492. Offense complete, though contract void.—On a charge of bribery against a public officer for receiving money to influence his official conduct in contracting for property for the public, it is not material whether the contract could be enforced or not. If the contract was executed and the public money paid under the influence of a bribe, the offense is complete.⁷

§ 1493. Giving bond, for money.—The giving of a bond conditioned for the payment of money to procure the efforts of one of the members of a committee of the city council, who was an alderman, to serve the interest of the person giving such bond, in the decision of the matter then before them for determination, is bribery.⁸

§ 1494. Bribing legislator.—The payment of money to a legislator for the purpose of influencing his vote for the election of a United States senator is bribery at common law.⁹

³ *P. v. Hurley*, 126 Cal. 351, 58 Pac. 814.

⁴ 3 Greenl. Ev., § 71; *Walsh v. P.*, 65 Ill. 60; *S. v. Ellis*, 33 N. J. L. 102, 97 Am. R. 707; *Jackson v. S.*, 43 Tex. 421. See *S. v. Geyer*, 3 Ohio L. N. 431; *P. v. Ah Fook*, 62 Cal. 493; 2 Bish. New Cr. L. (8th ed.), § 88; *Underhill Cr. Ev.*, § 451; *Ruffin v. S.* (Tex.), 38 S. W. 999; *Com. v. Dietrich*, 7 Pa. Sup. Ct. 515, 42 W. N. C. 459; *S. v. Durnam*, 73 Minn. 150, 75 N. W. 1127.

⁵ 3 Greenl. Ev., § 72; *P. v. Markham*, 64 Cal. 157, 30 Pac. 620. See *S. v. Dudoussat*, 47 La. 977, 17 So. 685; *Messer v. S.*, 37 Tex. Cr. 635, 40 S. W. 488; *Ruffin v. S.*, 36 Tex. Cr. 565, 38 S. W. 169; *Newman v. P.*, 23 Colo. 300, 47 Pac. 278.

⁶ *Com. v. Murray*, 135 Mass. 530.

⁷ *Glover v. S.*, 109 Ind. 391, 7 Am. C. R. 116, 10 N. E. 282.

⁸ *Cook v. Shipman*, 24 Ill. 616.

⁹ *S. v. Davis*, 2 Pen. (Del.) 139, 45 Atl. 394.

§ 1495. **Persons included under statutes.**—A statute relating to the receiving of a bribe by “any executive officer, in a matter which may be brought before him in his official capacity,” will include a police officer for accepting money as a consideration not to make arrests.¹⁰ Bribery as defined by the federal statute is comprehensive enough to include persons who are not public officers, such as a detective in the secret service of the government.¹¹ But the federal statute will not be construed to reach an interpreter of a language at the hearing of a criminal charge before a United States commissioner.¹² A county solicitor is a “ministerial officer,” within the meaning of the bribery statute.¹³

§ 1496. **What included in “decision;” “executive officer.”**—A certificate which, under a statute, a board of examining surgeons is required to make out, is a “decision or action on a question, matter, or cause, or proceeding,” within the meaning of the statute relating to bribery.¹⁴ A member of the state board of education is an “executive officer,” within the meaning of a statute relating to bribery.¹⁵

§ 1497. **Bribing jurors.**—An attempt to bribe a juror, “with intent to influence him to violate his duty,” applies to all jurors selected and summoned to act as jurors, and not merely to jurors actually trying particular cases.¹⁶

§ 1498. **Bribing juror—Mere offer.**—Under a statute which provides that “any juror who asks, receives, or agrees to receive any bribe, upon any agreement or understanding that his vote shall be influenced thereby,” shall be punished, will be included the mere offering to be bribed.¹⁷

§ 1499. **Negligence of officers.**—“The negligence of public officers intrusted with the administration of justice, as sheriffs, coroners,

¹⁰ *P. v. Markham*, 64 Cal. 157, 30 Pac. 620. See *S. v. Pearce*, 14 Fla. 153; *P. v. Turnbull*, 93 Cal. 630, 29 Pac. 224.

¹¹ *U. S. v. Ingham*, 97 Fed. 935.

¹² *In re Yee Gee*, 83 Fed. 145.

¹³ *Diggs v. S.*, 49 Ala. 311.

¹⁴ *U. S. v. Kessel*, 62 Fed. 57; *U. S. v. Van Leuven*, 62 Fed. 62. See *In re Bozeman*, 42 Kan. 451, 22 Pac. 628.

¹⁵ *S. v. Womack*, 4 Wash. 19, 29 Pac. 939.

¹⁶ *S. v. McCrystal*, 43 La. 907, 9 So. 922; *S. v. Glaudi*, 43 La. 914, 9 So. 925; *White v. S.*, 103 Ala. 72, 16 So. 63; *S. v. Williams*, 136 Mo. 293, 38 S. W. 75. See § 1635.

¹⁷ *P. v. Squires*, 99 Cal. 327, 33 Pac. 1092; *P. v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

constables, and the like, makes the offender liable to be fined." This offense is a species of bribery.¹⁸

§ 1500. **Officer de facto sufficient.**—An officer *de facto*, as well as an officer *de jure*, holding an office of trust, is within the terms of the statute defining bribery. That he was only an officer *de facto* is no defense to a charge of bribery.¹⁹

ARTICLE II. MATTERS OF DEFENSE.

§ 1501. **Illegal arrest, no defense.**—An officer making an illegal arrest and then accepting a bribe from the accused as a consideration for allowing him to escape, is guilty of bribery, although the arrest was illegal.²⁰

§ 1502. **Bribing voters.**—"If any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe forfeits £500, and is forever disabled from voting and holding any office in any corporation."²¹

§ 1503. **Statute unconstitutional.**—A person holding an office created by an unconstitutional statute is not an officer within the meaning of the law relating to extortion and can not therefore be guilty of extortion.²²

§ 1504. **Belief no defense.**—That the accused, who gave a bribe to influence a public officer, believed that the bribe (promissory notes) was worthless, is no defense to a charge of bribery.²³

¹⁸ 4 Bl. Com. 140. See 2 McClain Cr. L., § 909.

¹⁹ S. v. Duncan, 153 Ind. 318, 54 N. E. 1066; Florez v. S., 11 Tex. App. 102; S. v. Gardner, 54 Ohio St. 24, 42 N. E. 999; S. v. Gramelspacher, 126 Ind. 398, 26 N. E. 81; Underhill Cr. Ev., § 452.

²⁰ Moseley v. S., 25 Tex. App. 515, 8 S. W. 652.

²¹ 1 Bl. Com. 179; 2 Bish. Cr. L. (8th ed.), § 86; Berry v. Hill, 6 N. M. 643, 30 Pac. 936. See Underhill Cr. Ev., § 455.

²² Kirby v. S., 57 N. J. L. 320, 31 Atl. 213. But see S. v. Gardner, 54 Ohio St. 24, 42 N. E. 999.

²³ Com. v. Donovan, 170 Mass. 228, 49 N. E. 104.

§ 1506. **Prosecuting witness giving bribe.**—It is no defense to an indictment charging bribery that the bribe was given by the prosecuting witness.²⁵ The fact that the public officer suggested bribery and expressed his willingness to be bribed by the accused is no defense to the charge.²⁶

§ 1507. **Promissory note as bribe, void.**—The indictment alleges in substance that the prosecuting attorney received a promissory note for the payment of twenty-five dollars, as a consideration to influence his behavior in office as such prosecuting attorney in the prosecution of a certain felony mentioned in the indictment: Held not to be bribery; that it must allege the officer actually received something of value. The promissory note was held to be void and of no value.²⁷

§ 1508. **Bribing councilman.**—Offering money to a councilman to induce him to vote for a certain person to fill an office which does not exist does not constitute bribery.²⁸

ARTICLE III. INDICTMENT.

§ 1509. **Statutory words sufficient.**—Charging the offense of bribery substantially in the language of the statute defining it sufficiently states the offense in the indictment or information.²⁹ An indictment alleging that the defendant "did receive and consent to receive" the offered bribe is sufficient under the statutory words "receive or consent to receive" any remuneration.³⁰

§ 1510. **Means used essential.**—An information charging bribery in attempting to influence a juror in a matter pending in court is

²⁵ *Newman v. P.*, 23 Colo. 300, 47 Pac. 278; *P. v. Liphardt*, 105 Mich. 80, 62 N. W. 1022; *S. v. Dudoussat*, 47 La. 977, 17 So. 685.

²⁶ *Rath v. S.*, 35 Tex. Cr. 142, 33 S. W. 229.

²⁷ *S. v. Walls*, 54 Ind. 561, 2 Am. C. R. 23; *P. v. Willis*, 54 N. Y. Supp. 52, 24 Misc. 549. But see *Watson v. S.*, 39 Ohio St. 123, 4 Am. C. R. 71, 76.

²⁸ *Com. v. Reese*, 16 Ky. L. 493, 29 S. W. 352.

²⁹ *P. v. Edson*, 68 Cal. 549, 10 Pac. 192; *S. v. McDonald*, 106 Ind. 233, 6 N. E. 607; *S. v. Glaudi*, 43 La. 914, 9 So. 925; *S. v. McCrystol*, 43 La. 907, 9 So. 922.

³⁰ *S. v. Wynne*, 118 N. C. 1206, 24 S. E. 216.

defective in failing to set out the means used to influence the juror. The statutory words are, "To corrupt a juror by offering a gift," etc.³¹

§ 1511. Bribing juror.—An indictment charging a juror with bribery is not required to allege that the juror received the bribe from a party to the cause in which it was given to influence him or from any one representing such party.³²

§ 1512. Offering to bribe.—The indictment sufficiently states the offense of offering to bribe an officer by alleging an offer to bribe him to vote a certain way on a matter upon which by law he was required to vote. It is not necessary to aver that the bribe was to induce the officer to do or not to do an act in violation of his duty.³³

§ 1513. Receiving a bribe.—The information alleged that the defendant received a bribe upon the understanding that he would not arrest persons engaged at gaming: Held sufficient, although it did not aver in the language of the statute that any such offense had been brought before him in his official capacity.³⁴

§ 1514. "At his instance" immaterial.—Under a statute defining bribery to be any reward to the person influenced or intended to be influenced or to another "at his instance," an indictment alleging that the bribe was offered with intent to influence the voter and did control the voter in his vote as councilman in a certain election is sufficient, without alleging that the bribe was offered at his instance.³⁵

§ 1515. Allegation as to being eligible.—An indictment for bribing a mayor to appoint a certain person to an office which he was authorized to fill by appointment need not allege that the defendant was eligible to fill such office.³⁶

§ 1516. Allegation describing document.—An indictment charging a state senator with accepting a bribe to vote for a certain joint reso-

³¹ *Armstrong v. Van De Vanter*, 21 Wash. 682, 59 Pac. 510.

³² *Com. v. Milliken*, 174 Mass. 79, 54 N. E. 357.

³³ *Rath v. S.*, 35 Tex. Cr. 142, 33 S. W. 229.

³⁴ *P. v. Markham*, 64 Cal. 157, 30 Pac. 620, 49 Am. R. 700.

³⁵ *Com. v. Root*, 96 Ky. 533, 29 S. W. 351.

³⁶ *S. v. Graham*, 96 Mo. 120, 8 S. W. 911.

lution is sufficient by designating the resolution by its title only, without further description of the resolution.³⁷

§ 1517. Relating to witness.—An indictment for attempting to bribe a witness is sufficient if it alleges that the attempt was made to induce the witness to absent himself so as to prevent his giving testimony in a cause before a justice of the peace of which the justice had jurisdiction. It is not necessary to allege that the witness had been subpoenaed nor that his testimony was material nor that he had been sworn as a witness.³⁸

§ 1518. Indictment—At common law.—An indictment which charges that the defendant, an alderman, made a proposal to receive a bribe to influence his action in the discharge of his duty sufficiently states a common law offense.³⁹

§ 1519. Description of bribe immaterial.—An indictment charging a public officer with accepting a bribe to influence him to enter into a contract for the purchase of property for the use of the public need not describe the property or state the kind, the purchase of the property not being the gravamen of the offense.⁴⁰

§ 1520. Venue material.—An indictment charging a town assessor with the offense of offering to receive a bribe to influence his official action by reducing the assessment on a certain lot is defective if it fails to allege that the lot was situated in the town for which the defendant is assessor.⁴¹

§ 1521. Indictment defective.—An indictment charging the defendant with unlawfully receiving a fee for services rendered "under color of his office" is not sufficient under a statute which forbids, under a penalty, any revenue officer to demand or receive any fee except as prescribed by law.⁴²

§ 1522. Director of corporation.—An indictment alleging that the defendant offered a bribe to a member of the board of directors of

³⁷ *S. v. Smalls*, 11 S. C. 262.

³⁸ *S. v. Biebusch*, 32 Mo. 276; *Chrisman v. S.*, 18 Neb. 107, 24 N. W. 434.

³⁹ *Walsh v. P.*, 65 Ill. 58.

⁴⁰ *Glover v. S.*, 109 Ind. 391, 10 N. E. 282, 7 Am. C. R. 114.

⁴¹ *Gunning v. P.*, 189 Ill. 165, 59 N. E. 494.

⁴² *U. S. v. Williams*, 76 Fed. 223.

a corporation is defective in failing to allege that such corporation is a public corporation, as the statute applies and has reference only to public and *quasi*-public corporations.⁴³

§ 1523. Knowledge material.—An indictment charging an offer to bribe a juror, though in the language of the statute, is defective in not alleging that the defendant knew that the person to whom he offered the bribe was a juror.⁴⁴

§ 1524. Duplicity—Two offices.—Charging in the indictment that the defendant offered money to a person named, a member of the house of representatives and also a member of a committee of such house, to induce him to vote for a certain bill and for a favorable report in the committee, is not bad for duplicity.⁴⁵

§ 1525. Quantity of value.—It is not necessary to allege or prove the quantity of value where that is not an essential element of the offense. To allege in the indictment "a large amount of money of great value" was offered as a bribe is sufficient, under a statute which provides that "whoever corruptly offers any money" or thing of value shall be guilty of bribery. The words, "anything of value," include money.⁴⁶ An allegation in the indictment that the defendant did give a bribe, without a statement of the value or what the bribe was, is sufficient.⁴⁷

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1526. Testimony of accomplice.—The testimony of an accomplice voluntarily given is competent evidence against the other, when the parties to the offense are tried separately.⁴⁸

§ 1527. Indictment, competent evidence.—On the trial of a case in which the defendant is charged with attempting to bribe a witness,

⁴³ P. v. Turnbull, 93 Cal. 630, 29 Pac. 224.

⁴⁴ S. v. Howard, 66 Minn. 309, 68 N. W. 1096.

⁴⁵ Watson v. S., 39 Ohio St. 123, 4 Am. C. R. 73.

⁴⁶ Watson v. S., 39 Ohio St. 123, 4 Am. C. R. 71; Leeper v. S., 29 Tex. App. 154, 15 S. W. 411. See S. v. Stephenson, 83 Ind. 246; S. v.

McDonald, 106 Ind. 233, 6 N. E. 607; Caruthers v. S., 74 Ala. 406.

⁴⁷ P. v. Ward, 110 Cal. 369, 42 Pac. 894. See Leeper v. S., 29 Tex. App. 154, 15 S. W. 411; S. v. Biebusch, 32 Mo. 276.

⁴⁸ Benson v. U. S., 146 U. S. 325, 13 S. Ct. 60. See Com. v. Bell, 145 Pa. St. 374, 22 Atl. 641, 644; P. v. Spencer, 66 Hun 149, 21 N. Y. Supp. 33.

the indictment in the case on which is indorsed the name of the person as such witness, is competent evidence.⁴⁹

§ 1528. Identity of briber.—Where the evidence on the trial of an alderman charged with agreeing to accept money for his vote on a street railway franchise is otherwise sufficient, it is not material as to the identity of the person promising to pay the money.⁵⁰

§ 1529. Proving bribery.—The allegation of the payment of money to a voter may be proved by evidence that it was under color of a loan, for which his note was taken, if it were at the same time agreed that it should be given up, after he had voted.⁵¹

§ 1530. Evidence wanting.—Where there is no evidence to sustain the charge of bribery as alleged, the court should, on motion, dismiss the case, the same as in any other criminal cause.⁵²

§ 1531. Deposits in bank, when incompetent.—On a charge of extortion, evidence that the accused made deposits of sums of money in a bank in excess of his salary as an officer during several months, including the time of the alleged offense, is improper, there being no correspondence between the sums so deposited and the sums alleged to have been received by him by extortion.⁵³

§ 1532. Other offenses.—Other acts of bribery than that charged in the indictment may be given in evidence, where such acts establish a continuing system under which the parties involved were acting.⁵⁴

§ 1533. Variance—Bribe offered by one or more.—An indictment alleging that the contract of bribery was made with B. and paid by him "and other persons to the grand jury unknown" is supported by proof that B. alone paid the money for the corrupt purpose charged, and there is no variance.⁵⁵

⁴⁹ *Chrisman v. S.*, 18 Neb. 107, 24 N. W. 434. See *P. v. Northey*, 77 Cal. 618, 19 Pac. 865, 20 Pac. 129.

⁵⁰ *P. v. O'Neil*, 109 N. Y. 251, 16 N. E. 68, 48 Hun 36.

⁵¹ 3 Greenl. Ev., § 73.

⁵² *Johnson v. Com.*, 90 Ky. 53, 13 S. W. 520, 12 Ky. L. 20.

⁵³ *Williams v. U. S.*, 168 U. S. 382, 18 S. Ct. 92.

⁵⁴ *Guthrie v. S.*, 16 Neb. 667, 21 N. W. 455, 4 Am. C. R. 81, 82; *P. v. Sharp*, 107 N. Y. 427, 14 N. E. 319; *P. v. Hurley*, 126 Cal. 351, 58 Pac. 814. Evidence sufficient: *In re Wellcome*, 23 Mont. 450, 50 Pac. 445; *Com. v. Donovan*, 170 Mass. 228, 49 N. E. 104.

⁵⁵ *Guthrie v. S.*, 16 Neb. 667, 21 N. E. 455, 4 Am. C. R. 79.

CHAPTER XXXV.

EMBRACERY.

ART.	I. Definition and Elements,	§§ 1534-1537
	II. Matters of Defense,	§ 1538
	III. Indictment,	§§ 1539-1540
	IV. Evidence; Variance,	§ 1541

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1534. **Embracery defined.**—Embracery is an attempt to influence a jury corruptly to one side, by promises, persuasions, entreaties, money, entertainments, and the like; and punishment is provided for the person embracing and for the juror embraced.¹

§ 1535. **Juror summoned only, sufficient.**—Under a statute making it a criminal offense “to corrupt or attempt to corrupt a juror,” is included any person who has been summoned as a juror, whether he has become one of the traverse jurymen or not.²

§ 1536. **Officer treating jury.**—An officer in charge of a jury by taking them to a saloon and treating them at his own expense commits an offense, especially in a case where a reward has been offered for a conviction.³

§ 1537. **A mere attempt constitutes offense.**—Any effort to unlawfully influence a jury, whether successful or not, constitutes embracery.⁴

¹ 4 Bl. Com. 140; Underhill Cr. Ev., § 450; S. v. Williams, 136 Mo. 293, 38 S. W. 75; S. v. Brown, 95 N. C. 685; Gibbs v. Dewey, 5 Cow. (N. Y.) 503; 2 Bish. New Cr. Proc., 344; 3 Greenl. Ev. (Redf. ed.), § 100. See *In re Haymond*, 121 Cal. 385, 53 Pac. 899.

² S. v. Williams, 136 Mo. 293, 38 S. W. 75. See § 1497.

³ P. v. Myers, 70 Cal. 582, 12 Pac. 719.

⁴ S. v. Sales, 2 Nev. 268.

ARTICLE II. MATTERS OF DEFENSE.

§ 1538. **Juror not influenced, no defense.**—It is no defense to a charge of attempting to influence a juror to hang the jury that the juror had already made up his mind to do so, under a statute which provides that "every person who corrupts or attempts to corrupt any other person summoned or sworn as a juror" shall be punished.⁵

ARTICLE III. INDICTMENT.

§ 1539. **Judicial proceeding essential.**—An indictment charging embracery must, with other proper averments, allege the pendency of a judicial proceeding at the time the offense is alleged to have been committed.⁶

§ 1540. **Knowledge sufficiently stated.**—An indictment charging that the defendant "did unlawfully attempt to influence" a person named, "as a juror, with intent to improperly influence his action and findings as a juror in said cause," sufficiently avers that the defendant knew such person was a juror.⁷

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1541. **Variance.**—An indictment charging a person with attempting to improperly influence a juror by saying to him, "See that right was done, that it would not be to his loss," and similar language, is supported by evidence showing that the defendant said to the juror: "You are the only friend I have on the jury, and I want you to look after my rights. How will it go? I will make it all right," and the like.⁸

⁵ S. v. Williams, 136 Mo. 293, 38 S. W. 75.

⁶ Queen v. Leblanc, 8 Leg. News 114.

⁷ S. v. Dankwardt, 107 Iowa 704, 77 N. W. 495.

⁸ S. v. Dankwardt, 107 Iowa 704, 77 N. W. 495.

CHAPTER XXXVI.

MALFEASANCE IN OFFICE.

ART. I.	What Constitutes Offense,	§§ 1542-1551
II.	Matters of Defense,	§§ 1552-1554
III.	Indictment,	§§ 1555-1558

ARTICLE I. WHAT CONSTITUTES OFFENSE.

§ 1542. **Malfeasance in office.**—Any public officer who, being prompted by corrupt or dishonest motives, does any act as an officer which he is not by law authorized to do, in such a manner as is likely to deceive and mislead others, commits the offense of malfeasance in his office.¹

§ 1543. **Committed by extortion.**—Extortion is an abuse of public justice which consists in any officer unlawfully taking, by color of his office, from any man, any money or thing of value that is not due him, or more than is due him, or before it is due.² And an officer collecting fees or costs to which he is not entitled, can not excuse his act by saying that he did not know such collections were illegal. Ignorance of the law is no excuse.^{2a}

§ 1544. **Disregard of duty—Letting contract.**—A public officer who willfully disregards his plain duty in awarding a contract for the public and lets the contract to the disadvantage of the public, is guilty of criminal conduct and liable to punishment.³

¹ S. v. Wedge, 24 Minn. 150.

² 4 Bl. Com. 141; Com. v. Saulsbury, 152 Pa. St. 554, 25 Atl. 610; U. S. v. Deaver, 14 Fed. 599; 2 McClain Cr. L., § 914; 1 Bish. Cr. L. (new ed.), § 573; Underhill Cr. Ev., § 456.

^{2a} Levar v. S., 103 Ga. 42, 29 S. E. 467; Leggatt v. Prideaux, 16 Mont. 205, 40 Pac. 377; S. v. Jones, 71

Miss. 872, 15 So. 237; Com. v. Bagley, 7 Pick. (Mass.) 279; P. v. Monk, 8 Utah 35, 28 Pac. 1115; Underhill Cr. Ev., § 456. But see Cutter v. S., 36 N. J. L. 125; Cleaveland v. S., 34 Ala. 254; S. v. Pritchard, 107 N. C. 921, 12 S. E. 50.

³ S. v. Kern, 51 N. J. L. 259, 17 Atl. 114.

§ 1545. **Misappropriating funds.**—A public officer, by depositing public money entrusted to him, in a bank, on which he receives interest for his own personal use, is guilty of a criminal offense under a statute which forbids any public officer, in any manner not authorized by law, to use money entrusted to his safe keeping, in order to make a profit therefrom.⁴

§ 1546. **Justice of peace—Wrongful act.**—Under a statute providing that “justices of the peace may, for corrupt acts of oppression, partiality, or malfeasance in office,” be fined and removed from office, an act of misconduct by a justice such as taking up estray animals and corruptly causing them to be appraised before himself, as such justice, comes within the statute.⁵

§ 1547. **Officer refusing to discharge duty.**—A tax collector by refusing to receive taxes when tendered to him by a person on behalf of the person who owes the taxes, is liable to suspension from office, although the person offering to pay such taxes had no authority from the person so owing, to pay his taxes.⁶

§ 1548. **De facto officer and deputy included.**—The laws relating to misconduct of officers apply to any deputy officer and also to a *de facto* officer. When a man assumes the responsibilities and duties of a public office, he will not be permitted to dispute the validity of his appointment when prosecuted for misconduct as an officer.⁷

§ 1549. **Clerk is “public officer:” “collector and custodian.”**—A clerk of the judge of the probate court, appointed as provided by statute, is a “public officer,” within the meaning of the law relating to misconduct of public officers.⁸ A “collector and custodian of public money or property” will include a clerk of a court who receives fines and penalties imposed by the court of which he is clerk.⁹

§ 1550. **Responsible for consequences.**—An officer will be held responsible for the consequences of his acts, where it is in his power to determine his duty under circumstances likely to arise, and he fails to do so.¹⁰

⁴ S. v. Boggs, 16 Wash. 143, 47 Pac. 417.

⁵ Wickersham v. P., 1 Scam. (Ill.) 128.

⁶ S. v. Johnson, 30 Fla. 499, 11 So. 855.

⁷ S. v. Berkshire, 2 Ind. 207; S. v. Goss, 69 Me. 22; S. v. Stone, 40

Iowa 547; S. v. Long, 76 N. C. 254; Bish. New Cr. Proc., § 824.

⁸ Scruggs v. S., 111 Ala. 60, 20 So. 642. See S. v. Moores, 52 Neb. 770, 73 N. W. 299.

⁹ S. v. Moores, 52 Neb. 770, 73 N. W. 299.

¹⁰ S. v. Colton, 9 Houst. (Del.) 530.

§ 1551. **Officer must turn over funds—Demand.**—It is the duty of a public officer who has held his office for successive terms to turn over any public money which came to his hand at any previous term, as well as the last term, and on failure to do so he becomes criminally liable.¹¹ Unless required by statute, a demand on an outgoing officer to turn over to his successor the public money in his hands is not essential on a prosecution for neglecting to turn over such money to his successor.¹²

ARTICLE II. MATTERS OF DEFENSE.

§ 1552. **Taking advice competent.**—The defendant may, on a charge of willfully intruding into a public office, show that he acted in good faith after taking advice from counsel, and that his intention was not willful.¹³

§ 1553. **Mere error of judgment.**—A mere error in judgment or departure from sound policy is not sufficient to subject a tribunal, possessing discretionary power, to an indictment for palpable omission of duty. Before such a prosecution can be sustained, it must be shown that there was palpable omission of duty imperatively required by law, in a matter involving no discretion, or a willful and corrupt as well as palpable neglect of duty.¹⁴

33 Atl. 259; *S. v. Hatch*, 116 N. C. 1003, 21 S. E. 430. See *S. v. Moores*, 52 Neb. 770, 73 N. W. 299 (willful). On misconduct and abuse of authority by public officers, see the following additional cases. Officers refusing to act: *Buck v. Com.*, 90 Pa. St. 110; *Wilson v. Com.*, 10 Serg. & R. (Pa.) 373; *S. v. Furguson*, 76 N. C. 197. Neglect of officer to do his duty: *S. v. Baldwin*, 80 N. C. 390; *S. v. Hoit*, 23 N. H. 355; *Com. v. Reiter*, 78 Pa. St. 161; *Moose v. S.*, 49 Ark. 499, 5 S. W. 885; *P. v. Coon*, 15 Wend. (N. Y.) 277. Instances of abuse: *S. v. Spidle*, 44 Kan. 439, 24 Pac. 965; *S. v. Wedge*, 24 Minn. 150; *Duty v. S.*, 9 Ind. App. 595, 36 N. E. 655; *Brackenridge v. S.*, 27 Tex. App. 513, 11 S. W. 630; *P. v. Peck*, 138 N. Y. 386, 34 N. E. 347; *S. v. Hawkins*, 77 N. C. 494; *S. v. Leach*, 60 Me. 58. Misconduct of officer: *P. v. Wheeler*, 73 Cal. 252, 14 Pac. 796; *S. v. Hawkins*, 77 N. C. 494;

Bracey v. S., 64 Miss. 17, 8 So. 163. On intent as an element: *S. v. Miller*, 100 N. C. 543, 5 S. E. 925; *S. v. Kite*, 81 Mo. 97; *S. v. Smith*, 18 N. H. 91; *P. v. Burns*, 75 Cal. 627, 17 Pac. 646; *S. v. Morse*, 52 Iowa 509, 3 N. W. 498.

¹¹ *Johnson v. P.*, 123 Ill. 624, 627, 15 N. E. 37.

¹² *S. v. Assmann*, 46 S. C. 554, 24 S. E. 673. *Contra*, *S. v. Jones*, 10 Humph. (Tenn.) 41.

¹³ *P. v. Bates*, 29 N. Y. Supp. 894.

¹⁴ *Eyman v. P.*, 1 Gilm. (Ill.) 7; *S. v. Hastings*, 37 Neb. 96, 55 N. W. 774; *S. v. Welsh*, 109 Iowa 19, 79 N. W. 369. See *Stahl v. S.*, 5 Ohio C. D. 29, 11 Ohio C. C. 23. But see *S. v. Assmann*, 46 S. C. 554, 24 S. E. 673. See also *S. v. Hatch*, 116 N. C. 1003, 21 S. E. 430; *Com. v. Thompson*, 126 Pa. St. 614, 17 Atl. 754; 2 Bish. New Cr. L., § 972.

§ 1554. **Term of officer expired.**—The fact that the term of a public officer has expired will not defeat a prosecution of such person for misconduct as an officer while in office.¹⁵

ARTICLE III. INDICTMENT.

§ 1555. **Omitted or violated duty, essential.**—In charging public officers with the offense of permitting a nuisance in a public highway, an indictment in failing to allege that the defendants omitted or violated some official duty is fatally defective.¹⁶

§ 1556. **Must aver facts of misconduct.**—The facts constituting the particular act of misconduct of an officer must be set out in the indictment. It is not sufficient to aver that the defendant "has continued to fail, neglect, and refuse to comply with any of the provisions of the statute."¹⁷

§ 1557. **Duplicity—Collected and refused to turn over.**—Charging in an indictment that a tax collector had, on a day stated, collected public money, and "on that day and for five days thereafter refused and omitted to turn it over," is not bad for duplicity.¹⁸

§ 1558. **"Knowingly" amounts to knowledge.**—An indictment which charges that the defendant was knowingly concerned in unlawfully receiving assessments from officers or employes of the United States for political purposes sufficiently avers that he knew that the persons who made the contributions were public officers.¹⁹

¹⁵ Com. v. Coyle, 160 Pa. St. 36, 28 Atl. 576, 634.

¹⁶ Com. v. Kinnaird, 18 Ky. L. 647, 37 S. W. 840; S. v. Darling, 89 Me. 400, 36 Atl. 632. See also P. v. Meakim, 133 N. Y. 214, 30 N. E. 828; Russell v. S., 57 Ga. 420; Hatch

v. S., 10 Tex. App. 515; McCullough v. S., 63 Ala. 75.

¹⁷ Dixon v. S., 4 Blackf. (Ind.) 312; S. v. Longley, 10 Ind. 482.

¹⁸ P. v. Otto, 70 Cal. 523, 11 Pac. 675.

¹⁹ U. S. v. Scott, 74 Fed. 213.

CHAPTER XXXVII.

RESISTING OFFICER.

ART. I.	What Constitutes,	§§ 1559-1560
II.	Matters of Defense,	§§ 1561-1570
III.	Indictment,	§§ 1571-1579
IV.	Evidence,	§§ 1580-1581

ARTICLE I. WHAT CONSTITUTES.

§ 1559. **Essential elements.**—To constitute the offense of resisting an officer, the officer or person resisted must be authorized to execute the process in the execution of which he is resisted, the process must be a legal process emanating from a court or person having jurisdiction to issue it, and the officer at the time and place must be authorized in law to serve or execute the same.¹

§ 1560. **Special officer included.**—The language of the statute is: "Every person who shall hinder, obstruct, resist, or abuse any justice of the peace, or resist, hinder, obstruct, or abuse any sheriff, deputy sheriff, constable, or other officer, in the execution of his office, shall be punished." Such statute includes a special officer; that is, a private person deputed to serve or execute some process.²

ARTICLE II. MATTERS OF DEFENSE.

§ 1561. **Execution sale.**—If an officer selling goods by virtue of an execution be resisted in delivering possession to the purchaser, such resistance is a violation.³

¹ Bowers v. P., 17 Ill. 374; S. v. Hooker, 17 Vt. 658; Cantrill v. P., 3 Gilm. (Ill.) 357; S. v. Estis, 70 Mo. 427. See P. v. Nash, 1 Idaho

² S. v. Moore, 39 Conn. 244, 1 Green C. R. 298; 4 Bl. Com. 129.
³ Mitchell v. S., 101 Ga. 578, 28 S. E. 916.

§ 1562. **Resisting arrest.**—On a charge of resisting an officer who was attempting to arrest the defendant, it is no defense that some time after the attempted arrest the defendant offered to go with the officer before some other justice than the one by whom the warrant was issued.*

§ 1563. **Officer showing warrant.**—It is no defense to a charge of resisting an officer making an arrest that the officer did not show the warrant where the defendant knew the official character of the officer and that he had a warrant.⁵

§ 1564. **Arrested person not guilty.**—It is no defense to a charge of resisting an officer in making an arrest that the person arrested is not guilty of the offense charged.⁶

§ 1565. **Arrest unlawful.**—It is no offense in breaking away from an officer where improperly deprived of liberty by process issued without jurisdiction.⁷ An officer in attempting to execute his writ by taking the wrong person or property may be resisted.⁸

§ 1566. **Resisting unreasonable violence.**—Where an officer in making an arrest uses unreasonable violence, it is not an offense to use reasonable force in repelling such unreasonable violence.⁹

§ 1567. **Assaulting officer—Putting in fear.**—Attacking an officer with a weapon while attempting to make a lawful arrest, and threatening to shoot him, or in any manner putting him in fear while in the discharge of his duty, constitutes an offense.¹⁰

§ 1568. **Stealing goods from officer.**—To defeat an officer in the execution of his process, by stealing the goods from him taken by

*King v. S., 89 Ala. 43, 8 So. 120.

⁵ S. v. Dula, 100 N. C. 423, 6 S. E. 89.

⁶ S. v. Garrett, 80 Iowa 590, 40 N. W. 748; Com. v. Tracey, 5 Metc. (Mass.) 552.

⁷ Housh v. P., 75 Ill. 491 (citing S. v. Leach, 7 Conn. 452); 2 McClain Cr. L., § 922; P. v. Ah Teung, 92 Cal. 421, 28 Pac. 577; S. v. Beebe, 13 Kan. 589; S. v. Jones, 78 N. C. 420.

⁸ Wentworth v. P., 4 Scam. (Ill.) 555. The burden is on the defend-

ant to show the invalidity of the warrant. S. v. Freeman, 8 Iowa 428; Underhill Cr. Ev., § 446.

⁹ S. v. Dennis, 2 Marv. (Del.) 433, 43 Atl. 261.

¹⁰ S. v. Seery, 95 Iowa 652, 64 N. W. 631; S. v. Russell (Iowa), 76 N. W. 653; S. v. Dennis, 2 Marv. (Del.) 433, 43 Atl. 261; Armstrong v. Vicksburg, etc., R. Co., 46 La. 1448, 16 So. 468. See Woodworth v. S., 26 Ohio St. 196.

virtue of his writ, is not "resisting an officer." Such taking of the property is larceny if the officer was rightfully entitled to the possession of the same.¹¹

§ 1569. **When not resisting.**—The defendant did nothing except to lay up the fence which the officer was pulling down to enable him to take a piece of machinery that he was not entitled to take by a writ of possession: Held not an offense of resisting.¹²

§ 1570. **Taking, when not resistance.**—Where property which has been levied upon by the sheriff and left in charge of another is privately taken away by the person claiming to be the owner, it is not a violation of the statute for "willfully obstructing, resisting, or opposing any sheriff or other officer in serving or executing any lawful process."¹³

ARTICLE III. INDICTMENT.

§ 1571. **Statutory words sufficient.**—Describing the offense in the indictment in the words of the statute is sufficient; words importing knowledge, such as "knowingly," are not essential in the description, unless made so by statutory definition.¹⁴

§ 1572. **Describing "process."**—An indictment for obstructing an officer in the service of legal process, must expressly allege such process to be a "lawful process," or so describe it that it shall appear to be so.¹⁵ The indictment must allege that the warrant which the officer was serving when resisted was a "lawful process," or so describe it that it shall appear to be so, on the face of the indictment.¹⁶ A general averment that the process was a "lawful process," and the person resisted a public officer, authorized to execute the same, as a constable, in the execution of which he is resisted or opposed, is sufficient allegation both of the validity of the process and the jurisdiction of the officer.¹⁷

¹¹ Davis v. S., 76 Ga. 721.

¹² Smith v. P., 99 Ill. 447; U. S. v. Terry, 42 Fed. 317; Agee v. S., 64 Ind. 340; P. v. Hopson, 1 Denio (N. Y.) 574.

¹³ Davis v. S., 76 Ga. 721.

¹⁴ S. v. Perkins, 43 La. 186, 8 So. 439; S. v. Ashworth, 43 La. 204, 8 So. 625; S. v. Morrison, 46 Kan. 679, 27 Pac. 133.

¹⁵ S. v. Flagg, 50 N. H. 330.

¹⁶ S. v. Flagg, 50 N. H. 321, 330; S. v. Beasom, 40 N. H. 367. For form of indictment held sufficient, see Bowers v. P., 17 Ill. 373.

¹⁷ Bowers v. P., 17 Ill. 374; Cantrill v. P., 3 Gilm. (Ill.) 356; McQuoid v. P., 3 Gilm. (Ill.) 80; S. v. Moore, 39 Conn. 244; Slicker v. S., 13 Ark. 397; S. v. Roberts, 52 N. H.

§ 1573. **Description of officer's process immaterial.**—By statutory provision of Alabama, an indictment charging the offense of unlawfully resisting an officer, in serving criminal process, need not describe the offense named in the warrant or by whom issued, nor need it state the date of the warrant.¹⁸

§ 1574. **Officer's act to be alleged.**—In stating the offense, it is not sufficient to allege in general terms that the officer resisted was in the due and legal performance of his duty. The indictment should aver what he was doing.¹⁹

§ 1575. **Alleging how resisted.**—Following the words of the statute, an information which alleges that the defendant did unlawfully "resist, delay, and obstruct" an officer in the discharge of his duty is sufficient, and need not set out in what manner he resisted.²⁰

§ 1576. **Alleging knowledge—"Knowingly."**—An indictment in charging the defendant with assaulting an "officer of the penitentiary," without alleging that he knew him to be an officer, is defective.²¹ Under a statute making it an offense to "knowingly and willfully" resist an officer in serving process, an indictment which charges the defendant with "unlawfully and willfully" resisting the officer is defective. The word willfully does not convey the meaning of knowingly.²²

§ 1577. **Stating name, immaterial.**—In charging the offense of resisting an officer in the discharge of his duty in carrying a prisoner to jail, it is not necessary to state the name of the prisoner in the indictment, nor is it necessary to set out the warrant.²³

492, 1 Green C. R. 157; *S. v. Cassady*, 52 N. H. 500, 1 Green C. R. 163.

¹⁸ *Howard v. S.*, 121 Ala. 21, 25 So. 1000.

¹⁹ *S. v. Flagg*, 50 N. H. 321; *S. v. Johnson*, 42 La. 559, 7 So. 588. *Contra*, *S. v. Pickett*, 118 N. C. 1231, 24 S. E. 350.

²⁰ *P. v. Hunt*, 120 Cal. 281, 52 Pac. 658.

²¹ *S. v. Smith*, 11 Or. 205, 8 Pac. 343; *S. v. Maloney*, 12 R. I. 251; *S. v. Burt*, 25 Vt. 373; *Blake v. U. S.*,

71 Fed. 286; *Com. v. Israel*, 4 Leigh (Va.) 675; *Patton v. S.* (Tex. Cr.), 49 S. W. 389; *S. v. Brown*, 6 Wash. 609, 34 Pac. 133; *S. v. Phipps*, 34 Mo. App. 400; *Bristow v. S.*, 36 Tex. Cr. 379, 37 S. W. 326; *S. v. Carpenter*, 54 Vt. 551, 4 Am. C. R. 560.

²² *S. v. Perry*, 109 Iowa 353, 80 N. W. 401.

²³ *S. v. Garrett*, 80 Iowa 589, 46 N. W. 748; *S. v. Dunn*, 109 N. C. 839, 13 S. E. 881.

§ 1578. **Arresting without warrant.**—On a charge of resisting an officer in making an arrest for a misdemeanor without a warrant, the indictment, in failing to allege that the offense was one for which the officer could lawfully make an arrest without a warrant, is fatally defective.²⁴

§ 1579. **Persons assisting officer.**—Where an officer has persons assisting him in serving lawful process and the accused knew such persons were assisting, it is not necessary to allege in the indictment that the officer had requested them to assist him.²⁵

ARTICLE IV. EVIDENCE.

§ 1580. **Proving person to be officer.**—It must appear in evidence that the person resisted was an officer, and this fact may be proved by parol evidence.²⁶ Proof that an individual has acted notoriously as a public officer is *prima facie* evidence of his official character without producing his commission or appointment. That the officer is one *de facto* is sufficient.²⁷

§ 1581. **Officer de facto sufficient.**—Evidence that the person assaulted was at the time of the assault and with the defendant's knowledge acting as a police officer and wearing a uniform and badge of such an officer, was competent and sufficient evidence of his official capacity. The want of similar proof as to any other time or offense might affect the weight but not the competency of such evidence.²⁸

²⁴ McKinney v. S. (Tex. Cr.), 22 S. W. 146.

²⁵ S. v. Emery, 65 Vt. 464, 27 Atl. 167.

²⁶ Merritt v. S. (Miss.), 5 So. 386; Com. v. McCue, 16 Gray (Mass.) 226; S. v. Zeibart, 40 Iowa 169; S. v. Carpenter, 54 Vt. 551; S. v. Beasom, 40 N. H. 367; Pettibone v. U. S., 148 U. S. 197, 13 S. Ct. 542; Underhill Cr. Ev., § 446.

²⁷ S. v. Roberts, 52 N. H. 492, 1 Green C. R. 158; S. v. Dierberger, 90 Mo. 369, 2 S. W. 286; S. v. Watson,

66 Iowa 670, 24 N. W. 268; S. v. Brooks, 39 La. 817, 2 So. 498; P. v. Hopson, 1 Denio (N. Y.) 574; Robinson v. S., 82 Ga. 535, 9 S. E. 528; 1 Greenl. Ev., § 83; Cockerman v. S. (Miss.), 19 So. 195; Underhill Cr. Ev., § 446. See S. v. Sherburne, 59 N. H. 99; Com. v. Tobin, 108 Mass. 429; Reg. v. Vickery, 12 Q. B. 478.

²⁸ Com. v. Tobin, 108 Mass. 429; Reg. v. Vickery, 12 Q. B. 478; S. v. Roberts, 52 N. H. 492, 1 Green C. R. 158; 1 Greenl. Ev., § 83.

CHAPTER XXXVIII.

PERJURY.

ART.	I. Definition and Elements,	§§ 1582-1610
	II. Matters of Defense,	§§ 1611-1623
	III. Indictment,	§§ 1624-1649
	IV. Evidence; Variance,	§§ 1650-1669

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1582. **Perjury defined: "willfully and falsely."**—Perjury consists in willfully and falsely swearing to a fact material to the point in issue before a court or tribunal having legal authority to inquire into the cause or matter investigated.¹ To sustain a charge of perjury the evidence must prove the following essential elements: (1) The authority of the officer to administer the oath; (2) the occasion of administering it; (3) the taking of the oath by the accused; (4) the substance of the oath; (5) the material matter sworn to; (6) the introductory averments; (7) the falsity of the matter sworn to; and (8) the corrupt intention of the accused.² To commit perjury a person must "willfully, corruptly and falsely" swear or affirm. The false assertion made by the witness under oath must be known to such witness to be false and must be intended by him or her to mislead the court or jury.³

¹ 4 Bl. Com. 137; *Pankey v. P.*, 1 Scam. (Ill.) 81; *S. v. Hunt*, 137 Ind. 537, 9 Am. C. R. 433, 37 N. E. 409. See *S. v. Houston*, 103 N. C. 383, 8 Am. C. R. 631, note; *S. v. Mace*, 76 Me. 64, 5 Am. C. R. 589; *Hood v. S.*, 44 Ala. 86; *Greenl. Ev.* (Redf. ed.), § 188; *Underhill Cr. Ev.*, § 466.

² 2 Roscoe Cr. Ev., 836, 1045. See

3 *Greenl. Ev.*, § 189, as to essential averments.

³ *Coyne v. P.*, 124 Ill. 24, 14 N. E. 668; *Johnson v. P.*, 94 Ill. 505; *P. v. German*, 110 Mich. 244, 68 N. W. 150. See *S. v. Higgins*, 124 Mo. 640, 28 S. W. 178; *P. v. Ross*, 103 Cal. 425, 37 Pac. 379; *Bell v. Senneff*, 83 Ill. 122; *P. v. Willey*, 2 Park. Cr. (N. Y.) 19; *Thomas v.*

§ 1583. **Inciting another—Both must know falsity.**—To constitute the crime of inciting another to commit perjury it must appear that the accused was urging the other witness to give false testimony, knowing that the other, as well as himself, was aware of its falsity. They both must know it to be false.⁴

§ 1584. **Subornation—What essential.**—In order to convict the accused of subornation of perjury it is essential for the commonwealth to show that the person whom he is alleged to have suborned has committed perjury.⁵ "Subornation of perjury is the offense of procuring another to take such a false oath, as constitutes perjury in the principal."⁶

§ 1585. **Knowledge, when essential.**—Swearing falsely to material matters in an affidavit is not perjury, unless it be shown that the defendant in making the affidavit knew it was to be used as evidence in the particular proceeding in which it was used and that he made the affidavit for that purpose.⁷

§ 1586. **Degree of materiality.**—The degree of materiality of the matter testified to is of no importance, for if it tends to prove the matter in hand it is enough, though it be but circumstantial. Questions affecting the defendant's credit as a witness are material.⁸ And a witness' answers on cross-examination are material and may be assigned as perjury, however discursive they may be, if they go to his credit as a witness.⁹

S., 71 Ga. 252; S. v. Cruikshank, 6 Blackf. (Ind.) 62; Miller v. S., 15 Fla. 577; Green v. S., 41 Ala. 419; Williams v. Com., 91 Pa. St. 493; Davidson v. S., 22 Tex. App. 372, 3 S. W. 662; 1 Hawk. P. C. 429, § 2. ⁴Coyne v. P., 124 Ill. 25, 14 N. E. 668 (citing 2 Whar. Cr. L. (9th ed.), § 1329); U. S. v. Evans, 19 Fed. 912; P. v. Ross, 103 Cal. 425, 37 Pac. 379.

⁵Maybush v. Com., 29 Gratt. (Va.) 857, 3 Am. C. R. 293, citing 2 Bish. Cr. Proc., § 879; U. S. v. Evans, 19 Fed. 912; U. S. v. Wilcox, 4 Blatch. 393. See 3 Greenl. Ev., § 188.

⁶4 Bl. Com. 138.

⁷Rowe v. S., 99 Ga. 706, 27 S. E. 710.

⁸3 Greenl. Ev., §§ 195, 196; Queen v. Baker, L. R. (1895) 1 Q. B. 797, 9 Am. C. R. 421; S. v. Day, 100 Mo. 242, 12 S. W. 365; S. v. Clogston, 63 Vt. 215, 22 Atl. 607; Masterson v. S., 144 Ind. 240, 43 N. E. 138; P. v. Macard, 109 Mich. 623, 67 N. W. 968; Hanscom v. S., 93 Wis. 273, 67 N. W. 419; S. v. Hunt, 137 Ind. 537, 37 N. E. 409, 9 Am. C. R. 433; George v. S., 40 Tex. Cr. 646, 50 S. W. 374, 51 S. W. 378; Dilcher v. S., 39 Ohio St. 130; P. v. Courtney, 94 N. Y. 490; 4 Bl. Com. 137.

⁹S. v. Hunt, 137 Ind. 537, 9 Am. C. R. 434, 37 N. E. 409; Hanscom v. S., 93 Wis. 273, 67 N. W. 419; 3 Greenl. Ev., § 195.

§ 1587. **Witness' credibility material.**—If a person as a witness testifies that he never had been tried in the central criminal court and had never been in custody at a certain station named, knowing such testimony to be false, he is guilty of perjury.¹⁰ If the evidence given by a witness in direct examination is not material his testimony on cross-examination on matters relating only to his credibility can not be the foundation for a charge of perjury.¹¹

§ 1588. **Belief should be reasonable.**—A man can not corruptly swear falsely and shield himself from the penalty of perjury by stating in his affidavit that he believes his statement to be true. The belief of the accused should be reasonable and not capricious and willfully entertained without reasonably fair evidence upon which it may be based.¹²

§ 1589. **Matter, when material.**—Willful false swearing in attempting to identify a person by a photograph, where the identity of such person was material in a prosecution for offering a forged deed for record, is sufficiently material to base perjury upon it.¹³

§ 1590. **Materiality, question of law.**—Whether the evidence upon which perjury is assigned be material or not is a question entirely for the court and not the jury.¹⁴ But where by statute the jury in a criminal case is made the judge of the law and the evidence, the defendant on a perjury charge has the right to have submitted to the jury the materiality of the testimony charged to be false in the case in which it was given.¹⁵

§ 1591. **Perjury on imperfect pleadings; defective proceedings.**—Perjury may be assigned on testimony which, under the pleading,

¹⁰ Reg. v. Lavey, 3 C. & R. 26; Com. v. Bonner, 97 Mass. 587; S. v. Park, 57 Kan. 431, 46 Pac. 713; Com. v. Johnson, 175 Mass. 152, 55 N. E. 804; Williams v. S., 28 Tex. App. 301, 12 S. W. 1103. See also U. S. v. Landsberg, 23 Fed. 585, 21 Blatchf. 159, 4 Am. C. R. 475; S. v. Mooney, 65 Mo. 494; Reg. v. Gibbons, 9 Cox C. C. 105.

¹¹ Stanley v. U. S., 1 Okla. 336, 33 Pac. 1025.

¹² Johnson v. P., 94 Ill. 513, 514; Rex v. Pedley, 1 Leach 365; Com. v. Cornish, 6 Binn. (Pa.) 249.

¹³ P. v. Von Tiedeman, 120 Cal. 128, 52 Pac. 155.

¹⁴ Gordon v. S., 48 N. J. L. 611, 7 Atl. 476; U. S. v. Singleton, 54 Fed. 488; S. v. Williams, 30 Mo. 364; 2 Thompson Trials, § 2187; S. v. Caywood, 96 Iowa 367, 65 N. W. 385; S. v. Swafford, 98 Iowa 362, 67 N. W. 284; Peters v. U. S., 2 Okla. 138, 37 Pac. 1081; P. v. Lem You, 97 Cal. 224, 32 Pac. 11; Hanscom v. S., 93 Wis. 273, 67 N. W. 419; S. v. Park, 57 Kan. 431, 46 Pac. 713.

¹⁵ S. v. Spencer, 45 La. 1, 12 So. 135.

where given, was objectionable; but if not objected to the imperfection in the pleadings will be out of the case.¹⁶ Where a witness willfully testifies falsely in a proceeding which may be voidable, but not void, before a justice or court, and which could be met by amendment, perjury can be prosecuted on such false testimony.¹⁷

§ 1592. Before grand jury.—Willful false swearing before a grand jury on a material matter relating to some particular case under investigation is perjury. But if the false swearing be in reference to a general investigation by the grand jury, directed to no particular end, it is not perjury.¹⁸

§ 1593. Perjury in making affidavit.—Perjury may be based on a false statement in an affidavit, on a material matter, where such affidavit is required to be made on making an application to purchase government lands.¹⁹

§ 1594. Affidavit for continuance.—The defendant in his affidavit for a continuance on a burglary charge stated that his absent witness, naming him, would swear on the trial that he, the defendant, was at his home at the time of the burglary, and that he had no other witness by whom he could prove that he was at home, as stated in the affidavit. The statement in the affidavit that he has no other witness to prove that he was at home is a material allegation upon which perjury could be assigned.²⁰

§ 1595. In making affidavit for writ.—An affidavit may be falsely made to procure a writ of arrest, or as a foundation for a proceeding to compel another to keep the peace and the like, in each of which the essential quality of indictable perjury material to the point of inquiry exists.²¹

¹⁶ Cronk v. P., 131 Ill. 60, 22 N. E. 862; S. v. Molier, 1 Dev. (N. C.) 263; Morford v. Ter. (Okla., 1901), 63 Pac. 958; Chamberlain v. P., 23 N. Y. 85; Reg. v. Gibbon, L. & C. 109; Crump v. Com., 75 Va. 922; S. v. Trask, 42 Vt. 152. See Warner v. Fowler, 8 Md. 25.

¹⁷ Maynard v. P., 135 Ill. 431, 25 N. E. 740; 2 Bish. Cr. L. (5th ed.) 1028; S. v. Brown, 68 N. H. 200, 38 Atl. 731.

¹⁸ Pipes v. S., 26 Tex. App. 318, 9 S. W. 614; Banks v. S., 78 Ala. 14; P. v. Greenwell, 5 Utah 112, 13 Pac.

89; S. v. Offutt, 4 Blackf. (Ind.) 355; Mackin v. P., 115 Ill. 321, 3 N. E. 222; S. v. Turley, 153 Ind. 345, 55 N. E. 30.

¹⁹ U. S. v. Wood, 70 Fed. 485.

²⁰ Sanders v. P., 124 Ill. 222, 16 N. E. 81; S. v. Bunker, 38 Kan. 737, 17 Pac. 651. See also Maybush v. Com., 29 Gratt. (Va.) 857, 3 Am. C. R. 292; 3 Greenl. Ev., § 190; S. v. Winsteadley, 151 Ind. 316, 51 N. E. 92; S. v. Matlock, 48 La. 663, 19 So. 669.

²¹ Jacobs v. S., 61 Ala. 448, 6 Am. C. R. 467; S. v. Johnson, 7 Blackf.

§ 1596. **Affidavit, not used.**—Although the false testimony was given in an affidavit or deposition which was not actually used on the trial for and in which it was taken, it is, nevertheless, perjury.²²

§ 1597. **Attorney swearing falsely.**—Where an attorney in an affidavit for an attachment falsely and knowingly states that he is the attorney for the plaintiff his statement is material on which perjury can be based.²³

§ 1598. **Affidavit includes "deposition."**—Under a statute which states the time when depositions shall be deemed complete as a basis for perjury the term "deposition" will include affidavits.²⁴

§ 1599. **Matter, when immaterial.**—A disinterested witness, in making the required affidavit for an applicant for vacant lands, is not guilty of perjury in swearing that the lands for which application is made are "unimproved," if there were no buildings thereon susceptible of occupancy as abodes, though the lands may be under cultivation and fences thereon.²⁵

§ 1600. **Swearing in land contest.**—Swearing falsely in a land contest before the register or receiver of a local land office respecting an entry of a homestead is perjury, although such contest is not specially authorized by statute, but is authorized by the rules of the land department under a general grant of authority to prescribe appropriate regulations for the disposition of the public lands.²⁶

§ 1601. **Matter, when immaterial.**—The defendant testified before the grand jury that he had not purchased nor seen any one purchase intoxicating liquors in a certain town on Sunday for two years: Held not material on which to base perjury, because the statute makes sales made on Sunday criminal acts only when made by certain traders.²⁷

(Ind.) 49. See *Meyers v. U. S.*, 5 Okla. 173, 48 Pac. 186.

²² *S. v. Whittemore*, 50 N. H. 245; *P. v. Naylor*, 82 Cal. 607, 23 Pac. 116; *U. S. v. Volz*, 14 Blatch. (U. S.) 15; *Reg. v. Vreones*, L. R. (1891) 1 Q. B. D. 360; *Shell v. S.*, 148 Ind. 50, 47 N. E. 144. See *S. v. Geer*, 46 Kan. 529, 26 Pac. 1027. But see *P. v. Fox*, 25 Mich. 492.

²³ *S. v. Madigan*, 57 Minn. 425, 59 N. W. 490.

²⁴ *P. v. Robles*, 117 Cal. 681, 49 Pac. 1042. See *P. v. Maxwell*, 118 Cal. 50, 50 Pac. 18.

²⁵ *Com. v. Clark*, 157 Pa. St. 257, 27 Atl. 723.

²⁶ *Caha v. U. S.*, 152 U. S. 211, 14 S. Ct. 513; *Peters v. U. S.*, 2 Okla. 116, 33 Pac. 1031. But see *U. S. v. Manion*, 44 Fed. 800.

²⁷ *Meeks v. S.*, 32 Tex. Cr. 420, 24 S. W. 98.

§ 1602. **Matter must be material.**—That the matter sworn to and alleged to be false must be material to the issue, see the following cases.²⁸

§ 1603. **Officer administering oath.**—It is a material and important fact for the prosecution to establish that the oath administered to the witness, on which perjury is alleged, was legally administered, and that the officer administering the oath had authority and jurisdiction to swear the witness. When the prosecution has made *prima facie* proof of the fact, the right to contradict it is clear and unequivocal and can not be controverted by presumptions that the appointing power has performed its duty.²⁹

§ 1604. **Officer must have authority.**—There is no perjury in false testimony given under the sanction of an oath unless such oath is administered by some one having legal authority, and the case, proceeding or matter in respect of which it is administered must be one of which the tribunal or magistrate has jurisdiction.³⁰

§ 1605. **Officer, when authorized.**—An assessor or other officer is not authorized to administer an oath outside his township or territorial limits unless expressly authorized by statute.³¹

§ 1606. **Officer not authorized.**—A person who is not an elector at a primary election will not be guilty of perjury in taking a false oath before the primary election officer, because such officer is authorized by the statute to administer oaths only to electors and not to persons who are not electors.³²

²⁸ Miller v. S., 15 Fla. 577; Com. v. Grant, 116 Mass. 17; S. v. Hattaway, 2 N. & M. (S. C.) 118, 10 Am. D. 580; S. v. Lawson, 98 N. C. 759, 4 S. E. 134; S. v. Trask, 42 Vt. 152; S. v. Hobbs, 40 N. H. 229; S. v. Aikens, 32 Iowa 403; Hembree v. S., 52 Ga. 242; Nelson v. S., 47 Miss. 621; Hicks v. S., 86 Ala. 30, 5 So. 425; S. v. Murphy, 101 N. C. 697, 8 S. E. 142; Saunders v. P., 124 Ill. 218, 16 N. E. 81.

²⁹ Lambert v. P., 76 N. Y. 220, 230; 2 Hawk. P. C. (7th ed.) 86. See 3 Greenl. Ev., § 190; U. S. v. Curtis, 107 U. S. 671, 2 S. Ct. 507; Van Dusen v. P., 78 Ill. 645.

³⁰ Maynard v. P., 135 Ill. 425, 25 N. E. 740; 2 Bish. Cr. L. (5th ed.), § 1020; Morrell v. P., 32 Ill. 499; Renew v. S., 79 Ga. 162, 4 S. E. 19; Ter. v. Anderson, 2 Idaho 537, 21 Pac. 417; S. v. Wilson, 87 Tenn. 693, 11 S. W. 792; Greene v. P., 182 Ill. 278, 55 N. E. 341; Lavender v. S., 85 Ga. 539, 11 S. E. 361; Anderson v. S., 24 Tex. App. 715, 7 S. W. 40; S. v. Furlong, 26 Me. 69; S. v. Whittemore, 50 N. H. 245. See P. v. Cohen, 118 Cal. 74, 50 Pac. 20.

³¹ Van Dusen v. P., 78 Ill. 647; 2 McClain Cr. L., § 855.

³² Com. v. Polluck, 6 Pa. Dist. R. 559.

§ 1607. **Officer de facto.**—The rule founded upon public policy, which requires the acts of *de facto* officers to be treated for many purposes as valid and binding, does not apply when an oath administered by such an officer is made the foundation of a prosecution for perjury.³³

§ 1608. **Failure to claim privilege.**—If a person voluntarily testify before the grand jury about the matter on which he is indicted, without claiming his privilege as a witness, perjury may be assigned upon it if his testimony is willfully false.³⁴

§ 1609. **Result of case immaterial.**—Evidence as to the outcome or result of the case in which the perjury is alleged to have been committed is immaterial. It is not necessary to allege or prove the final determination of that case.³⁵

§ 1610. **On affidavit for continuance—When defective.**—On a charge of perjury for willfully falsely swearing to an affidavit for a continuance of a cause, it makes no difference that the continuance was denied for a failure to show diligence, or other defect; if the affidavit was false as to a material fact necessary to support the general ground upon which a continuance was asked, the perjury was committed.³⁶

ARTICLE II. MATTERS OF DEFENSE.

§ 1611. **Swearing in void proceedings.**—Swearing falsely in a matter which is a void proceeding, or before a body illegally constituted, is not perjury, however corrupt the intention may have been in so swearing.³⁷

³³ *Biggerstaff v. Com.*, 11 Bush (Ky.) 169, 1 Am. C. R. 497, 500; *S. v. Hascall*, 6 N. H. 352. See 3 Greenl. Ev., § 190; *Lambert v. P.*, 76 N. Y. 220; *Muir v. S.*, 8 Blackf. (Ind.) 154; *Rex v. Verelst*, 3 Camp. 432.

³⁴ *Mackin v. P.*, 115 Ill. 321, 3 N. E. 222, 56 Am. R. 157; *P. v. Courtney*, 94 N. Y. 490; *S. v. Hawkins*, 115 N. C. 712, 20 S. E. 623; *Pipes v. S.*, 26 Tex. App. 318, 9 S. W. 614. See 3 Greenl. Ev., § 191. See also *Com. v. Turner*, 98 Ky. 526, 17 Ky. L. 925, 33 S. W. 88; *S. v. Turley*, 153 Ind. 345, 55 N. E. 30.

³⁵ *P. v. Williams*, 92 Hun 354, 36 N. Y. Supp. 511; *Com. v. Moore*, 9 Pa. Co. Ct. R. 501. A trial for perjury may proceed to a conclusion though the case in which the perjury was committed is still pending: *Greene v. P.*, 182 Ill. 278, 55 N. E. 341. See *P. v. Hayes*, 140 N. Y. 484, 35 N. E. 951; *U. S. v. Pettus*, 84 Fed. 791.

³⁶ *Sanders v. P.*, 124 Ill. 223, 16 N. E. 81; *Com. v. Grant*, 116 Mass. 17; *Wood v. P.*, 59 N. Y. 117; *S. v. Dayton*, 23 N. J. L. 49.

³⁷ *Urquhart v. S.*, 103 Ala. 90, 16 So. 17; *Com. v. Hillenbrand*, 96 Ky.

§ 1612. **Affidavit immaterial.**—Perjury can not be assigned upon an affidavit made with the view of applying for an order of seizure of goods, if no such application was actually made or no such order was obtained. Such affidavit is extra-judicial and can not be made the basis of perjury.³⁸

§ 1613. **In suit not commenced.**—The defendant tried to induce another to commit perjury by falsely swearing in a suit when it should be commenced and tried: Held not to be perjury “in a proceeding before any court, tribunal or officer created by law, or in relation to which an oath or affirmation is by law authorized.”³⁹

§ 1614. **Acquittal of former charge—Defense.**—The fact that the defendant was acquitted on a charge of adultery, in which cause he testified that he had not had sexual intercourse with a certain woman, is a bar to a prosecution for perjury alleged to have been committed by swearing that he had not had sexual intercourse with the woman.⁴⁰

§ 1615. **Result of former trial immaterial.**—The defendant may be guilty of perjury though the party whose case was being investigated was innocent, and in fact no such offense had been committed by him.⁴¹

§ 1616. **Pending case not essential.**—Under a statute providing that “if any person endeavor to incite or procure another to commit perjury, though no perjury be committed, he shall be punished,” it is not necessary to show that a case was actually pending.⁴²

§ 1617. **Oath not authorized.**—Swearing falsely in a matter or proceeding without the authority of any court or where no oath is required by statute, can not be made the foundation of perjury.⁴³

407, 16 Ky. L. 485, 29 S. W. 287. See *Weaver v. S.*, 34 Tex. Cr. 554, 31 S. W. 400; *U. S. v. Jackson*, 20 D. C. 424; *Morford v. Ter.* (Okla., 1901), 63 Pac. 958.

³⁸ *Jacobs v. S.*, 61 Ala. 448, 4 Am. C. R. 468; *P. v. Fox*, 25 Mich. 492. See also *P. v. Gaige*, 26 Mich. 30, 1 Green C. R. 524; *Silver v. S.*, 17 Ohio 365; *Com. v. Kimball*, 108 Mass. 473.

³⁹ *S. v. Joaquin*, 69 Me. 218, 2 Am. C. R. 651; *Reg. v. Bishop*, Car. & M. 302; *S. v. Plummer*, 50 Me. 217.

⁴⁰ *Cooper v. Com.*, 21 Ky. L. 546, 51 S. W. 789, 45 L. R. A. 216.

⁴¹ *S. v. Schill*, 27 Iowa 263; *S. v. Williams*, 61 Kan. 739, 60 Pac. 1050; *S. v. Wakefield*, 73 Mo. 549; *Mackin v. P.*, 115 Ill. 325, 3 N. E. 222; *Hutcherson v. S.*, 33 Tex. Cr. 67, 24 S. W. 908.

⁴² *S. v. Waddle*, 100 Iowa 57, 69 N. W. 279. But see *S. v. Howard*, 137 Mo. 289, 38 S. W. 908; *Nicholson v. S.*, 97 Ga. 672, 25 S. E. 360.

⁴³ *U. S. v. Babcock*, 4 McLean (U. S.) 115; *Lamden v. S.*, 5 Humph.

§ 1618. Person who administered oath, unauthorized.—The evidence must show that the person who administered the oath was authorized by law to administer it to warrant a conviction. A jurat of the clerk, under seal, is not sufficient.⁴⁴ No oath taken before those who take upon them to administer oaths of a public nature without legal authority can ever amount to perjury in the eye of the law, for they are of no manner of force.⁴⁵

§ 1619. Swearing before unauthorized person.—An officer elect, such as assessor, is not authorized to administer oaths before the time fixed by law for him to enter upon the discharge of his duties, nor can one officer administer oaths for another, as a justice, for a coroner, if not authorized by statute.⁴⁶

§ 1620. Validity of election of officer, immaterial.—On the trial of an indictment charging perjury, alleged to have been committed before a justice of the peace, the validity of the election of such justice can not be questioned.⁴⁷

§ 1621. Advice from attorney.—On a charge of perjury the defendant may show that he consulted an attorney at law in reference to the matter about which he testified and that but for the advice of the attorney he would not have testified as he did.⁴⁸

§ 1622. Defendant may disprove alleged firm.—The defendant may show on a charge of perjury in swearing that he had never been a member of a certain firm, that no such firm ever existed, although he may have stated to certain persons that he had been a member of the alleged firm.⁴⁹

§ 1623. Matter immaterial—Defense.—The oath upon which perjury was assigned was upon the examination of the accused in open

(Tenn.) 83; *S. v. McCarthy*, 41 Minn. 59, 42 N. W. 599.

⁴⁴ *Morrell v. P.*, 32 Ill. 502; *U. S. v. Garcelon*, 82 Fed. 611; *S. v. Theriot*, 50 La. 1187, 24 So. 179; *Underhill Cr. Ev.*, § 470.

⁴⁵ *Biggerstaff v. Com.*, 11 Bush (Ky.) 169, 1 Am. C. R. 499; 1 Hawk. P. C., ch. 69, § 4; *U. S. v. Manion*, 44 Fed. 800. See *Lavender v. S.*, 85

Ga. 539, 11 S. E. 861; *S. v. Theriot*, 50 La. 1187, 24 So. 179.

⁴⁶ *S. v. Phippen*, 62 Iowa 54, 17 N. W. 146; *S. v. Knight*, 84 N. C. 789. See *S. v. Cannon*, 79 Mo. 343.

⁴⁷ *P. v. DeCarlo*, 124 Cal. 462, 57 Pac. 383.

⁴⁸ *S. v. McKinney*, 42 Iowa 205; *Jesse v. S.*, 20 Ga. 156.

⁴⁹ *S. v. Smith*, 119 N. C. 856, 25 S. E. 871.

court, touching his qualifications to give bail for another for three thousand dollars. The material point of inquiry was not whether he was worth the definite sum of forty thousand dollars, as he had sworn, but whether he was fully able to respond to the sum of three thousand dollars. If that amount could be readily made, with costs and interest, out of his property, it was wholly immaterial whether ten times the amount could or not.⁵⁰

ARTICLE III. INDICTMENT.

§ 1624. Essential elements.—The essential elements of the indictment are as follows: (1) A judicial proceeding; (2) a lawful oath to be taken; (3) the false testimony given; (4) the materiality of the testimony; (5) that the testimony was willfully false.⁵¹

§ 1625. Jurisdiction must appear.—The indictment should allege expressly that the court had jurisdiction, or set forth a state of facts from which the jurisdiction would appear; otherwise the oath is extrajudicial.⁵²

§ 1626. Oath must be material; also facts sworn to.—It is necessary that it should appear on the face of the indictment that the oath taken was material to the question depending.⁵³ Not only the falsity but the materiality of the fact sworn to must appear from the averments in the indictment.⁵⁴

⁵⁰ Pollard v. P., 69 Ill. 150; Gibson v. S., 44 Ala. 17; U. S. v. Howard, 37 Fed. 666. See Com. v. Hughes, 5 Allen (Mass.) 499; Com. v. Butland, 119 Mass. 317; Stratton v. P., 20 Hun (N. Y.) 288.

⁵¹ 3 Greenl. Ev., § 189; S. v. Huckleby, 8 Mo. 414. See § 1582.

⁵² Franklin v. S., 91 Ga. 713, 17 S. E. 987; Eighmy v. P., 79 N. Y. 546; Com. v. Butland, 119 Mass. 317; S. v. Nelson, 146 Mo. 256, 48 S. W. 84; P. v. Howard, 111 Cal. 655, 44 Pac. 342; Rich v. U. S., 1 Okla. 354, 33 Pac. 804; Pankey v. P., 1 Scam. (Ill.) 80; Montgomery v. S., 10 Ohio 220; P. v. Ross, 103 Cal. 426, 37 Pac. 379; Hambree v. S., 52 Ga. 242; S. v. Flagg, 25 Ind. 243; U. S. v. Pettus, 84 Fed. 791; S. v. Ela, 91 Me. 309, 39 Atl. 1001; Dorrs v. S. (Tex. Cr.), 40 S. W. 311; P. v. De Carlo, 124 Cal. 462, 57 Pac. 383; Thompson v. P., 26 Colo. 496, 59

Pac. 51. See Maynard v. P., 135 Ill. 425, 25 N. E. 740; 3 Greenl. Ev., § 190; Cope v. Com., 20 Ky. L. 721, 47 S. W. 436; Fitch v. Com., 92 Va. 824, 24 S. E. 272.

⁵³ Kimmel v. P., 92 Ill. 459; Pollard v. P., 69 Ill. 153; Adams v. S. (Tex. Cr.), 29 S. W. 270; Cravey v. S., 33 Tex. Cr. 557, 28 S. W. 472; Jacobs v. S., 61 Ala. 448, 4 Am. C. R. 466; S. v. McCormick, 52 Ind. 169; Perdue v. Com., 96 Pa. St. 311; Scott v. S., 35 Tex. Cr. 11, 29 S. W. 274. See P. v. Ross, 103 Cal. 425, 37 Pac. 379.

⁵⁴ Morrell v. P., 32 Ill. 501; Hambree v. S., 52 Ga. 242, 1 Am. C. R. 504; S. v. Cunningham, 66 Iowa 94, 23 N. W. 280, 6 Am. C. R. 555; McMurry v. S., 38 Tex. Cr. 521, 43 S. W. 1010; 3 Greenl. Ev., § 189; 2 McClain Cr. L., 878. See Butler v. S., 33 Tex. Cr. 551, 28 S. W. 465.

§ 1627. Materiality of former testimony.—It is sufficient to allege generally in the indictment that the former matter or proceedings on which perjury is charged became material.⁵⁵

§ 1628. Charging material matter.—An indictment charging that it became and was a material question on the trial of a charge of embezzlement against a certain person, naming him (before the grand jury), whether the defendant had deposited a certain sum of money with the person so named, sufficiently states the materiality of the matter.⁵⁶ An indictment alleging that it then and there became material to know whether a certain photograph was the photograph of the woman who represented herself to the accused as a certain person, and charging that the defendant feloniously and falsely swore it was not, sufficiently sets out the materiality of the false testimony.⁵⁷

§ 1629. Indictment defective—Relating to election.—An indictment charging a person with perjury in taking an oath as judge of a certain election, by swearing that he was not interested in any bet on the result of such election, when in fact he “was interested in a certain bet and wager on the result of said election by him theretofore made,” is defective in that it does not aver when, where, or with whom the defendant made the wager.⁵⁸

§ 1630. Matter in writing sworn to—Affidavit.—An indictment charging the defendant with having committed the crime of perjury “by falsely swearing to material matter in a writing signed by him,” without mentioning the character or purpose of the writing nor what the matter falsely sworn to was, is not sufficient.⁵⁹ An indictment based on an affidavit alleged to be false must set out the particular portion of the affidavit claimed to be false. It is not sufficient to allege generally that the affidavit is false.⁶⁰

⁵⁵ *Greene v. P.*, 182 Ill. 278, 284, 55 N. E. 341; *Kimmel v. P.*, 92 Ill. 460; *Thompson v. P.*, 26 Colo. 496, 59 Pac. 51; *Com. v. McCarty*, 152 Mass. 577, 26 N. E. 140; *S. v. Gonsoulin*, 42 La. 579, 7 So. 633; *Cutler v. Ter.*, 8 Okla. 101, 56 Pac. 861; *S. v. Thrift*, 30 Ind. 211; *Sisk v. S.*, 28 Tex. App. 432, 13 S. W. 647.

⁵⁶ *Kimmel v. P.*, 92 Ill. 460; *S. v. Davis*, 69 N. C. 495; *S. v. Hopper*, 133 Ind. 460, 32 N. E. 878; *Lea v. S.*, 64 Miss. 278, 1 So. 235.

⁵⁷ *P. v. Von Tiedeman*, 120 Cal. 128, 52 Pac. 155; *King v. S.*, 103 Ga. 263, 30 S. E. 30; *Shaffer v. S.*, 87 Md. 124, 39 Atl. 313; *Rich v. U. S.*, 1 Okla. 354, 33 Pac. 804.

⁵⁸ *S. v. Roberts*, 22 Wash. 1, 60 Pac. 65.

⁵⁹ *S. v. Mace*, 76 Me. 64, 5 Am. C. R. 76. See *Ford v. Com.*, 16 Ky. L. 528, 29 S. W. 446; *Harrison v. S. (Tex. Cr.)*, 53 S. W. 863.

⁶⁰ *Harrison v. S. (Tex. Cr.)*, 53 S. W. 863; *Ross v. S.*, 40 Tex. Cr. 349,

§ 1631. **Matters in affidavit.**—Under a statute which requires the parties to a chattel mortgage to make an affidavit that the mortgage is made only to secure a debt specified, justly due from the mortgagor to the mortgagee, an indictment charging perjury in swearing falsely in such affidavit, must describe the debt and charge that the defendant swore falsely in stating that it was a just debt owing from the mortgagor to the mortgagee, and that the mortgage was given to secure the payment of the debt.⁶¹

§ 1632. **Based on affidavit for continuance.**—In an indictment charging perjury based on an affidavit for a continuance in a criminal cause, it is not necessary to set out the indictment in the former cause.⁶²

§ 1633. **Immaterial assignments.**—The fact that some of the statements on which perjury is assigned may not be material will not vitiate the indictment. It is sufficient if any one assignment be material.⁶³

§ 1634. **Form of oath not essential.**—An indictment for perjury is not required to set forth the form of the oath taken by the defendant. It is sufficient to allege that he was duly sworn.⁶⁴ And even where the statute prescribes a form of the oath to be taken, a departure in form but not in substance is not material.⁶⁵

§ 1635. **"Feliciously;" "willfully;" "knowingly;" "falsely."**—An indictment failing to allege that the act constituting the crime was feloniously committed is bad.⁶⁶ An indictment is defective in not alleging that the false testimony was willfully given by the witness;

50 S. W. 336. See *Braeutigam v. S.*, 63 N. J. L. 38, 42 Atl. 748.

⁶¹ *S. v. Estabrooks*, 70 Vt. 412, 41 Atl. 499. See *S. v. Collins*, 62 Vt. 195, 19 Atl. 368; *S. v. Floto*, 81 Md. 600, 32 Atl. 315; *Ex parte Carpenter*, 64 Cal. 267, 30 Pac. 816.

⁶² *Ross v. S.*, 40 Tex. Cr. 349, 50 S. W. 336.

⁶³ *Jefferson v. S.* (Tex. Cr.), 49 S. W. 88; *Dorris v. S.* (Tex. Cr.), 40 S. W. 311; *S. v. Williams*, 61 Kan. 739, 60 Pac. 1050.

⁶⁴ *Beach v. S.*, 32 Tex. Cr. 240, 22 S. W. 976; *Tuttle v. P.*, 36 N. Y.

431. See *Johnson v. S.*, 76 Ga. 790; *U. S. v. Mallard*, 40 Fed. 151; *Dodge v. S.*, 24 N. J. L. 455; *Campbell v. P.*, 8 Wend. (N. Y.) 636; *Jackson v. S.*, 15 Tex. App. 579; *Greene v. P.*, 182 Ill. 283, 55 N. E. 341.

⁶⁵ *Johnson v. S.*, 76 Ga. 790; *S. v. Keene*, 26 Me. 33; *S. v. Dayton*, 23 N. J. L. 49, 53 Am. D. 270; *S. v. Owen*, 72 N. C. 605; *S. v. Neal*, 42 Mo. 119.

⁶⁶ *S. v. Shaw*, 117 N. C. 764, 23 S. E. 246; *S. v. Bunting*, 118 N. C. 1200, 24 S. E. 118. *Contra. S. v. Matlock*, 48 La. 663, 19 So. 669.

but the omission of the word "knowingly" will not render the indictment defective, where it charges that the testimony was willfully and corruptly false.⁶⁷ An indictment alleging that the defendant did "unlawfully and feloniously" swear falsely, is defective, the words of the statute defining the offense being "willfully and knowingly."⁶⁸ An indictment charging that the defendant "did feloniously, willfully, and corruptly depose, swear, and testify" is not sufficient, in that it omits to aver that he testified falsely.⁶⁹

§ 1636. **Alternative averment.**—An indictment alleging that it became a material inquiry whether the accused had not seen a certain third person exhibit or keep a "gaming table or bank for the purpose of gaming" is bad as being in the alternative.⁷⁰

§ 1637. **Authority to swear.**—An indictment alleging that the defendant was sworn by the deputy clerk of the court (naming him) is sufficient allegation that the deputy clerk had power to administer the oath, without an express averment that he had such power.⁷¹ Charging in one count that the oath was administered by the judge, the clerk and the deputy clerk, naming them, is bad. The proper course is to allege the matter in different counts, stating one of the persons in each count.⁷²

§ 1638. **Authority to administer.**—It was alleged in the indictment that the accused and two others (naming them) were duly elected listers at the annual meeting. It was not alleged that the two others ever qualified or acted as such. Held defective. If a town choose but one lister, it is evident that he alone has no authority to act, or take jurisdiction of the matters properly coming before the board of listers. His acts would be void, and being so he could not commit perjury.⁷³

⁶⁷ *P. v. Turner*, 122 Cal. 679, 55 Pac. 685; *S. v. Morse*, 90 Mo. 91, 2 S. W. 137; *Johnson v. P.*, 94 Ill. 510; *P. v. Ross*, 103 Cal. 425, 37 Pac. 379; *U. S. v. Pettus*, 84 Fed. 791; *Ferguson v. S.*, 36 Tex. Cr. 60, 35 S. W. 369; *U. S. v. Edwards*, 43 Fed. 67; *S. v. Davis*, 84 N. C. 787; *Allen v. S.*, 42 Tex. 12.

⁶⁸ *Com. v. Taylor*, 96 Ky. 394, 16 Ky. L. 482, 29 S. W. 138. *Contra*, *Williams v. P.*, 26 Colo. 272, 57 Pac. 701.

⁶⁹ *Fitch v. Com.*, 92 Va. 824, 24 S. E. 272; *Reg. v. Oxley*, 3 C. & K. 317. *Contra*, *S. v. Anderson*, 103 Ind. 170, 2 N. E. 332.

⁷⁰ *Fry v. S.*, 36 Tex. Cr. 582, 37 S. W. 741, 38 S. W. 168.

⁷¹ *Masterson v. S.*, 144 Ind. 240, 43 N. E. 138.

⁷² *Hitesman v. S.*, 48 Ind. 473; *S. v. Oppenheimer*, 41 Tex. 82.

⁷³ *S. v. Peters*, 57 Vt. 86, 5 Am. C. R. 591.

§ 1639. **By whom sworn: authority.**—An indictment which omits to aver before whom the affidavit, upon which perjury is assigned, was made is defective, and should be quashed.⁷⁴ If the indictment aver that the person who administered the oath had lawful authority to do so, that is sufficient, without further allegation, as to that fact.⁷⁵ The court will take judicial notice that the officer administering the oath was authorized to administer it.⁷⁶

§ 1640. **Facts must be negatived.**—An indictment after setting out several different statements of fact, on which perjury is assigned, then alleging generally that such facts were false, is not sufficient. It should by special averments negative each of the facts alleged to have been false, or in some manner state wherein they were false.⁷⁷

§ 1641. **Stating the falsity.**—Where the issue was whether the defendant, on a charge of perjury, had seen a game of cards played at a certain time and place, the indictment must allege not only that the testimony of the defendant was false, but also that he did see the game of cards played at that particular time and place.⁷⁸

§ 1642. **Intent essential.**—Under a statute which provides that a deposition shall be deemed complete as a basis for perjury, when "it is delivered by the accused to any other person with intent that it be uttered or published as true," an indictment charging that the accused made a false affidavit, without alleging that he delivered it to some person with the intent to utter or publish it as true, is materially defective.⁷⁹

⁷⁴ *Kerr v. P.*, 42 Ill. 308; *Morrell v. P.*, 32 Ill. 500. Compare *S. v. Scott*, 78 Minn. 311, 81 N. W. 3.

⁷⁵ *Maynard v. P.*, 135 Ill. 426, 25 N. E. 740; *Cope v. Com.*, 20 Ky. L. 721, 47 S. W. 436; *S. v. Cunningham*, 66 Iowa 97, 23 N. W. 280; *Jacobs v. S.*, 61 Ala. 448, 4 Am. C. R. 468; *Com. v. Butland*, 119 Mass. 320; *S. v. Belew*, 79 Mo. 584; *Halleck v. S.*, 11 Ohio 400; *S. v. Chamberlin*, 30 Vt. 559; *Markham v. U. S.*, 160 U. S. 319, 16 S. Ct. 288; *S. v. Plummer*, 50 Me. 217.

⁷⁶ *U. S. v. Lehman*, 39 Fed. 49; *S. v. Thibodaux*, 49 La. 15, 21 So. 127. See *Greene v. P.*, 182 Ill. 278, 55 N. E. 341.

⁷⁷ *S. v. Nelson*, 74 Minn. 409, 77

N. W. 223; *S. v. Ela*, 91 Me. 309, 39 Atl. 1001; *Com. v. Compton*, 18 Ky. L. 479, 36 S. W. 1116; *Ter. v. Lockhart*, 8 N. M. 523, 45 Pac. 1106. See *S. v. Sutton*, 147 Ind. 158, 46 N. E. 468; *U. S. v. Pettus*, 84 Fed. 791; *Johnson v. S.*, 76 Ga. 790; *P. v. Clements*, 42 Hun (N. Y.) 353.

⁷⁸ *Com. v. Still*, 83 Ky. 275. See *Stefani v. S.*, 124 Ind. 3, 24 N. E. 254; *S. v. Scott*, 78 Minn. 311, 81 N. W. 3. See also *McMurtry v. S.*, 38 Tex. Cr. 581, 43 S. W. 1010; *Higgins v. S.*, 38 Tex. Cr. 539, 43 S. W. 1012; *King v. S.*, 103 Ga. 263, 30 S. E. 30.

⁷⁹ *P. v. Robles*, 117 Cal. 681, 49 Pac. 1042.

§ 1643. **Affidavit for continuance.**—Where perjury is charged in making an affidavit for a continuance, the indictment is defective in not alleging that a motion for a continuance had been made and that the affidavit was material on such application.⁸⁰

§ 1644. **Indictment sufficient.**—An indictment which shows the court in which the proceedings were had and the materiality of the testimony on which perjury is charged is sufficient; and it need not allege that the defendant entered a plea of not guilty.⁸¹

§ 1645. **Summary conclusion.**—It is not necessary under the statute that the indictment should conclude with the averment, to wit: And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the defendant did commit willful and corrupt perjury.⁸²

§ 1646. **Charging subornation.**—It is well established that to constitute the crime of subornation of perjury all the essential elements constituting the crime of perjury must be stated in the indictment.⁸³

§ 1647. **Knowledge essential.**—Guilty knowledge on the part of the suborner is a necessary element in the crime of subornation of perjury, and must be averred in the indictment and proved on the trial. It is not enough to aver and prove that he had knowledge of the falsity of the testimony which the suborned witness was to give: he must also have known or intended that the witness was to give the testimony corruptly or with a knowledge or belief of its falsity.⁸⁴

§ 1648. **Charging subornation—Sufficient.**—An information for subornation of perjury alleging that the defendant did unlawfully, willfully, corruptly, and feloniously persuade, incite, procure, and suborn the willful and corrupt perjury charged, is sufficient, without stating that the perjury was committed by reason of the persuasion, procurement, and subornation of the defendant.⁸⁵ On a charge of

⁸⁰ Morrell v. P., 32 Ill. 501.

⁸¹ Adellberger v. S. (Tex. Cr.), 39 S. W. 103; Montgomery v. S. (Tex. Cr.), 40 S. W. 805.

⁸² Henderson v. P., 117 Ill. 268, 7 N. E. 677; U. S. v. Wood, 44 Fed. 753.

⁸³ P. v. Ross, 103 Cal. 426, 37 Pac. 379; Coyne v. P., 124 Ill. 17, 14 N.

E. 668, 7 Am. R. 324. See S. v. Porter, 105 Iowa 677, 75 N. W. 519; U. S. v. Evans, 2 West Coast R. 611.

⁸⁴ Stewart v. S., 22 Ohio St. 477, 1 Green C. R. 529. See P. v. Ross, 103 Cal. 425, 37 Pac. 379.

⁸⁵ S. v. Geer, 48 Kan. 752, 30 Pac. 236.

subornation of perjury, the indictment alleged that a person, naming her, willfully and corruptly testified that she did not do certain acts that were set out, whereas she then and there well knew that she did do the acts alleged, and that the defendant did feloniously and maliciously incite her to commit perjury in manner and form aforesaid: Held sufficient. The words feloniously and maliciously import that the defendant knowingly procured the perjury.⁸⁶

§ 1649. Subornation—Indictment defective.—An information charging subornation of perjury which fails to state that the false affidavit or testimony of the suborned witness was used or procured to be used in some case or proceeding before some court or body having jurisdiction, is fatally defective.⁸⁷

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1650. Two witnesses not essential.—If any material circumstance be proved by other witnesses in confirmation of the witness who gave the direct testimony of the perjury, it may turn the scale and warrant a conviction. The old rule requiring two witnesses has long since been relaxed.⁸⁸ Where several witnesses testify that the defendant admitted to them that the affidavit made by him was false this does not constitute proof by two witnesses.⁸⁹ Where the indictment contains several assignments of perjury, a conviction can not be had on the direct evidence of a living witness to the falsity of one with circumstantial evidence of the falsity of another. The evidence of the witness and the evidence of the circumstances must both bear upon the falsity of the same statement of fact.⁹⁰

⁸⁶ *Com. v. Devine*, 155 Mass. 224, 29 N. E. 515. See *Stewart v. S.*, 22 Ohio St. 477; *S. v. Porter*, 105 Iowa 677, 75 N. W. 519.

⁸⁷ *S. v. Geer*, 46 Kan. 529, 26 Pac. 1027; *Smith v. S.*, 125 Ind. 440, 25 N. E. 598.

⁸⁸ *Mackin v. P.*, 115 Ill. 329, 3 N. E. 222; *Pollard v. P.*, 69 Ill. 153; *Schwartz v. Com.*, 27 Gratt. (Va.) 1025, 2 Am. C. R. 412; *S. v. Heed*, 57 Mo. 252, 1 Am. C. R. 502; *S. v. Gibbs*, 10 Mont. 213, 25 Pac. 289; *Ter. v. Williams*, 9 N. M. 400, 54 Pac. 232; *S. v. Peters*, 107 N. C. 876, 12 S. E. 74; *Grandison v. S.*, 29 Tex. App. 186, 15 S. W. 174; *Will-*

iams v. Com., 91 Pa. St. 493; *P. v. Stone*, 32 Hun (N. Y.) 41; *Crusen v. S.*, 10 Ohio St. 258; *Peterson v. S.*, 74 Ala. 34; *S. v. Miller*, 24 W. Va. 802; *McDermott v. S.*, 89 Ind. 192; *S. v. Dickson*, 6 Kan. 211; *U. S. v. Hall*, 44 Fed. 864. See *S. v. Buckley*, 18 Or. 228, 22 Pac. 838; *Rex v. Mayhew*, 6 C. & P. 315; *S. v. Waddle*, 100 Iowa 57, 69 N. W. 279; *Com. v. Pollard*, 12 Metc. (Mass.) 225; *Haines v. S.*, 109 Ga. 526, 3 S. E. 141; *Underhill Cr. Ev.*, § 468.

⁸⁹ *Butler v. S.* (Tex. Cr.), 38 S. W. 46; *Rogers v. S.*, 35 Tex. Cr. 221, 32 S. W. 1044.

⁹⁰ *Underhill Cr. Ev.*, § 468, citing

§ 1651. **Two contradictory statements.**—If the evidence in proof of the crime of perjury consists of two opposing statements of the accused and nothing more, he can not be convicted, there being nothing to show which of the two statements is false.⁹¹

§ 1652. **Material and immaterial averments.**—Where the indictment charges immaterial as well as material matters alleged to be perjury, evidence of the immaterial matters is competent, where, if true, it conclusively shows that the false testimony on the material matters was given willfully, and not by mistake.⁹²

§ 1653. **Files competent; record and proceedings.**—The files of the case in which perjury is charged to have been committed are competent to show the pendency and regularity of that case.⁹³ The record of such pending suit is the only legal proof thereof.⁹⁴ If the charge of perjury is based on evidence given on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proven, or at least so much of it as shows that the matter sworn to was material to the issue or point in question.⁹⁵

§ 1654. **Stenographer's notes.**—It is proper to permit a stenographer who took the testimony of the defendant in the case in which perjury is charged to have been committed to read from his notes, when he swears that he can give such testimony just as the defendant gave it in court.⁹⁶ And the stenographer may read his notes in order to show the materiality of the testimony of the defendant.⁹⁷

§ 1655. **Jurat of officer.**—The jurat of the officer attached to a deposition or affidavit is sufficient *prima facie* proof of the taking of

Reg. v. Virrier, 12 A. & E. 317; Williams v. Com., 91 Pa. St. 493, 501; Harris v. P., 64 N. Y. 148; Adellberger v. S. (Tex. Cr.), 39 S. W. 103.

⁹¹ 1 Greenl. Ev., § 259; Schwartz v. Com., 27 Gratt. (Va.) 1025, 2 Am. C. R. 414; S. v. Buckley, 18 Or. 228, 22 Pac. 838; Freeman v. S., 19 Fla. 552, 4 Am. C. R. 472. *Contra*, Whitaker v. S., 37 Tex. Cr. 479, 36 S. W. 253.

⁹² Jefferson v. S. (Tex. Cr.), 29 S. W. 1090. See P. v. Ah Sing, 95 Cal. 657, 30 Pac. 796.

⁹³ P. v. Macard, 109 Mich. 623, 67

N. W. 968; Martinez v. S., 39 Tex. Cr. 479, 46 S. W. 826; Smith v. S., 103 Ala. 57, 15 So. 866.

⁹⁴ Heflin v. S., 88 Ga. 151, 14 S. E. 112.

⁹⁵ Young v. P., 134 Ill. 42, 24 N. E. 1070. See Martinez v. S., 39 Tex. Cr. 479, 46 S. W. 826; 3 Starkie Ev. 1142.

⁹⁶ P. v. Macard, 109 Mich. 623, 67 N. W. 968.

⁹⁷ S. v. Camley, 67 Vt. 322, 31 Atl. 840. See S. v. Gibbs, 10 Mont. 213, 25 Pac. 289 (parol evidence).

the oath by the person charged with perjury, and the place where the oath was taken is also shown by the jurat.⁹⁸

§ 1656. **Other violations incompetent.**—Where the issue is whether the defendant on a charge of perjury had purchased liquor from a certain person or not, evidence that others than the defendant had so purchased and that such person had been convicted of selling liquor, is incompetent.⁹⁹

§ 1657. **Hearsay incompetent.**—On the trial of a case in which the issue was whether the defendant committed perjury in swearing that an assault was not committed by a certain person, evidence of the flight of such person after the assault and his admission of guilt, made in the absence of the defendant, is incompetent.¹⁰⁰

§ 1658. **Judge's remarks—Hearsay.**—Permitting the prosecution to show on the trial of one charged with perjury that on the former trial, in which the perjury is charged to have been committed, the judge presiding said "in his opinion the man had been guilty of perjury," was error.¹

§ 1659. **Conversations—Declarations.**—Evidence of any conversations or declarations at the time of making an affidavit or the giving of testimony on which perjury is charged, is competent as part of the *res gestae* and to show that the affidavit or testimony was false or that it was given by mistake and not intended.²

§ 1660. **Circumstantial evidence sufficient.**—The falsity of the statement upon which perjury is assigned may be established by circumstantial evidence if it convinces the jury beyond a reasonable doubt that such statement is false.³

⁹⁸ *Rex v. Spencer*, 1 C. & P. 260; *Van Dusen v. P.*, 78 Ill. 645.

⁹⁹ *Hemphill v. S.*, 71 Miss. 877, 16 So. 261.

¹⁰⁰ *Reavis v. S.*, 6 Wyo. 240, 44 Pac. 62.

¹ *P. v. Gibson*, 48 N. Y. Supp. 861, 24 App. Div. 12.

² *Heflin v. S.*, 88 Ga. 151, 14 S. E. 112; *Spencer v. Com.*, 15 Ky. L. 182, 22 S. W. 559. See *S. v. Gibbs*, 10 Mont. 212, 25 Pac. 289. See also *Henderson v. P.*, 117 Ill. 268, 7 N.

E. 677; *Com. v. Monahan*, 9 Gray (Mass.) 119.

³ *P. v. Porter*, 104 Cal. 415, 38 Pac. 88; *Gandy v. S.*, 23 Neb. 436, 36 N. W. 817; *Sloan v. S.*, 71 Miss. 459, 14 So. 262; *Plummer v. S.*, 35 Tex. Cr. 202, 33 S. W. 228; *P. v. Strassman*, 112 Cal. 683, 45 Pac. 3. The evidence in the following cases was held sufficient to sustain convictions: *Roberts v. P.*, 99 Ill. 276; *P. v. Maxwell*, 118 Cal. 50, 50 Pac. 18; *Bledsoe v. S.*, 64 Ark. 474, 42

§ 1661. **Variance—Judge or clerk.**—An indictment charging that the oath was administered to the accused by the judge is supported by proof that he was sworn by the clerk of the court under the direction of the judge presiding.⁴ But where the indictment alleges that the defendant was sworn by the clerk of the county and the proof shows that he was sworn by the clerk of a city court, it is a fatal variance.⁵

§ 1662. **Variance as to time.**—An indictment charged that the defendant testified and swore that he saw a certain person named, "about fifteen minutes after the hour of eleven o'clock in the forenoon" of a particular day, and the proof was that he had seen the person mentioned "about a quarter past eleven o'clock" on the day alleged, without stating whether in the forenoon or afternoon: Held ambiguous and not sufficient.⁶

§ 1663. **Several assignments.**—"If there are several distinct assignments of perjury upon the same testimony, in one indictment, it will be sufficient if any one of them be proved."⁷

§ 1664. **Variance as to amount.**—The indictment charged the defendant with swearing falsely that he had 60,000 cigars in the

S. W. 899; *Carter v. S.* (Tex. Cr.), 43 S. W. 996; *Butler v. S.*, 36 Tex. Cr. 444, 37 S. W. 746; *P. v. Porter*, 104 Cal. 415, 38 Pac. 88; *P. v. Wells*, 103 Cal. 631, 37 Pac. 529; *Meeks v. S.*, 32 Tex. Cr. 420, 24 S. W. 98; *Maul v. S.* (Tex. Cr.), 26 S. W. 199; *Rich v. U. S.*, 1 Okla. 354, 33 Pac. 804; *P. v. Rodley* (Cal., 1900), 63 Pac. 351. But not sufficient in the following: *Franklin v. S.*, 38 Tex. Cr. 346, 43 S. W. 85; *Martinez v. S.*, 39 Tex. Cr. 479, 46 S. W. 826; *Lomax v. S.* (Tex. Cr.), 40 S. W. 999; *S. v. Hawkins*, 115 N. C. 712, 20 S. E. 623; *Hemphill v. S.*, 71 Miss. 877, 16 So. 261; *Mason v. S.*, 55 Ark. 529, 18 S. W. 827; *Cronk v. P.*, 131 Ill. 56, 22 N. E. 862; *U. S. v. Brown*, 6 Utah 115, 21 Pac. 461; *Wohlge-muth v. U. S.*, 6 N. M. 568, 30 Pac. 854; *Gabe v. S.* (Tex. App.), 18 S. W. 413; *Kitchen v. S.*, 29 Tex. App. 45, 14 S. W. 392; *Brooks v. S.*, 29 Tex. App. 582, 16 S. W. 542; *Cerns v. Ter.*, 3 Wyo. 270, 21 Pac. 699;

Wilkerson v. S. (Tex. Cr.), 55 S. W. 49.

⁴ *P. v. Nolte*, 44 N. Y. Supp. 443, 19 Misc. 674; *Staight v. S.*, 39 Ohio St. 498. See *Walker v. S.*, 107 Ala. 5, 18 So. 393; *S. v. Caywood*, 96 Iowa 367, 65 N. W. 385; *Rowland v. Thompson*, 65 N. C. 110; *Oaks v. Rodgers*, 48 Cal. 197; *S. v. Knight*, 84 N. C. 793.

⁵ *McClerkin v. S.*, 105 Ala. 107, 17 So. 123; *Cutler v. Ter.*, 8 Okla. 101, 56 Pac. 861.

⁶ *Reg. v. Bird*, 17 Cox C. C. 387.

⁷ 3 Greenl. Ev. (Redf. ed.), § 193; 1 Roscoe Cr. Ev., 84, 126; *S. v. Blaisdell*, 59 N. H. 328; *Com. v. Johns*, 6 Gray (Mass.) 274; *Harris v. P.*, 64 N. Y. 148; *S. v. Day*, 100 Mo. 242, 12 S. W. 365; *Smith v. S.*, 103 Ala. 57, 15 So. 866; *Moore v. S.*, 32 Tex. Cr. 405, 24 S. W. 95; *Marvin v. S.*, 53 Ark. 395, 14 S. W. 87; *Com. v. McLaughlin*, 122 Mass. 449; *S. v. Bordeaux*, 93 N. C. 560; *Wood v. P.*, 59 N. Y. 117.

building which was burned, when in fact he swore that he had 65,000 there—a mistake in his favor: Held no variance.⁸

§ 1665. Variance—Larceny or robbery.—An indictment charging perjury by swearing falsely as surety on a bail bond of a person held on a charge of larceny is not supported by evidence that such person was arrested and held on a charge of robbery.⁹

§ 1666. Variance as to date.—A variance between the proof and the allegations, as to the date of the offense, is not material where the perjury charged is not based on any written document or record.¹⁰

§ 1667. How officer elected immaterial.—Whether the officer before whom perjury is alleged to have been committed was elected or appointed is not material. And a variance between the allegations and proof in that respect is not material.¹²

§ 1668. Venue.—It must appear that the oath was taken in the county where the indictment was found, but the jurat of the officer, though *prima facie* evidence of the place, is not conclusive, and may be contradicted.¹³ The venue is sufficiently proven by the caption of the affidavit, to wit: "State of Illinois, Carroll County." This clearly manifests the place where the oath was administered.¹⁴

§ 1669. Jurisdiction: State or federal court.—Perjury committed in the state courts in proceedings for naturalization, in violation of a federal statute, may be prosecuted in the state court.¹⁵

⁸ Harris v. P., 64 N. Y. 148, 2 Am. C. R. 420, citing P. v. Warner, 5 Wend. (N. Y.) 271.

⁹ P. v. Strassman, 112 Cal. 683, 45 Pac. 3.

¹⁰ Matthews v. U. S., 161 U. S. 500, 16 S. Ct. 640. See Dill v. P., 19 Colo. 469, 36 Pac. 229.

¹² S. v. Williams, 60 Kan. 837, 58 Pac. 476.

¹³ 3 Greenl. Ev., §§ 195, 196.

¹⁴ Van Dusen v. P., 78 Ill. 646.

¹⁵ S. v. Whittemore, 50 N. H. 245, 9 Am. D. 196; Rump v. Com., 30 Pa. St. 475. *Contra*, P. v. Sweetman, 3 Park. Cr. (N. Y.) 358. See P. v. Kelly, 38 Cal. 145; S. v. Adams, 4 Blackf. (Ind.) 147; *Ex parte* Bridges, 2 Wood (U. S.) 428.

CHAPTER XXXIX.

CONTEMPT.

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ARTICLE I. POWER OF COURTS TO PUNISH.

§ 1670. **Common law origin.**—Statutory provisions empowering courts of record to punish contempts do not create a new power, but re-affirm a pre-existing power; and the courts will still look to the common law as to what constitutes a contempt of court.¹ The power to commit for contempt has always existed in the higher courts and is part of the law of the land within the meaning of Magna Charta, and of our Declaration of Rights.²

¹ P. v. Wilson, 64 Ill. 195, 16 Am. R. 528; Whitten v. S., 36 Ind. 196-212; Middlebrook v. S., 43 Conn. 257, 21 Am. R. 650; S. v. Morrill, 16 Ark. 384; Hale v. S., 55 Ohio St. 210, 45 N. E. 199, 36 L. R. A. 252; Nebraska Children's Home Soc. v. S., 57 Neb. 765, 78 N. W. 267; S. v. Frew, 24 W. Va. 416, 4 Am. R. 257; 4 Bl. Com. 286; Underhill Cr. Ev. § 459.

² Whitcomb's Case, 120 Mass. 118, 120; S. v. Matthews, 37 N. H. 453; Shattuck v. S., 51 Miss. 50; P. v. Wilson, 64 Ill. 195; Morrison v. McDonald, 21 Me. 550; Wilson's Case, 7 Q. B. 984; Ex parte Smith, 28 Ind. 47; 2 Bish. New Cr. L., § 243;

§ 1671. Legislature can not abridge.—The legislature can not abridge the power of courts to punish summarily such wrongful acts as obstruct the administration of justice. Such power exists independently in the courts and independently of legislative authority.³ The authority to punish contempts is a necessary incident inherent in the very organization of all legislative bodies and of all courts of law and equity, independent of statutory provision.⁴

§ 1672. Power of justice courts.—A justice of the peace, under statute, may fine a contemner not to exceed the amount fixed by statute, and by common law may order a committal until the fine shall be paid.⁵ Where a person acting as an attorney in a case in a justice court resisted a motion in a rude and contumacious manner, remarking to the court: "You can fine and be damned," he was guilty of contempt of court, and the justice was authorized to issue a warrant directed to the sheriff for the arrest of such person.⁶

ARTICLE II. TWO CLASSES—CRIMINAL AND CIVIL.

§ 1673. Two classes of contempt.—Contempts are of two classes, criminal and civil. In the criminal class, the object of the proceeding is punishment of the wrong-doer, to vindicate and preserve the dignity and respect for the public authority and public interest; in the other class, to afford relief *inter partes*—for the benefit of a private litigant.⁷

P. v. Durrant, 116 Cal. 209, 48 Pac. 75; *P. v. Stapleton*, 18 Colo. 569, 33 Pac. 167; *In re Millington*, 24 Kan. 214; *Baldwin v. S.*, 126 Ind. 31, 25 N. E. 820; *Arnold v. Com.*, 80 Ky. 300, 44 Am. R. 480; *In re Cooper*, 32 Vt. 253.

³ *Hale v. S.*, 55 Ohio St. 210, 45 N. E. 199, 36 L. A. R. 254 (citing *S. v. Frew*, 24 W. Va. 416; *Little v. S.*, 90 Ind. 338, 46 Am. R. 224; *S. v. Morrill*, 16 Ark. 384; *S. v. Matthews*, 37 N. H. 450; *Cartwright's Case*, 114 Mass. 230); *Hawes v. S.*, 46 Neb. 150, 64 N. W. 699; *Cheadle v. S.*, 110 Ind. 301, 59 Am. R. 199, 11 N. E. 426; *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071.

⁴ *S. v. Matthews*, 37 N. H. 453; *Anderson v. Dunn*, 6 Wheaton 204; *U. S. v. Hudson*, 7 Cranch 32; *Ex parte Adams*, 25 Miss. 883; *Emery's Case*, 107 Mass. 172; *Reg. v. Paty*, 2 Salk. 503; *Kilbourn v. Thompson*, 103

U. S. 168; *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. D. 676; *Howard v. Gosset*, 10 Q. B. (59 E. C. L.) 359; *Ex parte Dalton*, 44 Ohio St. 143, 58 Am. R. 800, 5 N. E. 136; *Ex parte Lawrence*, 116 Cal. 298, 48 Pac. 124; *Clark v. P.*, Breese (Ill.) 340; *S. v. Knight*, 3 S. D. 509, 54 N. W. 412, 9 Am. C. R. 223; *U. S. v. Church*, etc., 6 Utah 9, 21 Pac. 503, 524, 8 Am. C. R. 141; *P. v. Pirfenbrink*, 96 Ill. 68; *Ex parte Robinson*, 19 Wall. (U. S.) 505; *Cossart v. S.*, 14 Ark. 541.

⁵ *Brown v. P.*, 19 Ill. 612; *Newton v. Locklin*, 77 Ill. 104; *Coleman v. Roberts*, 113 Ala. 323, 21 So. 449; *In re Cooper*, 32 Vt. 253; *S. v. Copp*, 15 N. H. 212. See 2 Bish. New Cr. L., § 244.

⁶ *Hill v. Crandall*, 52 Ill. 70. See 2 Bish. New Cr. L., §§ 263, 266.

⁷ *P. v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Lester v. P.*, 150 Ill. 408,

§ 1674. **Civil contempt—Object.**—In civil contempt the proceedings are instituted by a private litigant against the adverse party for his sole benefit, and the fine imposed is for the purpose of compensating him for damages sustained by reason of the act done charged as a contempt.⁸

§ 1675. **Direct and constructive.**—Contempts are either direct, such as are offered in the presence of the court while in session, or constructive, being offered out of the presence of the court, but tending to obstruct, embarrass, or prevent the due administration of justice.⁹

§ 1676. **Out of presence of court.**—Contemptuous acts of lawyers at a meeting held in a room in the court-house, when court was not in session, and to which meeting they invited the judge of the court, can not be regarded as in the presence of the court.¹⁰

§ 1677. **Strict construction.**—In a prosecution for criminal contempt the rules of strict construction are the same as in other criminal causes, and in such case no presumption will be indulged in against the accused to sustain a conviction.¹¹

ARTICLE III. DEFINITIONS AND ILLUSTRATIONS.

§ 1678. **What constitutes contempt.**—Any conduct which is calculated to interfere with the proceedings of the court, by assaulting wit-

23 N. E. 387, 37 N. E. 1004; Phillips v. Welch, 11 Nev. 187; Beck v. S., 72 Ind. 250; Buck v. Buck, 60 Ill. 105; Ex parte Bollig, 31 Ill. 96; Crook v. P., 16 Ill. 534; P. v. Court of Oyer and Terminer, 101 N. Y. 245, 6 Am. C. R. 165, 4 N. E. 259; S. v. Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. R. 809; Thompson v. Pennsylvania R. Co., 48 N. J. Eq. 105, 21 Atl. 182; Baltimore, etc., R. Co. v. City of Wheeling, 13 Gratt. (Va.) 57; Fischer v. Hayes, 6 Fed. 63, 19 Blatchf. (U. S.) 13; 2 Bish. Cr. L. (8th ed.), § 248; Howard v. Durand, 36 Ga. 358.

⁸ P. v. Court of Oyer and Terminer, 101 N. Y. 245, 54 Am. R. 691, 4 N. E. 259; Phillips v. Welch, 11 Nev. 187; Wells v. Oregon R., etc., Co., 19 Fed. 20, 9 Sawy. 601; Chapel v. Hull, 60 Mich. 167, 26 N. W. 874; P. v. McKane, 78 Hun (N.

Y.) 154, 28 N. Y. Supp. 981; Poertner v. Russel, 33 Wis. 194; S. v. Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. R. 809. This rule seems to have originated from construction of statutory provisions.

⁹ Stuart v. P., 3 Scam. (Ill.) 404; Holman v. S., 105 Ind. 513, 5 N. E. 556; Baker v. S., 82 Ga. 776, 9 S. E. 743, 14 Am. R. 192; P. v. Wilson, 64 Ill. 214, 1 Am. C. R. 108; 4 Bl. Com. 284; 5 Cr. L. Mag. 173; In re Dill, 32 Kan. 668, 49 Am. R. 505, 5 Pac. 39; Underhill Cr. Ev., §§ 460, 461. For a digest of many cases on contempt in the presence and out of the presence of the court, see note to U. S. v. Church, 8 Am. C. R. 142.

¹⁰ Snyder v. S., 151 Ind. 553, 52 N. E. 152.

¹¹ Hydock v. S., 59 Neb. 297, 80 N. W. 902.

nesses or litigants within the precincts of the court, or preventing or hindering or endeavoring to prevent or hinder them in their access to the court, or otherwise, is a contempt.¹² Where the conduct of a person is such as tends to bring the authority and administration of the law into disrespect, or to interfere with or prejudice parties litigant or their witnesses during the litigation, he is guilty of contempt.¹³

§ 1679. Demand, an element.—Where the court enters an order, requiring the payment of alimony, a demand for the payment is necessary as a foundation for contempt proceedings, unless the party declines to pay before demand is made.¹⁴ And so, also, in other cases, where money is ordered to be paid or property delivered, a previous demand is necessary before contempt proceedings can be maintained.¹⁵ Where a statute provides that if money be not paid within thirty days after order of the court, after demand has been made, the demand is an essential element of the case to constitute contempt.¹⁶

§ 1680. Arresting litigants or witnesses.—Arresting parties to a cause, or witnesses while in attendance at court on a trial, or while going to and from court on such trial, is a contempt of court.¹⁷ The arrest, in the actual or constructive presence of the court, of a party or witness who, by reason of attendance thereon, is exempt from arrest, is a contempt.¹⁸

§ 1681. Interfering with officer.—Any unauthorized interference with property in the hands of a receiver, either by taking forcible possession or by legal proceedings without the sanction of the court appointing such receiver, is a direct and immediate contempt of court, and punishable by attachment.¹⁹ Property in the hands of a receiver

¹² Dahnke v. P., 168 Ill. 107, 48 N. E. 137, citing Oswald, Contempts of Court; Underhill Cr. Ev., § 459.

¹³ Dahnke v. P., 168 Ill. 107, 48 N. E. 137.

¹⁴ Potts v. Potts, 68 Mich. 492, 36 N. W. 240; Edison v. Edison, 56 Mich. 185, 22 N. W. 264; Park v. Park, 80 N. Y. 156.

¹⁵ Haines v. P., 97 Ill. 162; Pantton v. Zebbley, 19 How. Pr. (N. Y.) 394; Gray v. Cook, 24 How. Pr. (N. Y.) 432; McComb v. Weaver, 11 Hun (N. Y.) 271; Matter of Ockershausen, 59 Hun 200, 13 N. Y. Supp. 396.

¹⁶ Haines v. P., 97 Ill. 178; Blake v. P., 161 Ill. 75, 43 N. E. 590.

¹⁷ Wood v. Neale, 5 Gray (Mass.) 538; May v. Shumway, 16 Gray (Mass.) 86, 77 Am. D. 401; S. v. Buck, 62 N. H. 670; Ex parte McNeil, 6 Mass. 245. See Thompson's Case, 122 Mass. 428, 23 Am. R. 370.

¹⁸ 2 Bish. New Cr. L., § 252, citing Blight v. Fisher, Peters C. C. 41; Rex v. Hall, 2 W. Bl. 1110.

¹⁹ Richards v. P., 81 Ill. 554; Knott v. P., 83 Ill. 532; Noe v. Gibson, 7 Paige (N. Y.) 513; Greene v. Odell, 60 N. Y. Supp. 346, 43 App. Div. 608; In re Christian Jensen Co., 128

is in the custody of the court appointing the receiver, and attaching property so held, knowing it to be in possession of such receiver, is a contempt of court.²⁰ And suing a receiver without leave of the court making the appointment of the receiver is a contempt.²¹ Where a sheriff, receiver, or other officer of the court has lawful possession of property by a proper writ or in his official capacity, it is in the custody of the court, and any unwarranted interference with such possession by any person is a contempt of court.²²

§ 1682. Interfering with court.—If a person takes forcible possession of property after it has been taken from the defendant by a writ of replevin, and delivered to the plaintiff, such act is a contempt of court.²³

§ 1683. Violating injunction; knowledge.—Where a writ of injunction has been issued by a court of competent jurisdiction, restraining the doing or commanding the performance of certain acts designated, any violation of such injunction, by the party or parties against whom it runs, is a contempt of court.²⁴ Where a person has received knowledge of the existence of an injunction, from the time he has been informed of the existence of such order he is bound by it, whether it be actually served on him or not.²⁵ And to disobey an injunction,

N. Y. 550, 28 N. E. 665; *Levy v. Stanion*, 53 N. Y. Supp. 472, 33 App. Div. 632; *Sainberg v. Weinberg*, 54 N. Y. Supp. 559, 25 Misc. 327; *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834.

²⁰ *Holbrook v. Ford*, 153 Ill. 633, 39 N. E. 1091, 46 Am. R. 917.

²¹ *Com. v. Young*, 11 Phila. (Pa.) 606; *Smith v. Wayne Cir. Judge*, 84 Mich. 564, 47 N. W. 1092; *Thompson v. Scott*, 4 Dill. (U. S.) 508. *Contra*, *Kinney v. Crocker*, 18 Wis. 75; *Allen v. R. R. Co.*, 42 Iowa 683.

²² *Richards v. P.*, 81 Ill. 551; *Sabin v. Fogarty*, 70 Fed. 482; *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. R. 147, 21 N. E. 606; *Cartwright's Case*, 114 Mass. 230; *Com. v. Young*, 11 Phila. (Pa.) 606; *Hazelrigg v. Bronaugh*, 78 Ky. 62; *Noe v. Gibson*, 7 Paige (N. Y.) 513; *Huntington v. McMahon*, 48 Conn. 174; *Vermont R. Co. v. Vermont, etc.*, R. Co. 46 Vt. 792; *Ex parte Kellogg*, 64 Cal. 343, 30 Pac. 1030; *Matter of Lowenthal*, 74

Cal. 109, 15 Pac. 359. See *Williams v. Galt*, 95 Ill. 172; *Levy v. Stanion*, 59 N. Y. Supp. 306, 43 App. Div. 619.

²³ *P. v. Neill*, 74 Ill. 68; 4 Bl. Com. 285.

²⁴ *Hawkins v. S.*, 126 Ind. 294, 26 N. E. 43; *In re Debs*, 158 U. S. 564, 15 S. Ct. 900; *S. v. Baldwin*, 57 Iowa 266, 10 N. W. 645; *Poertner v. Russell*, 33 Wis. 193; *Baker v. Cordon*, 86 N. C. 116, 41 Am. R. 448; *Kerfoot v. P.*, 51 Ill. App. 410; *Welch v. P.*, 38 Ill. 20; *Wilcox, etc., Co. v. Schimmel*, 59 Mich. 524, 26 N. W. 692; *Vilas v. Burton*, 27 Vt. 56; *P. v. Van Buren*, 136 N. Y. 252, 32 N. E. 775; *Commercial Bank v. Waters*, 10 S. & M. (Miss.) 559; *Forsythe v. Winans*, 44 Ohio St. 277, 7 N. E. 13; *Johnson v. Superior Court*, 65 Cal. 567, 4 Pac. 575.

²⁵ *Poertner v. Russell*, 33 Wis. 193, 202; *Mead v. Norris*, 21 Wis. 310; *Winslow v. Nayson*, 113 Mass. 411; *P. v. Brower*, 4 Paige (N. Y.) 405;

after an appeal has been taken from a decree granting such injunction, is a contempt of court.²⁶

§ 1684. Disobeying court orders.—The disobedience of any order, judgment, or decree of court having jurisdiction to issue it is a contempt of the court, however erroneous or improvident the issuing of it may have been; such order is obligatory until overruled by an appellate court. But if, in making such order, the court was without jurisdiction, disobedience of the same is not a contempt.²⁷

§ 1685. Refusal to produce books.—It is no defense to a charge of contempt for refusal of a party to produce books and documents relating to an alleged partnership, that no interlocutory decree finding the existence of such partnership had first been entered.²⁸

§ 1686. Enforcing order.—An order of the court directing the person convicted of keeping and maintaining a nuisance by the unlawful sale of intoxicating liquors to abate the same may be enforced by attachment against the defendant, if the nuisance be continued.²⁹

§ 1687. Refusing to deliver property.—The defendant in refusing to obey the order of the court in supplementary proceedings, to turn over certain notes to be sold in satisfaction of an execution, is guilty of contempt, where it appears that the notes were under his control,

Fanshawe v. Tracy, 4 Biss. (U. S.) 490, 499; Davis v. Davis, 83 Hun (N. Y.) 500, 32 N. Y. Supp. 10; Freeman v. City of Huron, 8 S. D. 435, 66 N. W. 928; Howe v. Willard, 40 Vt. 654; Ter. v. Clancey, 7 N. M. 580, 37 Pac. 1108; McDonnell v. Henderson, 74 Iowa 619, 38 N. W. 512. *Contra*, Hennessy v. Nicol, 105 Cal. 138, 38 Pac. 649.

²⁶ Lindsay v. Clayton Dist. Court, 75 Iowa 509, 39 N. W. 817; Hunt v. Lambertville, 46 N. J. L. 59; Heinlen v. Cross, 63 Cal. 44; S. v. Dillon, 96 Mo. 56, 8 S. W. 781; Hawkins v. S., 126 Ind. 294, 26 N. E. 43; Central U. Tel. Co. v. S., 110 Ind. 203, 10 N. E. 922, 12 N. E. 136; San Antonio St. R. Co. v. S. (Tex. Civ.), 38 S. W. 54; P. v. Rice, 80 Hun (N. Y.) 437, 30 N. Y. Supp. 457.

²⁷ Jenkins v. S., 59 Neb. 68, 80 N.

W. 268; Devlin v. Hinman, 161 N. Y. 115, 55 N. E. 386; S. v. Nathans, 49 S. C. 199, 27 S. E. 52; Leopold v. P., 140 Ill. 552, 30 N. E. 348; French v. Commercial Nat. Bk., 79 Ill. App. 110; Clark v. Burke, 163 Ill. 334, 45 N. E. 235; S. v. Harper's Ferry Bridge Co., 16 W. Va. 877; Kaehler v. Halpin, 59 Wis. 40, 17 N. W. 868; S. v. Baldwin, 57 Iowa 266, 10 N. W. 645; Stimpson v. Putnam, 41 Vt. 238; S. v. Markuson, 7 N. D. 155, 73 N. W. 82; Billard v. Erhart, 35 Kan. 616, 12 Pac. 42; P. v. McKane, 78 Hun (N. Y.) 161, 28 N. Y. Supp. 981; Forrest v. Price, 52 N. J. Eq. 16, 29 Atl. 215; P. v. Bergen, 53 N. Y. 405; Ex parte Stickney, 40 Ala. 160.

²⁸ Southworth v. P., 183 Ill. 621, 56 N. E. 407.

²⁹ Schultz v. S., 32 Ohio St. 277, 281; Taggart v. Com., 21 Pa. St. 527.

though not in his hands.³⁰ Or any other disobedience of an order of court is a contempt where the court has jurisdiction to enter it.³¹

§ 1688. Order to make deed.—Where the contempt consisted in disobeying an order requiring the party to make a deed in a suit in equity for specific performance, it was no answer that he put it out of his power to make the deed by conveying the land to a third party *pendente lite*.³²

§ 1689. Void order.—Where the court makes an order without authority of law, the party has the right to question the propriety of such order, and to do so he must refuse to obey it. The order being unauthorized, he has a right to disregard it.³³ To refuse to obey an order to produce books and papers for inspection before trial is not a contempt of court, unless a showing is made upon good and sufficient cause that such books and papers contain evidence pertinent to the issue on behalf of the party applying therefor; such an order by the court is unauthorized.³⁴

§ 1690. Violating order.—A writ of *certiorari*, when served, operates as a stay of all proceedings, and any proceeding in the face of its restraining order is a contempt.³⁵

³⁰ Eikenberry v. Edwards, 67 Iowa 619, 56 Am. R. 360, 25 N. W. 832; Ex parte Kellogg, 64 Cal. 343, 30 Pac. 1030; Bond v. Bond, 69 N. C. 97; In re Milburn, 59 Wis. 24, 17 N. W. 965; S. v. Burrows, 33 Kan. 10, 5 Pac. 449; Lehmaier v. Griswold, 46 N. Y. Super. Ct. 11; S. v. Becht, 23 Minn. 411.

³¹ P. v. Salomon, 54 Ill. 41; O'Callaghan v. O'Callaghan, 69 Ill. 552; Knott v. P., 83 Ill. 532; Devlin v. Hinman, 57 N. Y. Supp. 663, 40 App. Div. 101.

³² 5 Cr. Law Mag. 180 (citing McClung v. McClung, 33 N. J. Eq. 462; O'Callaghan v. O'Callaghan, 69 Ill. 552); Staples v. Staples, 87 Wis. 592, 58 N. W. 1036; Tredway v. Van Wagenen, 91 Iowa 556, 60 N. W. 130; Haines v. Haines, 35 Mich. 138. See Stuart v. Stuart, 123 Mass. 370; P. v. Pearson, 3 Scam. (Ill.) 282.

³³ Lester v. P., 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. R. 375; P. v. Weigley, 155 Ill. 501, 40 N. E.

300; Sherwin v. P., 100 N. Y. 351, 3 N. E. 465, 5 Am. C. R. 195; Brown v. Moore, 61 Cal. 432; Hogue v. Hayes, 53 Iowa 377, 5 N. W. 541; Clark v. Burke, 163 Ill. 337, 45 N. E. 235; P. v. Donovan, 135 N. Y. 79, 31 N. E. 1009; S. v. Blair, 39 W. Va. 704, 20 S. E. 658; Ex parte Adams, 25 Miss. 883, 59 Am. D. 234; Com. v. Perkins, 124 Pa. St. 36, 16 Atl. 525; Bower v. Kidd, 23 Mich. 440; Bear v. Cohen, 65 N. C. 611; St. Louis, etc., R. Co. v. Wear, 135 Mo. 230, 36 S. W. 357, 658; In re Sawyer, 124 U. S. 200, 8 S. Ct. 482; Ex parte Brown, 97 Cal. 83, 31 Pac. 840; Ex parte Gardner, 22 Nev. 280, 39 Pac. 570; In re Pierce, 44 Wis. 411; McKinney v. Frankfort, etc., R. Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500.

³⁴ Lester v. P., 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004; Ex parte Clarke, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 835.

³⁵ S. v. Board of Public Works, 58 N. J. L. 536, 37 Atl. 578.

§ 1691. **Attorney refusing to pay.**—Where an attorney collects money for his client and refuses to obey an order of the court to pay it, he is guilty of contempt.³⁶

§ 1692. **Slandering the judge.**—A newspaper publication charging a judge with "deliberate lying about the law, deliberate, intentional falsification in his official capacity and deliberate, intentional denial of justice," in the trial of a cause, is a contempt of court.³⁷ But if the libelous or slanderous publication reflecting on the judge of the court is published after a decision is rendered or after the termination of the cause to which it relates, then such publication is not a contempt. The publication must relate to some cause or matter pending and undetermined.³⁸

§ 1693. **Reflecting on judge.**—The defendant had been indicted on a charge of perjury for giving false testimony and the perjury case was pending for trial. In the meantime the defendant and his friends had held public meetings in various parts of the country intending to excite sympathy for his cause and to collect funds for his defense on the perjury charge. Speeches were made by the defendant and his friends of a vituperative character, reflecting upon the justice before whom the perjury cause was pending for trial, the object appearing to have been to deter the justice from sitting at the trial: Held, on complaint, to constitute a contempt of court.³⁹ The use of abusive and

³⁶ Smith v. McLendon, 59 Ga. 523; P. v. Wilson, 5 Johns. (N. Y.) 368; Cotton v. Sharpstein, 14 Wis. 226, 80 Am. D. 774.

³⁷ Ex parte Barry, 85 Cal. 603, 25 Pac. 256, 20 Am. R. 248; S. v. Bee Pub. Co. (Neb.), 83 N. W. 404, 50 L. R. A. 195. See also the following cases: P. v. Wilson, 64 Ill. 196, 16 Am. R. 528; Tenney's Case, 23 N. H. 162; Bloom v. P., 23 Colo. 416, 48 Pac. 519; P. v. Stapleton, 18 Colo. 568, 33 Pac. 167; S. v. Kaiser, 20 Or. 50, 23 Pac. 964; Rosewater v. S., 47 Neb. 630, 66 N. W. 640; Cheadle v. S., 110 Ind. 301, 59 Am. R. 190, 11 N. E. 426; Myers v. S., 46 Ohio St. 473, 22 N. E. 43; S. v. Frew, 24 W. Va. 416, 49 Am. R. 257; Matter of Cheeseman, 49 N. J. L. 115, 60 Am. R. 596, 6 Atl. 513; In re Hughes, 8 N. M. 225, 43 Pac. 692; S. v. Anderson, 40 Iowa 207; Matter

of Sturoc, 48 N. H. 428, 97 Am. D. 630; Burke v. Ter., 2 Okla. 499, 37 Pac. 829; Matter of Shortridge, 99 Cal. 527, 37 Am. R. 78, 34 Pac. 227.

³⁸ Ex parte Barry, 85 Cal. 603, 20 Am. R. 248, 25 Pac. 256; S. v. Kaiser, 20 Or. 50, 23 Pac. 964; S. v. Anderson, 40 Iowa 207; Storey v. P., 79 Ill. 45, 22 Am. R. 158; Rosewater v. S., 47 Neb. 630, 66 N. W. 640; P. v. Wilson, 64 Ill. 195, 16 Am. R. 528; Bayard v. Passmore, 3 Yeates (Pa.) 438. See In re Chadwick, 109 Mich. 588, 67 N. W. 1071. *Contra*, S. v. Morrill, 16 Ark. 384.

³⁹ Reg. v. DeCastro, 12 Cox C. C. 371, 1 Green C. R. 121; Reg. v. Onslow, 12 Cox C. C. 358, 1 Green C. R. 110; 2 Bish. New Cr. L., § 259. See Stuart v. P., 3 Scam. (Ill.) 396; In re Hughes, 8 N. M. 225, 43 Pac. 692; 4 Bl. Com. 285.

defamatory language by an attorney against the judge of the court reflecting on his official action in reference to some cases pending in court and reflecting also on his private character, but not used in the immediate view or presence of the court or judge, but on the streets and in public places in the city in which the court was holding, does not constitute contempt.⁴⁰

§ 1694. Bribing juror.—An attempt to bribe or in any manner influence a juror in the discharge of his duty is a contempt of court.⁴¹ Holding a communication with a juror by signals, for the purpose of receiving information as to how the jury stood regarding their verdict in a cause, is a contempt.⁴² Mr. Bishop states that it was held to be a contempt where, after a jury had convicted a person on a criminal charge, his brother went to the house of the foreman and accused him of having bullied the jurors into rendering a verdict of guilty and challenged the foreman to mortal combat.⁴³

§ 1695. Threatening grand jury.—Sending insulting and threatening communications to a grand jury relating to matters which that body is investigating is a contempt of court.⁴⁴ Reflections on the grand jury published by the press can not be regarded as contempts, unless calculated to impede, embarrass, or obstruct the administration of law.⁴⁵ The publication of an article concerning a pending trial which is calculated to prejudice the jury and prevent a fair trial is a contempt of court, irrespective of the motive prompting the publication.⁴⁶

§ 1696. Abstracting files.—Taking papers from the files of the court and refusing to return them is a contempt of court.⁴⁷

§ 1697. Contempt by attorney.—The conduct of attorneys in the following matters constitutes contempt of court: (1) Commencing

⁴⁰ *S. v. Root*, 5 N. D. 487, 67 N. W. 590; *Percival v. S.*, 45 Neb. 741, 64 N. W. 221. See *Rosewater v. S.*, 47 Neb. 630, 66 N. W. 640.

⁴¹ *Langdon v. Wayne Cir. Judges*, 76 Mich. 358, 43 N. W. 310; *Cuddy, Petitioner*, 131 U. S. 280, 9 S. Ct. 703.

⁴² *S. v. Doty*, 32 N. J. L. 403, 90 Am. D. 671.

⁴³ 2 Bish. New Cr. L., § 258, citing *Reg. v. Martin*, 5 Cox C. C. 356.

⁴⁴ *Matter of Tyler*, 64 Cal. 434, 1 Pac. 884.

⁴⁵ *Storey v. P.*, 79 Ill. 45. See *Fishback v. S.*, 131 Ind. 304, 30 N. E. 1088.

⁴⁶ *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 52 N. E. 445.

⁴⁷ *Barker v. Wilford, Kirby* (Conn.) 235; *In re Gates*, 17 W. N. C. (Pa.) 142; *Baldwin v. S.*, 11 Ohio St. 681; 2 Bish. New Cr. L., § 253.

a suit on a feigned issue to get the decision of the court.⁴⁸ (2) Charging that the judge of the court is prejudiced.⁴⁹ (3) Advising clients to disregard the orders of the court.⁵⁰ (4) Filing pleadings in a cause unnecessarily gross and indelicate.⁵¹ (5) Willfully abusing the process of the court.⁵²

§ 1698. Surety justifying falsely.—It is an “unlawful interference” in a cause, for sureties to justify falsely in an undertaking bond, given for the purpose of discharging an attachment. Such conduct is a contempt of court.⁵³ Or to justify falsely in an appeal bond.^{53a}

§ 1699. Witness refusing to answer.—A witness who refuses to answer proper questions before a grand jury is guilty of a contempt of the court which organized the grand jury.⁵⁴ And so, also, the refusal of a witness to answer proper questions in any lawful proceeding in which the court has jurisdiction is a contempt of the court.⁵⁵

§ 1700. Witness disobeying subpoena.—Where a subpoena has been lawfully issued and served on a witness and he refuses to comply with its requirements, he is guilty of contempt.⁵⁶ In a civil case, a witness, though a party to the case, is not bound to obey a subpoena, unless his fees as such witness have been tendered to him.⁵⁷

⁴⁸ *Smith v. Junction R. Co.*, 29 Ind. 546; *Smith v. Brown*, 3 Tex. 360, 49 Am. D. 748.

⁴⁹ *Harrison v. S.*, 35 Ark. 458.

⁵⁰ *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182, 51 Hun 550, 4 N. Y. Supp. 247; *Ter. v. Clancey*, 7 N. M. 584, 37 Pac. 1108.

⁵¹ *Brown v. Brown*, 4 Ind. 627, 58 Am. D. 641.

⁵² *Butler v. P.*, 2 Colo. 295.

⁵³ *P. v. Tamsen*, 17 Misc. (N. Y.) 212, 40 N. Y. Supp. 1047.

^{53a} *King v. Barnes*, 51 Hun 550, 4 N. Y. Supp. 247, 113 N. Y. 476, 21 N. E. 182; *Lawrence v. Harrington*, 63 Hun 195, 17 N. Y. Supp. 649, 133 N. Y. 690, 31 N. E. 627.

⁵⁴ *Com. v. Bannon*, 97 Mass. 214; *P. v. Kelly*, 24 N. Y. 74; *Ward v. S.*, 2 Mo. 120, 22 Am. D. 449; *Newsum v. S.*, 78 Ala. 407; *Lockwood v. S.*, 1 Ind. 161; *U. S. v. Caton*, 1 Cranch 150; *Smith v. P.*, 20 Ill. App. 591; *In re Rogers*, 129 Cal. 468, 62 Pac. 47.

⁵⁵ *In re Rosenberg*, 90 Wis. 581, 63

N. W. 1065, 64 N. W. 299; *S. v. Barclay*, 86 Mo. 55; *Page v. Randall*, 6 Cal. 32; *P. v. Marston*, 18 Abb. Pr. (N. Y.) 257; *Wright v. P.*, 112 Ill. 540; *Dixon v. P.*, 63 Ill. App. 585; *Ex parte Adams*, 25 Miss. 883, 59 Am. D. 234; *S. v. Lonsdale*, 48 Wis. 348, 4 N. W. 390; *S. v. Towle*, 42 N. H. 540; *Barnes v. Circuit Judge*, 81 Mich. 374, 45 N. W. 1016; *Whitcomb's Case*, 120 Mass. 118, 21 Am. R. 502; *Matter of Gannon*, 69 Cal. 541, 11 Pac. 240; *Wilcox v. S.*, 46 Neb. 402, 64 N. W. 1072; *La Fontaine v. Southern, etc., Assn.*, 83 N. C. 132; *P. v. Hicks*, 15 Barb. (N. Y.) 153; *P. v. Kelly*, 24 N. Y. 74; *In re Abbott*, 7 Okl. 78, 54 Pac. 319.

⁵⁶ *Carman v. Emerson*, 71 Fed. 264; *Loop v. Gould*, 17 Hun (N. Y.) 585; *Hale v. S.*, 55 Ohio St. 210, 45 N. E. 199; *Wickwire v. S.*, 19 Conn. 477; *Wilson v. S.*, 57 Ind. 71; *Com. v. Carter*, 11 Pick. (Mass.) 277; 2 Bish. New Cr. L., § 253.

⁵⁷ *White v. Hermann*, 51 Ill. 243;

§ 1701. **Keeping witness away.**—Dissuading a witness from giving evidence, preventing a witness duly subpoenaed from attending court, or in any manner spiring away a witness, is a contempt of court.⁵⁸ Preventing or attempting to prevent a witness from attending a trial is a contempt of court, although not subpoenaed.⁵⁹ But there can be no contempt in evading or inducing another to evade process not yet issued. Until a witness has been subpoenaed, or a subpoena issued for him, it is clearly no contempt for the accused to induce him to absent himself to prevent being subpoenaed.⁶⁰

§ 1702. **Locking court room.**—During the adjournment of the court the defendant, acting under the direction of the county board, changed the locks on the doors and locked them, and refused to permit the judge and other officers attending the court to enter the court room, intending thereby to compel the court to vacate that room: Held to be a contempt of court.⁶¹

§ 1703. **Ordering a "strike."**—The "ordering of a strike" on a railroad which is in the hands of a receiver is a contempt of the court appointing the receiver.⁶² And where an injunction has been issued restraining persons from in any manner interfering with the operation of a railroad in the hands of a receiver, by threatening, intimidating, or persuading the employes to stop work, a violation of such injunction is a contempt of court.⁶³

ARTICLE IV. DEFENSES TO CONTEMPT.

§ 1704. **Disclaiming criminal intent.**—Where the language in a publication against a judge is susceptible of only one meaning, by fair construction, and that contemptuous, a disavowal of any wrong intent is no defense.⁶⁴ But where the language used is not libelous *per se*,

Vickers v. Hill, 1 Scam. (Ill.) 307; Peoria, etc., R. Co. v. Bryant, 15 Ill. 438.

⁵⁸ 4 Bl. Com. 126; Com. v. Feely, 2 Va. Cas. 1; In re Brule, 71 Fed. 943; Hale v. S., 55 Ohio St. 210, 3 L. R. A. 254, 45 N. E. 199.

⁵⁹ Montgomery v. Palmer, 100 Mich. 436, 59 N. W. 148. See 2 Bish. New Cr. L., § 258.

⁶⁰ McConnell v. S., 46 Ind. 298, 2 Green C. R. 724. But see In re Brule, 71 Fed. 943. Remaining away

from court, pretending to be sick, when given notice, and thereby obtaining a continuance of the cause, is a contempt of court: Carter v. Com., 96 Va. 791, 32 So. 780, 45 L. R. A. 310.

⁶¹ Dahnke v. P., 168 Ill. 105, 48 N. E. 137.

⁶² U. S. v. Debs, 64 Fed. 724; In re Debs, 158 U. S. 564, 15 S. Ct. 900; In re Wabash R. Co., 24 Fed. 217.

⁶³ In re Acker, 66 Fed. 295.

⁶⁴ Bloom v. P., 23 Colo. 416, 48 Pac.

and admits of an innocent construction, and the defendant by his answer to a charge of contempt makes a complete denial of any intention of reflecting on the court, he is entitled to be discharged.⁶⁵ Parties are responsible for the language used by them in any proceeding which they may bring into court, and it is not for them, nor their counsel, to construe or say what effect such language will have. A disclaimer and sweeping denial of any intended contempt, but that the party acted in good faith in the language used, is no defense.⁶⁶ But if the language used admits of two interpretations a disavowal will purge the defendant of contempt.⁶⁷

§ 1705. Witness claiming privilege.—A witness before a court, grand jury, or other inquisitorial body will not be guilty of contempt in refusing to answer questions the answers to which would convict or tend to convict him of a criminal offense.⁶⁸ While a witness may claim his privilege from giving or disclosing evidence tending to convict him, yet he can not evade answering when his answers will not so tend.⁶⁹

§ 1706. Witness's privilege—Example.—A witness before a grand jury was asked: "Do you know of your own knowledge of any person or persons having played for money, or other valuable thing, with cards? If so, state who, for what, and what did they play?" The witness stated: "I can not answer that question without criminating

519; *Fishback v. S.*, 131 Ind. 304, 30 N. E. 1088; *Cheadle v. S.*, 110 Ind. 301, 11 N. E. 426; *Dodge v. S.*, 140 Ind. 284, 39 N. E. 745; *P. v. Freer*, 1 Caines (N. Y.) 485; *Ter. v. Murray*, 7 Mont. 251, 15 Pac. 145; *Allen v. S.*, 131 Ind. 599, 30 N. E. 1093; *In re Woolley*, 74 Ky. 95.

⁶⁵ *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071; *Allen v. S.*, 131 Ind. 599, 30 N. E. 1093; *Fishback v. S.*, 131 Ind. 304, 30 N. E. 1088; *In re Woolley*, 74 Ky. 95. See *In re Robinson*, 117 N. C. 533, 23 S. E. 453. The court must determine the intent, by a proper interpretation of the language used: *Hughes v. P.*, 5 Colo. 453; *Henry v. Ellis*, 49 Iowa 205; *P. v. Stapleton*, 18 Colo. 568, 33 Pac. 167. See *P. v. Wilson*, 64 Ill. 195, 16 Am. R. 528.

⁶⁶ *U. S. v. Church*, 6 Utah 9, 21 Pac. 503, 524, 8 Am. C. R. 138; *McCor-*

mick v. Sheridan, 77 Cal. 253, 19 Pac. 419. See *In re Woolley*, 74 Ky. 109.

⁶⁷ *In re Chadwick*, 109 Mich. 588, 67 N. W. 1071. See *Matter of Moore*, 63 N. C. 397 (setting out the language used); *Ex parte Biggs*, 64 N. C. 202.

⁶⁸ *Cullen v. Com.*, 24 Gratt. (Va.) 625; *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195; *Matter of Nickell*, 47 Kan. 734, 27 Am. R. 315, 28 Pac. 1076; *Ex parte Cohen*, 104 Cal. 524, 43 Am. R. 127, 38 Pac. 364; *S. v. Nowell*, 58 N. H. 314; *S. v. Quarles*, 13 Ark. 307; *Emery's Case*, 107 Mass. 172, 9 Am. R. 22; *Richman v. S.*, 2 Greene (Iowa) 532; *Minters v. P.*, 139 Ill. 365, 29 N. E. 45.

⁶⁹ *Smith v. P.*, 20 Ill. App. 591; 2 *Bish. New Cr. L.*, § 253.

myself or divulging the names of witnesses who would criminate me, and of which witnesses the people have no knowledge, as I believe, other than would be derived from my testimony in answering the question." The witness was then informed by the foreman of the grand jury that the question had reference to no game in which he took part. The witness was guilty of contempt in refusing to answer the question. He should have answered "no" if he could not answer without criminating or furnishing evidence tending to criminate himself.⁷⁰

§ 1707. Witness, when not privileged.—Where by statute a witness is fully and completely protected from indictment, prosecution, or punishment for a criminal offense under investigation, he may be compelled to testify and can not claim his privilege that his testimony would furnish evidence to convict or tend to convict him of a criminal offense.⁷¹ A witness refusing to answer questions on the ground that his answers would convict or tend to convict him, where the offense about which he is being interrogated is barred by the statute of limitation, is guilty of contempt.⁷² But where the questions put to a witness are irrelevant and impertinent, he will not be guilty of contempt in refusing to answer.⁷³

§ 1708. Witness's privilege, court to judge.—The court is the exclusive judge as to whether an answer to a question would convict or tend to convict the witness of any offense. But if the very nature and form of the question would elicit an answer having that effect, then the witness is the sole judge.⁷⁴

§ 1709. Contempt at recess.—Mr. Bishop says that a recess or adjournment of the court for the day does not dissolve the court. So

⁷⁰ *Smith v. P.*, 20 Ill. App. 591.

⁷¹ *Ex parte Cohen*, 104 Cal. 524, 43 Am. R. 127, 38 Pac. 364; *P. v. Sharp*, 107 N. Y. 427, 1 Am. R. 851, 14 N. E. 319; *S. v. Newell*, 58 N. H. 314; *In re Falvey*, 7 Wis. 630; *Kendrick v. Com.*, 78 Va. 490; *Newsum v. S.*, 78 Ala. 407; *Floyd v. S.*, 7 Tex. 215. But see *S. v. Quarles*, 13 Ark. 307; *Bedgood v. S.*, 115 Ind. 275, 17 N. E. 621; *Cullen v. Com.*, 14 Gratt. (Va.) 629; *Emery's Case*, 207 Mass. 172, 9 Am. R. 22.

⁷² *Weldon v. Burch*, 12 Ill. 374; *Floyd v. S.*, 7 Tex. 215; *Calhoun v. Thompson*, 56 Ala. 166, 28 Am. R.

754; *Mahanke v. Cleland*, 76 Iowa 401, 41 N. W. 53; *U. S. v. Smith*, 4 Day (Conn.) 121.

⁷³ *Ex parte Henshaw*, 73 Cal. 486, 15 Pac. 110; *Ex parte Zeelandelaar*, 71 Cal. 238, 12 Pac. 259.

⁷⁴ *Janvrin v. Scammon*, 29 N. H. 280; *P. v. Mather*, 4 Wend. (N. Y.) 229, 21 Am. D. 122; *U. S. v. McCarthy*, 18 Fed. 87, 21 Blatchf. (U. S.) 469; *Richman v. S.*, 2 Greene (Iowa) 532; *Matter of Taylor*, 8 Misc. (N. Y.) 159, 28 N. Y. Supp. 500. But see *Com. v. Bell*, 145 Pa. St. 375, 22 Atl. 641, 644 (holding the judge to be always the sole judge).

that, during such recess, a person may be guilty of contempt by misbehavior in the court-house, at least if in the presence of the judge holding the court.⁷⁵

§ 1710. Attacking proceedings.—The defendant on a charge of contempt, for violating an injunction, will not be permitted to attack the truthfulness of the allegations of the original bill.⁷⁶

§ 1711. Purging by denial.—Where a party in a common law proceeding charged with contempt, by his affidavit, fully denies the charge, he is entitled to his discharge, and the court can not hear oral or other testimony to contradict his answer.⁷⁷

§ 1712. Defendant unable to comply.—If it be fairly proven to the court that at the time or since the order was entered, requiring a defendant to pay money according to the terms of a decree, he was unable to do so, then he is not in contempt of court.⁷⁸ But where the accused creates the inability to comply with the order of the court in anticipation of an order to pay money or deliver property, he is guilty of contempt.⁷⁹

§ 1713. Punishable by indictment.—The fact that the offense charged as a contempt may constitute a crime punishable by indictment is no defense to a contempt proceeding.⁸⁰

⁷⁵ 2 Bish. New Cr. L., § 253, citing *Baker v. S.*, 82 Ga. 776, 9 S. E. 743, 14 Am. R. 192.

⁷⁶ *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121.

⁷⁷ *Burke v. S.*, 47 Ind. 528; *Welch v. P.*, 30 Ill. App. 399; *Crook v. P.*, 16 Ill. 536; *Wilson v. S.*, 57 Ind. 71, 2 Am. C. R. 183; *S. v. Earl*, 41 Ind. 464; *Underhill Cr. Ev.*, § 461. *Contra*, *U. S. v. Church*, 6 Utah 9, 21 Pac. 503, 524, 8 Am. C. R. 138; *Henry v. Ellis*, 49 Iowa 205; *U. S. v. Anonymous*, 21 Fed. 761; *S. v. Bridge Co.*, 16 W. Va. 864; *Watson v. Citizens' Bank*, 5 S. C. 159. See § 1755.

⁷⁸ *Walton v. Walton*, 54 N. J. Eq. 607, 35 Atl. 289; *Register v. S.*, 8 Minn. 214.

⁷⁹ *Ex parte Kellogg*, 64 Cal. 343, 30 Pac. 1030; *Myers v. Trimble*, 3 E. D. Smith (N. Y.) 607; *Wise v. Chaney*, 67 Iowa 73, 24 N. W. 599; *Cartwright's Case*, 114 Mass. 230; *Sta-*

ples v. Staples, 87 Wis. 592, 58 N. W. 1036; *Smith v. McLendon*, 59 Ga. 523; *Jenkins v. S.* (Neb.), 82 N. W. 622. But see *In re Hilles*, 13 Phila. (Pa.) 340, and *Kane v. Haywood*, 66 N. C. 1.

⁸⁰ *U. S. v. Debs*, 64 Fed. 724; *S. v. Faulds*, 17 Mont. 140, 42 Pac. 285; *S. v. Williams*, 2 Speers (S. C.) 26; *Rex v. Ossulston*, 2 Strange 1107; *Spalding v. P.*, 7 Hill (N. Y.) 301; *Cartwright's Case*, 114 Mass. 230; *Yates v. Lansing*, 9 Johns. (N. Y.) 417, 6 Am. D. 290; *Matter of Griffin*, 98 N. C. 225, 3 S. E. 515; *Arnold v. Com.*, 80 Ky. 300, 44 Am. R. 480; *Hale v. S.*, 55 Ohio St. 210, 45 N. E. 199; *Pledger v. S.*, 77 Ga. 242, 3 S. E. 320; *Middlebrook v. S.*, 43 Conn. 257, 21 Am. R. 650; *In re Hughes*, 8 N. M. 225, 43 Pac. 692; *S. v. Faulds*, 17 Mont. 140, 42 Pac. 285; *Ex parte Bergman*, 3 Wyo. 396, 26 Pac. 914; *Bradley v. S.*, 111 Ga. 168, 36 S. E. 630.

§ 1714. **Advice of counsel.**—The fact that the act alleged to be a contempt was done by the accused after consultation with his counsel and upon his advice will not justify a disobedience of the order of the court on a charge of contempt.⁸¹ But such advice when acted upon in good faith will eliminate any criminal element from the contempt.⁸²

§ 1715. **Complete disavowal—Ignorance.**—A complete disavowal will, ordinarily, purge the contempt by a showing that the act charged was innocently done, and under some circumstances resulted from ignorance: as, where an officer in the discharge of his duties does the act in good faith under instructions from his superior.⁸³

§ 1716. **Intent, when not material.**—But in a proceeding for civil contempt instituted by a private individual for the purpose of protecting and enforcing his private rights, the offense does not depend on the intention or motive of the party in doing or failing to do the act alleged as a contempt, but on the act itself. The state of mind toward the court in such case is not material.⁸⁴

§ 1717. **Defendant unable to comply.**—On a charge of contempt for a failure to obey an order of the court, the defendant may purge himself of the alleged contempt by showing that he was actually unable to comply with the order.⁸⁵

⁸¹ *S. v. Board Pub. Works*, 58 N. J. L. 536, 37 Atl. 578; *Hawley v. Bennett*, 4 Paige (N. Y.) 164; *S. v. Harper's Ferry B. Co.*, 16 W. Va. 864; *Bate Refrigerating Co. v. Gillett*, 30 Fed. 683; *Lansing v. Easton*, 7 Paige (N. Y.) 364; *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834.

⁸² *Power v. Athens*, 19 Hun (N. Y.) 165; *Matthews v. Spangenberg*, 15 Fed. 813; *Billings v. Carver*, 54 Barb. (N. Y.) 40. See *Trimble v. Com.*, 96 Va. 818, 32 S. E. 786.

⁸³ *McQuade v. Emmons*, 38 N. J. L. 397; *Buck v. Buck*, 60 Ill. 105; *Matter of Filton*, 16 How. Pr. (N. Y.) 303; *Wells v. Com.*, 21 Gratt. (Va.) 500; *Haskett v. S.*, 51 Ind. 176; *S. v. Goff*, *Wright (Ohio)* 79; *P. v. Few*, 2 Johns. (N. Y.) 290.

⁸⁴ *Wilcox Silver-Plate Co. v. Schimmel*, 59 Mich. 525, 26 N. W. 692; *Thompson v. Pennsylvania R. Co.*,

48 N. J. Eq. 105, 21 Atl. 182; *Wartman v. Wartman*, Taney's Dec. (U. S.) 362; *Watson v. Citizens' Sav. Bank*, 5 S. C. 159. See also *S. v. Collins*, 62 N. H. 694; *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *Vose v. Reed*, 1 Woods (U. S.) 647; *Des Moines St. R. Co. v. Des Moines Broad Gauge St. R. Co.*, 74 Iowa 585, 38 N. W. 496.

⁸⁵ *Blake v. P.*, 80 Ill. 11; *Kadlowsky v. Kadlowsky*, 63 Ill. App. 292; *S. v. Dent*, 29 Kan. 416; *Newhouse v. Newhouse*, 14 Or. 290, 12 Pac. 422; *Russell v. Russell*, 69 Me. 336; *Ex parte Wright*, 65 Ind. 504; *Cowart v. Dunbar*, 56 Ga. 417; *Boyet v. Vaughan*, 89 N. C. 27; *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145; *Hurd v. Hurd*, 63 Minn. 443, 65 N. W. 728; *Allen v. Allen*, 72 Iowa 502, 34 N. W. 303; *Hull v. Harris*, 45 Conn. 544; *Matter of Ockershausen*,

§ 1718. **Property disposed of before order.**—Where a party had disposed of property before an order was issued by the court directing him to turn it over to a receiver, he will not be in contempt of court in failing to turn it over, if the property had passed out of his control not in anticipation of such order of the court.⁸⁶

§ 1719. **Attorney claiming property.**—An attorney for a defendant in an action in which judgment is rendered that the defendant restore possession of the premises, who thereupon notifies the sheriff that he is the owner and in exclusive possession of the premises, and that the defendant is not in possession, and that he will by all lawful means resist any attempt to take the possession from him, is not thereby guilty of contempt, though his notice deters the sheriff from serving the writ.⁸⁷

§ 1720. **Stranger to cause.**—A person who is not a party to a cause, by interfering and ousting a party who has been put in possession of property by a writ of possession, is not guilty of contempt of court.⁸⁸

§ 1721. **Constitutional rights; trial by judge.**—The constitutional provisions relating to persons accused of crime have no application to contempt cases. The defendant in a contempt proceeding has no constitutional right to meet the witnesses against him, face to face, as in criminal cases.⁸⁹ A contempt proceeding may be tried by any one of the judges holding the court, although the contempt was committed when a different judge was presiding.⁹⁰

§ 1722. **Husband unable to pay.**—When the husband, without his fault, is unable to pay alimony, and for that reason fails to obey the order of the court, he is not guilty of contempt.⁹¹

59 Hun (N. Y.) 200, 13 N. Y. Supp. 396; *Matter of Wilson*, 75 Cal. 580, 17 Pac. 698.

⁸⁶ *McKissack v. Voorhees*, 119 Ala. 101, 24 So. 523.

⁸⁷ *DeWitt v. Superior Court* (Cal.), 47 Pac. 871.

⁸⁸ *Atwood v. S.*, 59 Kan. 728, 54 Pac. 1057. See *Ex parte Truman*, 124 Cal. 387, 57 Pac. 223.

⁸⁹ *Buck v. Buck*, 60 Ill. 105; 2 Bish. New Cr. L., § 269.

⁹⁰ *Morris v. Whitehead*, 65 N. C.

637; *Whittem v. S.*, 36 Ind. 196; *Haight v. Lucia*, 36 Wis. 355.

⁹¹ *Blake v. P.*, 80 Ill. 11; *Kadlowsky v. Kadlowsky*, 63 Ill. App. 292; *Matter of Wilson*, 75 Cal. 580, 17 Pac. 698; *S. v. Dent*, 29 Kan. 416; *Newhouse v. Newhouse*, 14 Or. 290, 12 Pac. 422; *Carlton v. Carlton*, 44 Ga. 216; *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. D. 52; *Wright v. Wright*, 74 Wis. 439, 43 N. W. 145; *Pain v. Pain*, 80 N. C. 322; *Peel v. Peel*, 50 Iowa 521; *Allen v. Allen*, 72 Iowa 502, 34 N. W. 303.

§ 1723. **Jurisdiction of person.**—The court must have jurisdiction not only of the person and subject-matter, but also authority to render the particular judgment.⁹² Where a court exceeds its jurisdiction in issuing a peremptory writ of mandamus, an order of commitment for a refusal to comply is a nullity and hence the refusal is not a contempt of court.⁹³

§ 1724. **Juror's conduct.**—A juror in a criminal case, without the permission of the court, visited the scene of the crime to acquaint himself with the locality. Held not guilty of contempt. Such act of the juror was not a private or civil contempt, because no right of an individual suitor was invaded before the court; and it was not a criminal contempt, because not one of those enumerated in the statute which named and defined certain acts as criminal contempts, "and no others."⁹⁴

§ 1725. **Expert witness refusing.**—A physician in refusing to give his professional opinion as an expert witness unless first compensated by a proper fee for his services will not be guilty of contempt of court, the law being that a professional man has the right to demand such compensation before testifying as an expert.⁹⁵

§ 1726. **Party's rights, though in contempt.**—Where a party to a cause stands adjudged in contempt of court, he will not ordinarily be permitted to be heard on the merits of the order from which the contempt originated; nor will the court entertain any motions of the contemner as matters of favor while he stands in contempt.⁹⁶

⁹² *P. v. Liscomb*, 60 N. Y. 559, 14 Am. R. 211; *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111; *Ex parte Fisk*, 113 U. S. 713, 5 S. Ct. 724.

⁹³ *In re McCain*, 9 S. D. 57, 68 N. W. 163; *S. v. Winder*, 14 Wash. 114, 44 Pac. 125; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *S. v. Simmons*, 39 Kan. 262, 18 Pac. 177; *Haines v. Haines*, 35 Mich. 138. See *McKinney v. Frankfort*, etc., R. Co., 140 Ind. 95, 38 N. E. 170, 39 N. E. 500; *Kirk v. Milwaukee, etc., Mfg. Co.*, 26 Fed. 501.

⁹⁴ *P. v. Court of Oyer and Terminer*, 101 N. Y. 245, 4 N. E. 259, 6 Am. C. R. 168. On contempt by

jurors, see: *In re May*, 1 Fed. 737, 2 Flap. 562; *Miller v. Com.*, 80 Va. 33; *Murphy v. Wilson*, 46 Ind. 537; 2 Bish. New Cr. L., § 25.

⁹⁵ *Buchman v. S.*, 59 Ind. 1, 2 Am. C. R. 187, 26 Am. R. 75, citing many American and English cases; *Matter of Roelker*, 1 Sprague (U. S.) 276. *Contra*, *Dixon v. P.*, 168 Ill. 179, 48 N. E. 108; *Ex parte Dement*, 53 Ala. 389, 25 Am. R. 611; *Summers v. S.*, 5 Tex. App. 374.

⁹⁶ *Ex parte McCarthy*, 29 Cal. 395; *S. v. Ackerson*, 25 N. J. L. 209; *Knott v. P.*, 83 Ill. 532; *Coburn v. Tucker*, 21 Mo. 219; *Jacoby v. Goetter*, 74 Ala. 427; *Snickers v. Dorsey*, 2 Munf. (Va.) 505; *Saylor v. Mock-*

But the contemner may be heard on the measure of punishment in the contempt proceedings.⁹⁷ But the fact that a party stands in contempt will in no manner affect any of his legal rights in the cause out of which the contempt arose. He may appear and defend against any proceedings of his adversary and take any necessary steps to preserve his rights in the cause in which the contempt originated.⁹⁸

ARTICLE V. ENTITLING THE CAUSE.

§ 1727. **In original or distinct cause.**—In proceedings for criminal contempt the application for attachment may be made and filed in the original cause, but will be regarded as a distinct case, criminal in its nature, and may be docketed as such, and any judgment entered therein will exhaust the power of the court to further punish for the same offense.⁹⁹ But in some jurisdictions, if a contempt proceeding is really but an incident of the principal suit the practice seems to be to entitle and file the papers in the original cause. But when the proceeding is for criminal contempt it would be more appropriate to prosecute in the name of the people, and such is the general practice.¹⁰⁰ When the contempt is committed in a pending cause the proceeding is to punish the offender as a proceeding by itself. It is not entitled in the cause pending but on the criminal side, and is a separate proceeding.¹ But the practice is not uniform: sometimes the proceedings are in the name of the state against the offender and some-

bie, 9 Iowa 209; *Gant v. Gant*, 10 Humph. (Tenn.) 464, 55 Am. D. 736; *Pickett v. Ferguson*, 45 Ark. 177, 55 Am. R. 545; *Rogers v. Paterson*, 4 Paige (N. Y.) 450; *Goldstein v. S.* (Tex. Cr.), 23 S. W. 686; *Walker v. Walker*, 82 N. Y. 260, 20 Hun 400; *Wharton v. Stoutenburgh*, 39 N. J. Eq. 299; *McClung v. McClung*, 40 Mich. 493; *Baily v. Baily*, 69 Iowa 77, 28 N. W. 443; *Crafter v. Baker*, 75 Ala. 91, 51 Am. R. 424.

⁹⁷ *Endicott v. Mathis*, 9 N. J. Eq. 110; *Williamson v. Carnan*, 1 Gill & J. (Md.) 184. See *Robinson v. Owen*, 46 N. H. 38.

⁹⁸ *Hovey v. Elliott*, 167 U. S. 409; *S. v. Field*, 37 Mo. App. 83; *Peel v. Peel*, 50 Iowa 521; *Mead v. Norris*, 21 Wis. 311; *Johnson v. Court*, 63 Cal. 578; *Brinkley v. Brinkley*, 47 N. Y. 40. See *Herndon v. Campbell*, 86 Tex. 168, 23 S. W. 980; *P. v.*

Horton, 46 Ill. App. 434 (appeal).

⁹⁹ *Lester v. P.*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004; *Ingraham v. P.*, 94 Ill. 428; *Cartwright's Case*, 114 Mass. 238; *New Orleans v. Steamship Co.*, 20 Wall. 392; *S. v. Nathans*, 49 S. C. 199, 27 S. E. 52; *Freeman v. City of Huron*, 8 S. D. 435, 66 N. W. 928.

¹⁰⁰ *Lester v. P.*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004; *Blake v. Blake*, 80 Ill. 523; *Tolman v. Jones*, 114 Ill. 147, 28 N. E. 464; *Walton v. Develing*, 61 Ill. 206; *Wightman v. Wightman*, 45 Ill. 167; *Dickey v. Reed*, 78 Ill. 261; *P. v. Diedrich*, 141 Ill. 670, 30 N. E. 1038; *Rapalje on Contempt*, § 95.

¹ *Williamson's Case*, 26 Pa. St. 9, 18, citing *Case of Yates*, 4 Johns. (N. Y.) 325, 370, 375; *Yates v. Lansing*, 9 Johns. (N. Y.) 423; *Ex parte Adams*, 25 Miss. 886.

times bearing the title of the cause out of which the proceeding arose.²

§ 1728. **Judge invading one's rights.**—The judge of the court is not warranted in molesting a person who is conducting himself respectfully in the presence of the court in the doing of any act which he may lawfully do in the presence of the court.³

§ 1729. **Notary public unauthorized.**—A notary public is not authorized to try and punish for contempt, and a statute conferring such power on him is invalid.*

§ 1730. **No jury trial.**—The constitutional provisions of the states of the United States preserving and guaranteeing the right of trial by jury have no application to contempt proceedings.⁵ The right to punish for contempt without the intervention of a jury is recognized and fully established by the common law.⁶ A jury trial in a contempt case is unauthorized.⁷

§ 1731. **Imprisonment for debt.**—Though the constitution or a statute has abolished imprisonment for debt, a contempt incurred in a suit founded on the debt may be visited by imprisonment.⁸

§ 1732. **Commitment is execution.**—A commitment for contempt is an execution, in distinction from *mesne* process, and no bail is therefore allowable.⁹

* *S. v. Nathans*, 49 S. C. 199, 27 S. E. 52.

² 2 Bish. New Cr. L., § 252, citing *Stokeley v. Com.*, 1 Va. Cas. 330; *Blight v. Fisher*, *Peters C. C.* 41.

⁴ *In re Huron*, 58 Kan. 152, 48 Pac. 574. See also *In re Sims*, 54 Kan. 1, 37 Pac. 135.

⁵ *Garrigus v. S.*, 93 Ind. 239; *Barclay v. Barclay*, 184 Ill. 471, 56 N. E. 821; *Burke v. Ter.*, 2 Okla. 499, 37 Pac. 829; *S. v. Becht*, 23 Minn. 411, 414; *S. v. Markuson*, 5 N. D. 147, 64 N. W. 934; *S. v. Markuson*, 7 N. D. 155, 73 N. W. 82; *McDonnell v. Henderson*, 74 Iowa 619, 38 N. W. 512; *Huntington v. McMahon*, 48 Conn. 174; *Ludden v. S.*, 31 Neb. 429, 48 N. W. 61; *S. v. Matthews*, 37 N. H. 450; *Ex parte Hamilton*, 51 Ala. 66; *Crow v. S.*, 24 Tex. 12; 2 Bish. New Cr. L., § 269.

* *Arnold v. Com.*, 80 Ky. 300; *Ex parte Grace*, 12 Iowa 208.

⁷ *Garrigus v. S.*, 93 Ind. 239; *Emery's Case*, 107 Mass. 172; *Lewis v. Garrett*, 5 How. (Miss.) 434; *Eilenbecker v. District Court*, 134 U. S. 31, 10 S. Ct. 424; *Patrick v. Warner*, 4 Paige (N. Y.) 397; *Proffatt Jury Trial*, § 103.

⁸ 2 Bish. New Cr. L., § 242, citing *Bogart v. Elec. Supply Co.*, 23 Blatchf. 552, 27 Fed. 722; *In re Milburn*, 59 Wis. 24, 17 N. W. 965; *S. v. Becht*, 23 Minn. 411; *Ex parte Hardy*, 68 Ala. 303.

⁹ 2 Bish. New Cr. L., § 270, citing *Ex parte Kearney*, 7 Wheat. (U. S.) 38, 43; *Farrell's Case*, *Andr.* 298; *Phelips v. Barrett*, 4 Price 23. But if attached before committed and until committed, bail is allowable: 4 Bl. Com. 287.

§ 1733. **No change of venue.**—An order changing the venue in a contempt case is void; it does not divest the court before which it was commenced of its jurisdiction to dispose of the proceeding. No other court can take cognizance of the contempt.¹⁰

ARTICLE VI. COMPLAINT OR AFFIDAVIT.

§ 1734. **Affidavit—When necessary.**—“If the contempt be committed in the face of the court the offender may be instantly apprehended and imprisoned at the discretion of the judges without any further proof or examination. But in matters that arise at a distance and of which the court can not have so perfect a knowledge,” an affidavit should be made.¹¹ Where the contempt is committed out of the presence of the court an affidavit must be made by some person competent as a witness, stating the facts constituting the contempt, before the court can take notice of it.¹²

§ 1735. **Affidavit must allege facts.**—Proceedings against a party for a constructive contempt must be commenced by either a rule to show cause or by an attachment, and such rule should not be made or attachment issued unless upon affidavit specifically making the charge, setting forth the facts constituting the contempt.¹³

§ 1736. **Proceedings without complaint.**—That the judge of the court may have personal knowledge of the facts constituting a contempt committed out of the presence of the court will not warrant

¹⁰ Crook v. P., 16 Ill. 534; Bloom v. P., 23 Colo. 416, 48 Pac. 519; 2 Bish. New Cr. L., § 268.

¹¹ 4 Bl. Com. 286; Matter of Percy, 2 Daly (N. Y.) 530; P. v. Cartwright, 11 Hun (N. Y.) 362; Whittem v. S., 36 Ind. 196; S. v. Gibson, 33 W. Va. 97, 10 S. E. 58; P. v. Turner, 1 Cal. 152; S. v. Keeper of Jail, 5 N. J. L. 184.

¹² Whittem v. S., 36 Ind. 196; Chapin v. P., 57 Ill. App. 577. See Hawthorne v. S., 45 Neb. 871, 64 N. W. 359; S. v. Henthorn, 46 Kan. 613, 26 Pac. 937; S. v. Vincent, 46 Kan. 618, 620, 26 Pac. 939; In re Harmer, 47 Kan. 262, 27 Pac. 1004; Wilson v. Ter., 1 Wyo. 155; S. v. Blackwell, 10 S. C. 35; In re Nickell,

47 Kan. 734, 28 Pac. 1076; In re Murdock, 2 Bland 461, 20 Am. D. 381; Com. v. Snowden, 1 Brewst. (Pa.) 218; Rineland v. Dunham, 2 Civ. Proc. R. (N. Y.) 32; S. v. Thompson, 2 Ohio D. 30; Thomas v. P., 14 Colo. 254, 23 Pac. 326; Jordan v. Circuit Court, 69 Iowa 177, 28 N. W. 548; Saunderson v. S., 151 Ind. 550, 52 N. E. 151. But see P. v. Court of Sessions, 82 Hun 242, 31 N. Y. Supp. 373.

¹³ McConnell v. S., 46 Ind. 298, 2 Green C. R. 724, citing Whittem v. S., 36 Ind. 196, 213. See McCredie v. Senior, 4 Paige (N. Y.) 378; In re Smethurst, 4 How. Pr. 369, 3 Code R. (N. Y.) 55.

him in filing an unverified statement as a basis of contempt proceedings.¹⁴

§ 1737. Affidavit necessary to jurisdiction.—Where no affidavit or information was filed on which to base proceedings for constructive contempt, one imprisoned will be discharged on *habeas corpus* proceedings. The judgment is void.¹⁵

§ 1738. Affidavit, must state jurisdictional facts.—In order to give the court jurisdiction in a contempt proceeding the affidavit must show on its face sufficient facts to constitute a contempt. The affidavit on which the proceeding is based is jurisdictional, and all the jurisdictional facts must affirmatively appear by the affidavit before the court can take action thereon.¹⁶

§ 1739. Affidavit on information.—The court will not have jurisdiction to inquire into the proceedings for contempt unless every material fact constituting the alleged violation is stated in the affidavit upon which the contempt proceeding is based. The affidavit, in alleging the facts upon information and belief only, is not sufficient and does not confer jurisdiction.¹⁷

§ 1740. Affidavit, tested by rules.—An affidavit in a proceeding for criminal contempt is to be tested by the rules of criminal pleading applicable to indictments and informations, whether the proceeding be under a statute or at common law.¹⁸

§ 1741. Complaint, waiving defects.—The party accused of contempt by appearing and answering the charge waives any defects in

¹⁴ Snyder v. S., 151 Ind. 553, 52 N. E. 152.

¹⁵ In re Blush, 5 Kan. App. 879, 48 Pac. 147. See Com. v. Perkins, 124 Pa. St. 36, 16 Atl. 525; P. v. Pirfenbrink, 96 Ill. 68; Ex parte Fisk, 113 U. S. 713, 5 S. Ct. 724; In re Leach, 51 Vt. 630; P. v. Court of Oyer & Terminer, 101 N. Y. 245, 54 Am. R. 691, 4 N. E. 259; Wyatt v. P., 17 Colo. 252, 28 Pac. 961; Ex parte Hardy, 68 Ala. 303; P. v. Adams, 6 Hill (N. Y.) 236; Ex parte Rickert, 126 Cal. 244, 58 Pac. 549.

¹⁶ S. v. Sweetland, 3 S. D. 503, 54

N. W. 415; Strait v. Williams, 18 Nev. 430, 4 Pac. 1083; Wyatt v. P., 17 Colo. 252, 28 Pac. 961; Cooley v. S., 46 Neb. 603, 65 N. W. 799; Young v. Cannon, 2 Utah 560; S. v. Allen, 14 Wash. 684, 45 Pac. 644. See In re Meggett, 105 Wis. 291, 81 N. W. 419 (ability to comply).

¹⁷ Freeman v. City of Huron, 8 S. D. 435, 66 N. W. 928; Jordan v. Circuit Court, 69 Iowa 177, 28 N. W. 548; Ludden v. S., 31 Neb. 429, 48 N. W. 61.

¹⁸ S. v. Root, 5 N. D. 487, 67 N. W. 590.

the complaint or affidavit upon which the order was issued.¹⁹ But a defective affidavit for contempt is not cured by the defendant's giving bail.²⁰

§ 1742. Complaint, testing sufficiency.—In a contempt proceeding a motion to discharge or vacate the rule to show cause is a proper mode of testing the sufficiency of the affidavit or information on which the rule is based.²¹

ARTICLE VII. APPLICATION FOR RULE.

§ 1743. Notice, service of copy.—When the party proceeds by an order to show cause why an attachment should not issue for contempt, copies of the order and of the affidavits and other papers on which it is founded must be served on the accused or his solicitor.²²

§ 1744. Rule to show cause—Service.—An order or rule of the court to show cause why an attachment should not issue against the defendant should be served on him personally instead of his attorney, unless some special reason to the contrary appears, as where the defendant conceals himself to evade service.²³ But it has been held that the rule requiring service on the defendant personally has application only to cases of criminal contempt.²⁴

¹⁹ *P. v. Court of Sessions*, 147 N. Y. 290, 41 N. E. 700, 82 Hun 242, 31 N. Y. Supp. 373; *Zimmerman v. S.*, 46 Neb. 13, 64 N. W. 375; *In re Acock*, 84 Cal. 50, 23 Pac. 1029; *S. v. District Court*, 65 Minn. 146, 67 N. W. 796.

²⁰ *S. v. Gallup*, 1 Kan. App. 618, 42 Pac. 406. On the sufficiency of the affidavit or complaint in a contempt proceeding, see the following additional cases: *Curtis v. Gordon*, 62 Vt. 340, 20 Atl. 820; *Andrew v. Andrew*, 62 Vt. 495, 20 Atl. 817; *P. v. Court of Sessions*, 82 Hun 242, 31 N. Y. Supp. 373; *King v. Carpenter*, 48 Hun 617, 2 N. Y. Supp. 121; *Sweeny v. Traverse*, 82 Iowa 720, 47 N. W. 889; *Silvers v. Traverse*, 82 Iowa 52, 47 N. W. 888; *Worland v. S.*, 82 Ind. 49; *McConnell v. S.*, 46 Ind. 298; *In re Spencer*, 4 MacArthur & M. 433; *Pittman v. Hagins*,

91 Ga. 107, 16 S. E. 659; *Hedges v. Superior Court*, 67 Cal. 405, 7 Pac. 767; *Ex parte Ah Men*, 77 Cal. 198, 19 Pac. 380, 11 Am. R. 263.

²¹ *Cheadle v. S.*, 110 Ind. 301, 11 N. E. 426, 59 Am. R. 199.

²² *Pitt v. Davison*, 37 N. Y. 235-240; *Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. D. 551; *Flommerfelt v. Zellers*, 7 N. J. L. 31. See *Whitem v. S.*, 36 Ind. 196; *In re Smethurst*, 4 N. Y. Supr. (2 Sand.) 724, 4 How. Pr. 369; *Ward v. Arenson*, 23 N. Y. Supr. (10 Bos.) 589; *In re Farr*, 41 Kan. 276, 21 Pac. 273.

²³ *S. v. Assessors*, 53 N. J. L. 156, 20 Atl. 966; *Eureka, etc., Canal Co. v. Superior Court*, 66 Cal. 311, 5 Pac. 490; *Bate Refrig. Co. v. Gillett*, 24 Fed. 696; *Morris v. Creel*, 1 Va. Cas. 333.

²⁴ *Pitt v. Davison*, 37 N. Y. 235, 34 How. Pr. 355.

§ 1745. **Notice, no particular form.**—Where notice is given to the party charged with contempt no particular form of notice is required. It is sufficient if it advises him of the specific acts done by him constituting the contempt. The usual practice is to serve him with a copy of the order and of the affidavit and any other papers on which the charge is founded.²⁵

§ 1746. **Notice, when not necessary.**—An attachment may issue without any notice where the party in contempt neglects to obey the order of the court to pay alimony *pendente lite*.²⁶ It is not necessary to give the defendant notice of the contempt proceedings before the attachment issues, the object of the attachment being to make sure of the attendance of the defendant before the court and show cause why he should not be adjudged guilty of contempt.²⁷

§ 1747. **Rule should state facts.**—Where the court enters a rule on the defendant to show cause why an attachment should not issue for contempt, the rule should recite the facts constituting the contempt, but it will be sufficient if it informs him in a general way of the nature of the charge.²⁸

§ 1748. **Appearance by attorney.**—Where the court enters an order for a party to appear before the court on a certain day stated, he has the right to appear by his attorney with his answer in writing, and is not in contempt in failing to appear personally.²⁹ A party having failed to pay money for the support of his child as decreed, the court, therefore, ordered that he appear before the court in person on a day stated to show cause why he should not be punished for contempt. At the appointed time he appeared by his attorney, who presented to the court his answer under oath and some affidavits which he offered to file in response to the order against him, but the court

²⁵ *Bush v. Chenault*, 12 Ky. L. 249; *Pitt v. Davison*, 37 N. Y. 235, 240.

²⁶ *Petrie v. P.*, 40 Ill. 343; *Ex parte Petrie*, 38 Ill. 502.

²⁷ *Ex parte Petrie*, 38 Ill. 498. See *Jackson v. Smith*, 5 Johns. (N. Y.) 115.

²⁸ *Stewart v. S.*, 140 Ind. 7, 39 N. E. 508; *Hawkins v. S.*, 125 Ind. 570, 25 N. E. 818; *Pitt v. Davison*, 37 N. Y. 235, 37 Barb. 97; *Hammersley v. Parker*, 1 Barb. Ch. (N. Y.) 25.

See *P. v. Kenny*, 2 Hun (N. Y.) 346; *Ex parte Bergman*, 3 Wyo. 396, 26 Pac. 914.

²⁹ *Ex parte Gordan*, 92 Cal. 478, 28 Pac. 489, 27 Am. R. 154; *Watrous v. Kearney*, 79 N. Y. 496; *P. v. Van Wyck*, 2 Caines (N. Y.) 333; *Gordan v. Buckles*, 92 Cal. 481, 28 Pac. 490. *Contra*, *Vertner v. Martin*, 18 Miss. 103. See *Ex parte Hamilton*, 51 Ala. 66.

refused to receive them and entered judgment for contempt for not appearing in person and issued an attachment for his arrest: Held that the attachment was void, the court having no jurisdiction to issue it; that he had a right to appear by attorney.³⁰

ARTICLE VIII. ISSUING ATTACHMENT PROCESS.

§ 1749. **Attachment not necessary.**—If the contempt is committed in the presence of the court the offending party may be ordered into custody without a warrant or written order first made out.³¹ Process is not required where a contempt is committed in the presence of the court. The court may proceed and sentence the contemner, though he absents himself before the court takes action.³²

§ 1750. **Attachment without rule.**—An attachment will issue in the first instance without a rule to show cause, where the contempt is flagrant or where the accused stands in defiance of the court, and the court is fully advised of the facts constituting the contempt.³³ Where it appears that an order to show cause can not be served, then an attachment should be applied for to compel attendance of the party accused of contempt; and if he can not be found, *alias* and *plures* attachments should issue.³⁴

§ 1751. **Attachment, contents of it.**—It is not necessary to set out the attachment proceedings in the attachment for contempt, nor is it necessary to recite technically all of the jurisdictional facts. If it appears on the face of the attachment that it was issued in a cause of which the court had jurisdiction, it is sufficient.³⁵

³⁰ Ex parte Gordan, 92 Cal. 478, 28 Pac. 489, 27 Am. R. 154.

³¹ S. v. Matthews, 37 N. H. 453; Holcomb v. Cornish, 8 Conn. 375, 378; Ex parte Wright, 65 Ind. 504; Com. v. Dandridge, 2 Va. Cas. 408; P. v. Kelly, 24 N. Y. 75. See Smith v. Waalkes, 109 Mich. 16, 66 N. W. 679; S. v. Root, 5 N. D. 487, 67 N. W. 590; Middlebrook v. S., 43 Conn. 257, 21 Am. R. 650; Jackson v. Smith, 5 Johns. (N. Y.) 117; Lewis v. Miller, 21 Miss. 110; Hawkins v. S., 125 Ind. 570, 25 N. E. 818, 8 Cr. L. Mag. 498.

³² Middlebrook v. S., 43 Conn. 257, 21 Am. R. 650.

³³ S. v. Soule, 8 Rob. (La.) 500; McDonough v. Bullock, 2 Pears. (Pa.) 194; Andrews v. Andrews, 2 Johns. Cas. (N. Y.) 109; Thomas v. Cummins, 1 Yeates (Pa.) 1; In re Smethurst, 4 N. Y. Supr. 724, 4 How Pr. 369. See Jackson v. Mann, 2 Caines (N. Y.) 92.

³⁴ Pitt v. Davison, 37 Barb. 97, 37 N. Y. 235.

³⁵ P. v. Tamsen, 37 N. Y. Supp. 407, 25 Civ. Proc. 141; Dunford v. Weaver, 84 N. Y. 445. See Tucker v. Gilman, 60 Hun 577, 14 N. Y. Supp. 392, 20 Civ. Proc. 397.

§ 1752. **Motion for attachment not contested.**—Where a contempt proceeding is instituted by giving the defendant notice of a motion for an attachment, and such motion is not contested, the matter then stands for final hearing the same as an order to show cause why the defendant should not be punished for contempt.³⁶

§ 1753. **Process against corporation.**—Proceedings for contempt will lie against corporations as well as individuals. In equity the process against the corporation is by writ of sequestration; in courts of law, *distringas* is the appropriate writ, and by attachment against individuals.³⁷

ARTICLE IX. EVIDENCE; TRIAL.

§ 1754. **Burden on prosecution—Preponderance.**—The facts necessary to support a charge of contempt must be proven by the party instituting the contempt proceedings. The defendant is presumed to be innocent and the burden is on the complainant to establish his guilt.³⁸ Before a conviction is warranted in a contempt proceeding, the facts constituting the alleged contempt must be clearly and satisfactorily proved; a mere preponderance of evidence is not sufficient.³⁹

§ 1755. **Defendant's answer conclusive.**—Where a contempt proceeding is instituted to vindicate the majesty of the law or dignity of the court, the defendant will be discharged, if, by his answers to interrogatories filed, he makes such a statement as will free him from the imputed contempt, and opposing testimony will not be heard.⁴⁰ But where the contempt is charged to have been committed in a cause in a court of equity, the answer of the accused may be contradicted by opposing testimony.⁴¹ In all cases of proceedings for constructive

³⁶ In re Nichols, 54 N. Y. 62.

³⁷ S. v. Board Pub. Works, 58 N. J. L. 536, 37 Atl. 578; Hills v. Savings Bank, 30 Hun (N. Y.) 546. An attachment directed as follows is sufficient: "To any and all sheriffs of all the counties of the state of Illinois:" P. v. Pearson, 3 Scam. (Ill.) 270.

³⁸ Call v. Pike, 68 Me. 217; Dines v. P., 39 Ill. App. 565.

³⁹ In re Buckley, 69 Cal. 1, 10 Pac. 69; Weeks v. Smith, 3 Abb. Pr. (N. Y.) 211; Verplank v. Hall, 21 Mich.

469; Probasco v. Probasco, 30 N. J. Eq. 61; U. S. v. Jose, 63 Fed. 951 (reasonable doubt); Accumulator Co. v. Elec. Storage Co., 53 Fed. 793.

⁴⁰ Loven v. P., 158 Ill. 167, 42 N. E. 82; Storey v. P., 79 Ill. 52; Crook v. P., 16 Ill. 534; Buck v. Buck, 60 Ill. 105; Haskett v. S., 51 Ind. 176; Crow v. S., 24 Tex. 12; Thomas v. Cummins, 1 Yeates (Pa.) 40.

⁴¹ P. v. Diedrich, 141 Ill. 670, 30 N. E. 1038; Buck v. Buck, 60 Ill. 105; U. S. v. Debs, 64 Fed. 724; S. v. Matthews, 37 N. H. 450; Magennis

contempt, except, perhaps, when they are to enforce a civil remedy, if the party charged fully answers all the charges against him, he shall be discharged on the attachment, and the court can not hear evidence to contradict his answer.⁴²

§ 1756. When answer may be contradicted.—In a proceeding for contempt in a cause in equity, a sworn answer, however full and unequivocal, is not conclusive. The prosecution may introduce evidence disputing such answer.⁴³

§ 1757. Interrogatories or affidavit.—After the accused appears upon a rule to show cause, or is brought before the court by attachment, he may submit to the court his own answer in the form of an affidavit, or he may demand interrogatories to be filed for him to answer.⁴⁵ The defendant in making his defense to a charge of contempt, is not confined to answering the interrogatories propounded. He may make other and further defense by affidavits of himself and others disclaiming any willful intention to disobey the order of the court, showing a state of facts proving his innocence of the charge.⁴⁶ But where the facts constituting the contempt are admitted by the defendant, interrogatories are not required. The court may render judgment on such admission.⁴⁷ Where the defense is purely a ques-

v. Parkhurst, 4 N. J. Eq. 433; Underwood's Case, 2 Humph. (Tenn.) 46; Underhill Cr. Ev., § 461; 4 Bl. Com. 287. See *In re Snyder*, 103 N. Y. 178, 8 N. E. 479. See § 1756.

⁴² *S. v. Earl*, 41 Ind. 464, 2 Green C. R. 680; *Saunders v. Melhuish*, 6 Mod. 73; *Matter of Moore*, 63 N. C. 397; *P. v. Few*, 2 Johns. (N. Y.) 290; 2 Bish. New Cr. L., § 269; *In re Corbin*, 8 S. C. 390; *Stewart v. S.*, 140 Ind. 7, 39 N. E. 508; *Jackson v. Smith*, 5 Johns. (N. Y.) 117; *In re Walker*, 82 N. C. 95; *Wells v. Com.*, 21 Gratt. (Va.) 501. See § 1711.

⁴³ *U. S. v. Debs*, 64 Fed. 724, 738, citing *King v. Vaughan*, 2 Dougl. 516; *Underwood's Case*, 2 Humph. (Tenn.) 48, 49. See § 1755. The answers of the defendants in the following cases were held sufficient to entitle them to be discharged: *Kane v. Haywood*, 66 N. C. 1; *Haskett v. S.*, 51 Ind. 176; *S. v. Vincent*, 46 Kan. 618, 620, 26 Pac. 939; *Darby v. College*, 72 Ga. 212; *Percival v.*

S., 45 Neb. 741, 64 N. W. 221; *Rosewater v. S.*, 47 Neb. 630, 66 N. W. 640.

⁴⁵ *S. v. Matthews*, 37 N. H. 453; *Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. D. 551; *Jewett v. Dringer*, 27 N. J. Eq. 271; *P. v. Ten Eyck*, 2 Wend. (N. Y.) 617; *Pitt v. Davison*, 37 Barb. (N. Y.) 97. See *Witter v. Lyon*, 34 Wis. 564; *Ex parte Thurmond*, 1 Bailey (S. C.) 605. But see *In re Yates*, 4 Johns. (N. Y.) 317; *Taylor v. Baldwin*, 14 Abb. Pr. (N. Y.) 166; *In re Watson*, 5 Lans. (N. Y.) 466.

⁴⁶ *P. v. Murphy*, 1 Daly (N. Y.) 462; *Magennis v. Parkhurst*, 4 N. J. Eq. 433.

⁴⁷ *S. v. Brophy*, 38 Wis. 413; *P. v. Anthony*, 40 N. Y. Supp. 279, 7 App. Div. 132; *P. v. Cartwright*, 11 Hun (N. Y.) 362; *Clapp v. Lathrop*, 23 How. Pr. (N. Y.) 423; *Ter. v. Thierry*, 1 Mart. (O. S.) (La.) 101. See *Burke v. Ter.*, 2 Okla. 499, 37 Pac. 829; *Whittem v. S.*, 36 Ind. 196.

tion of law and not of fact, the court, being in possession of all the facts, may dispose of the proceeding without interrogatories.⁴⁸

§ 1758. Interrogatories, amendable.—Interrogatories may be amended for the purpose of explaining an ambiguity or calling out of a fuller answer, and additional ones may be filed.⁴⁹

§ 1759. Court compelling oral answers.—After the accused had answered the charge of contempt in writing, the court, over his objection, compelled him to answer, orally, numerous questions propounded by the court concerning the alleged contempt, to which exception was taken; and after such oral examination the court adjudged him guilty of contempt and assessed a fine against him: Held reversible error.⁵⁰

§ 1760. Husband conveying property.—On the trial of a contempt proceeding against a husband for his failure to obey an order requiring him to pay alimony, it is competent to prove that he conveyed his property to his daughter and son-in-law, as tending to show whether he is or is not able to comply with the order of the court.⁵¹

§ 1761. Previous acts of contempt.—Evidence of other previous acts of contempt is not competent, ordinarily, but where the defendant attempts to make it appear that his act was an innocent mistake, then evidence of other acts of contempt may be admitted to disprove innocent intent.⁵²

§ 1762. Executor's agreement with party.—An executor on a charge of contempt for a failure to comply with an order of the court as to distribution offered to show that he had previously paid a note on which he was surety, and that the distributee agreed that he might deduct the amount, so paid by him, out of money found to be due the distributee on final settlement: Held error to refuse the offered evidence.⁵³

⁴⁸ *Smith v. Waalkes*, 109 Mich. 16, 66 N. W. 679.

⁴⁹ *S. v. Matthews*, 37 N. H. 453; *Herring v. Tylee*, 1 Johns. Cas. (N. Y.) 31; *P. v. Brown*, 6 Cow. (N. Y.) 41.

⁵⁰ *Wilson v. S.*, 57 Ind. 71, 2 Am. C. R. 182.

⁵¹ *Stuart v. Stuart*, 123 Mass. 370.

⁵² *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121.

⁵³ *Blake v. P.*, 161 Ill. 74, 43 N. E. 590.

§ 1763. **Damages, amount may be shown.**—On a charge of contempt for violating an injunction, the amount of damages sustained by the complaining party is a proper subject of inquiry.⁵⁴

§ 1764. **Contempt before master.**—According to the usual practice in chancery, an attachment against a witness for contempt committed before a master or examiner requires an application to the court reciting the questions which the witness refused to answer, and asking instructions from the court.⁵⁵

§ 1765. **Practice and procedure in taking evidence.**—Where the defendant appears and denies the alleged contempt, the chancellor will refer disputed questions of fact to a master or clerk to take the proofs on the issues joined and make his report to the court, or the court may in its discretion proceed with the cause without such reference.⁵⁶ In trying a contempt case, the court may adopt such mode of procedure as it deems proper which is not violative of the defendant's rights and opportunity to make his defense.⁵⁷

§ 1766. **Trial, in absence of defendant.**—Where the defendant has been served with the rule to show cause why he should not be punished for contempt, and fails to appear on the day set for hearing, the court may proceed in his absence to a final order adjudging him guilty of contempt.⁵⁸ If the accused do not appear at the day appointed for the hearing of the charge of contempt, or if he appear and do not deny the alleged misconduct, the court will at once proceed to make a final decision, and if the court finds the accused guilty of the contempt charged it will award the proper punishment.⁵⁹

⁵⁴ *Harteau v. Stone Co.*, 3 T. & C. (N. Y.) 763; *Rogers Mfg. Co. v. Rogers*, 38 Conn. 121; *In re South Side R. Co.*, Fed. Cas. No. 13,190. The evidence in the following cases was held not sufficient to warrant convictions: *Dobbs v. S.*, 55 Ga. 272; *Burdick v. Marshall*, 8 S. D. 308, 66 N. W. 462; *Dinsmoor v. Commercial Trav. Assn.*, 14 N. Y. Supp. 676, 60 Hun 576; *In re Patterson*, 99 N. C. 407, 6 S. E. 643. Evidence sufficient: *Aldinger v. Pugh*, 57 Hun 181, 10 N. Y. Supp. 684.

⁵⁵ *Whitcomb's Case*, 120 Mass. 118, 120; 2 Daniel Chan. Pr., 1178, 1198; *Heard v. Pierce*, 8 Cush. (Mass.) 338.

⁵⁶ *Albany Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. D. 551; *Robins v. Frazier*, 61 Tenn. 100; *Aldinger v. Pugh*, 57 Hun 181, 10 N. Y. Supp. 684; *P. v. Alexander*, 3 Hun (N. Y.) 211. See *Conover v. Wood*, 5 Abb. Pr. (N. Y.) 84.

⁵⁷ *Ex parte Savin*, 131 U. S. 267, 9 S. Ct. 699.

⁵⁸ *Jordan v. Circuit Court*, 69 Iowa 177, 28 N. W. 548. See *Albany Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. D. 551; *Freeman v. City of Huron*, 8 S. D. 435, 66 N. W. 928; *S. v. Becht*, 23 Minn. 411; *S. v. Matthews*, 37 N. H. 450.

⁵⁹ 5 Cr. L. Mag. 506, citing *S. v. Matthews*, 37 N. H. 450, 456; *Bank v.*

ARTICLE X. SENTENCE; JUDGMENT.

§ 1767. **Commitment is execution.**—Contempt of court is a specific criminal offense. It is punished sometimes by indictment and sometimes by a summary proceeding. In either mode of trial the adjudication against the offender is a conviction, and the commitment, in consequence, is execution.⁶⁰

§ 1768. **Commitment for failure to pay.**—Where a party is committed by order of the court for his failure to do some act or to pay alimony as directed, the fine and costs and the amount of the alimony should be stated in the order of commitment.⁶¹

§ 1769. **Commitment, sufficiency.**—Where a witness refuses to answer proper questions before a grand jury, the matter should be reported to the court. And, as a basis for a lawful commitment, the order of commitment should set out the subject-matter which the grand jury was inquiring into, that the witness was duly sworn to answer questions relating to such inquiry, the questions propounded to him, and his refusal to answer them.⁶² Where a witness is committed for contempt for refusing to testify, the questions asked and refused to be answered must be stated in the order of commitment.⁶³ But it has been held sufficient to recite the facts without setting out the particular questions propounded to the witness.⁶⁴

§ 1770. **Facts constituting contempt.**—The facts constituting contempt need not be recited in judgments or sentences rendered by superior courts of record.⁶⁵

Schermerhorn, 9 Paige (N. Y.) 372; Kernoelle v. Cason, 25 Ind. 362; Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821.

⁶⁰ Williamson's Case, 26 Pa. St. 9, 67 Am. D. 374; Cartwright's Case, 114 Mass. 230; Ex parte Kearney, 7 Wheat. (U. S.) 38.

⁶¹ Jernee v. Jernee, 54 N. J. Eq. 657, 35 Atl. 458; Sherwood v. Sherwood, 32 Conn. 1; P. v. Grant, 50 Hun 243, 3 N. Y. Supp. 142.

⁶² Ex parte Rowe, 7 Cal. 181; Wilcox v. S., 46 Neb. 402, 64 N. W. 1072. See Ex parte Woodworth, 29 W. L. B. (Ohio) 315; Ex parte McKee, 18 Mo. 599.

⁶³ Wilcox v. S., 46 Neb. 402, 64 N. W. 1072.

⁶⁴ In re Jones, 6 Civ. Proc. (N. Y.) 250.

⁶⁵ Easton v. S., 39 Ala. 552. See Ex parte Summers, 5 Ired. L. (N. C.) 149; Ex parte Henshaw, 73 Cal. 486, 15 Pac. 110; S. v. Miller, 23 W. Va. 801; Davison's Case, 13 Abb. Pr. (N. Y.) 129; Seaman v. Duryea, 11 N. Y. 324; In re Muller, 67 Hun 34, 21 N. Y. Supp. 678; Whitney v. Whitney, 58 N. Y. Supr. 335. *Contra*, In re Deaton, 105 N. C. 59, 11 S. E. 244; S. v. Galloway, 45 Tenn. 326, 98 Am. D. 404; Butterfield v. O'Connor, 3 Ohio D. R. 34; Com. v. Perkins, 124 Pa. St. 36, 16 Atl. 525.

§ 1771. **Commitment, contents of.**—As a proper basis for an order committing a witness for contempt, in refusing to obey a *subpena duces tecum* to produce a certain book or paper to be used in evidence in a cause, the *mittimus* must describe the book or paper required, and that it was pertinent evidence in the cause and under the control and withheld by the witness at the time the subpoena was served upon him; and also that the court gave him time to produce the book.⁶⁶

§ 1772. **Committed until complying.**—Where the court resorts to contempt proceedings and commits the contemner to enforce an order to do a particular act within his power to perform, imprisonment until he does comply with the order is valid. The defendant can only escape indefinite imprisonment by complying with the order.⁶⁷

§ 1773. **Committed until fine paid.**—Where a fine has been imposed as the punishment for contempt of court, the contemner may be committed until the fine is paid, or he may be required to work out the fine as in other criminal cases.⁶⁸ The court on imposing a fine for contempt may order that the contemner shall stand committed until the fine and costs are paid.^{68a}

§ 1774. **Committed until—Sufficiency.**—Where the court in a civil contempt proceeding orders the defendant to pay a stated sum of money as an indemnity to the adverse party, and that he stand committed until the same shall be paid, without designating it as a fine, such order is not irregular.⁶⁹

§ 1775. **Commitment held regular.**—The evidence heard upon the motion to commit the respondent for contempt was sufficient to justify

⁶⁶ In re Sims, 4 W. L. B. (Ohio) 457.

⁶⁷ In re Steinert, 29 Hun 301; Ex parte Bergman, 3 Wyo. 396, 26 Pac. 914. See P. v. Tamsen, 40 N. Y. Supp. 1047, 17 N. Y. Misc. 212; P. v. Fancher, 4 T. & C. (N. Y.) 467; In re Whitmore, 9 Utah 441, 35 Pac. 524; P. v. Davidson, 35 Hun (N. Y.) 471; In re Clarke, 125 Cal. 388, 58 Pac. 22; In re Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; Cromartie v. Comrs., 85 N. C. 211; Ex parte Latimer, 47 Cal. 131; S. v. Knight, 3 S. D. 509, 54 N. W. 412, 44 Am. R. 809; Nebraska Children's

Home Soc. v. S., 57 Neb. 765, 78 N. W. 267.

⁶⁸ Sinnott v. S., 11 Lea (Tenn.) 281; Shore v. P., 26 Colo. 516, 59 Pac. 49.

^{68a} In re Burrows, 33 Kan. 675, 7 Pac. 148; In re Tyler, 64 Cal. 434, 1 Pac. 884; Ex parte Crittenden, 62 Cal. 534; Lanpher v. Dewell, 56 Iowa 153, 9 N. W. 101; Steele v. Gunn, 49 Hun 610, 3 N. Y. Supp. 692; Ex parte Sweeney, 18 Nev. 74, 1 Pac. 379; Newton v. Locklin, 77 Ill. 103.

⁶⁹ Poertner v. Russel, 33 Wis. 193; P. v. Anthony, 40 N. Y. Supp. 279, 7 App. Div. 132.

the order that he stand committed to the common jail of the county to answer for his contempt, and that he remain in custody until he comply with the order of the court; and among other things that he fully and truly submit to examination and testify and discover to the receiver before the master concerning his assets and property in his possession or under his control, and account for and turn over to the receiver the \$7,500 found in his possession and under his control. Judgment sustained.⁷⁰

§ 1776. Result if order set aside.—The judgment in a civil contempt proceeding is a judgment in a civil case, and if the order to which the civil contempt proceedings attached as an incident is set aside for any cause, the proceedings in civil contempt fall with it. But they will not fall in case of criminal contempt.⁷¹

§ 1777. Witness committed until he answers.—A witness before a grand jury, on being convicted of contempt for refusing to answer proper questions before that body, may be committed to jail until he shall answer; and a discharge of the grand jury or adjournment of the court will not give him the right to be released on bail.⁷²

§ 1778. When to be discharged.—Where a person stands committed for the non-payment of a fine in a contempt proceeding, or for a failure to pay over money as directed by the court, he is entitled to his discharge under the insolvent statute, or on a satisfactory showing of insolvency.⁷³

§ 1779. Imprisonment not for debt.—Where a person is committed for contempt of court in failing to pay alimony in a divorce suit, as required by the decree of the court, such commitment is not imprisonment for debt.⁷⁴

⁷⁰ Berkson v. P., 154 Ill. 81, 39 N. E. 1079; P. v. Anthony, 40 N. Y. Supp. 279, 7 App. Div. 132.

⁷¹ S. v. Nathans, 49 S. C. 199, 27 S. E. 52, citing Pelzer v. Hughes, 27 S. C. 408, 3 S. E. 781.

⁷² Ex parte Renshaw, 6 Mo. App. 474; Ex parte Harris, 4 Utah 5, 5 Pac. 129. *Contra*, Ex parte Maulsby, 13 Md. 625.

⁷³ Pierce v. S., 54 Kan. 519, 38 Pac. 812; Standley v. Harrison, 26 Ga. 139; S. v. Livingston, 4 Del. Ch. 264;

In re Wilson, 75 Cal. 580, 17 Pac. 698; Van Wezel v. Van Wezel, 1 Edw. Ch. (N. Y.) 113. But see Hanks v. Workman, 69 Iowa 600, 29 N. W. 628.

⁷⁴ O'Callaghan v. O'Callaghan, 69 Ill. 552; Barclay v. Barclay, 184 Ill. 471, 56 N. E. 821; Blake v. P., 80 Ill. 11; Potts v. Potts, 68 Mich. 492, 36 N. W. 240; Ex parte Hart, 94 Cal. 254, 29 Pac. 774; Staples v. Staples, 87 Wis. 592, 58 N. W. 1036; Harris v. Bridges, 57 Ga. 407, 24 Am. R.

§ 1780. **Void judgment.**—An order or judgment of a court acting within its jurisdiction punishing a party or person for contempt of its authority can not be reviewed or annulled by another court; but if a court, having no jurisdiction over the parties or the subject-matter before it, sentences a party, or a witness or other person, to imprisonment for contempt, the person thus illegally deprived of his liberty may be released by any court authorized to issue writs of *habeas corpus*.⁷⁵

§ 1781. **Indefinite commitment is void.**—If an order of commitment be for an indefinite time it will be void; as, for instance, to commit the accused on a charge of contempt “until the further order of the court.”⁷⁶ An order that the defendant stand committed in the county jail until the further order of the court is void, as being too indefinite.⁷⁷ But if the order be that the contemner shall stand committed until he complies with the order of the court to pay alimony, specifying the amount, or the performance of some act which the court has jurisdiction to exact, the judgment will not be void, but valid.⁷⁸

§ 1782. **Judgment without notice, void.**—The court in proceeding against a party and adjudging him guilty of contempt, in his absence, and without any attempt to give him notice, commits error.⁷⁹ The judge has no power at chambers to punish for contempts, and the entry of such order is void.⁸⁰

405; *Zimmerman v. Zimmerman*, 113 N. C. 432, 18 S. E. 334; *Murray v. Murray*, 84 Ala. 363, 4 So. 239; *Lewis v. Lewis*, 80 Ga. 706, 6 S. E. 918, 12 Am. R. 281; *Andrews v. Andrews*, 69 Ill. 609; *Wightman v. Wightman*, 45 Ill. 167; *Long v. McLean*, 88 N. C. 3; *Lyon v. Lyon*, 21 Conn. 185. *Contra*, *Coughlin v. Ehler*, 39 Mo. 285.

⁷⁵ *Ex parte Fisk*, 113 U. S. 713, 5 S. Ct. 724; *Ex parte Perkins*, 29 Fed. 908; *In re Morton*, 10 Mich. 208.

⁷⁶ *P. v. Pirfenbrink*, 96 Ill. 68; *In re Leach*, 51 Vt. 630; *Matter of Watson*, 5 Lans. (N. Y.) 466; *S. v. Myers*, 44 Iowa 580; *S. v. Voss*, 80 Iowa 467, 45 N. W. 898; *Ex parte Kearby*, 35 Tex. Cr. 531, 34 S. W. 635; *Yates v. P.*, 6 Johns. (N. Y.) 337; *Matter of Hammel*, 9 R. I. 248.

⁷⁷ *P. v. Pirfenbrink*, 96 Ill. 68; *P. v. Kelly*, 24 N. Y. 74; *Whittem v.*

S., 36 Ind. 196, 216. Compare *Ex parte Smith*, 40 Tex. Cr. 179, 49 S. W. 396; *McDonald v. P.*, 86 Ill. App. 223.

⁷⁸ *Jernee v. Jernee*, 54 N. J. Eq. 657, 35 Atl. 458; *Chapel v. Hull*, 60 Mich. 167, 26 N. W. 874; *Ex parte Crittenden*, 62 Cal. 534; *Forrest v. Price*, 52 N. J. Eq. 16, 29 Atl. 215; *Cromartie v. Bladen*, 85 N. C. 211; *Kernodle v. Cason*, 25 Ind. 362; *S. v. Irwin*, 30 W. Va. 405, 4 S. E. 413; *Matter of Allen*, 13 Blatchf. (U. S.) 271; *P. v. Tamsen*, 17 Misc. (N. Y.) 212, 40 N. Y. Supp. 1047.

⁷⁹ *Ex parte Langdon*, 25 Vt. 680, 682; *Ex parte Ireland*, 38 Tex. 344. See *Middlebrook v. S.*, 43 Conn. 257; *Ward v. Ward*, 70 Vt. 430, 41 Atl. 435.

⁸⁰ *S. v. Nathans*, 49 S. C. 199, 27 S. E. 52; *In re Barnhouse*, 60 Kan. 849, 58 Pac. 480.

§ 1783. **Committing before judgment—Void.**—A judgment should be rendered or ordered to be entered adjudging the party to be in contempt, before the court is authorized to issue an order of commitment.⁸¹

§ 1783a. **Committing on oral order.**—Committing the accused on the oral order of the court, without first issuing an order of commitment, is unlawful and void.⁸²

§ 1784. **Excessive punishment.**—If the court inflicts a punishment in excess of that allowed by law, the judgment will be void.⁸³

§ 1785. **Committing without allowing defense.**—Committing a person to jail and punishing him for contempt for refusing to pay money into court, as ordered, without giving him the right to be heard, is error.⁸⁴

§ 1786. **Judgment in alternative.**—A person can not be in contempt of court for a failure to pay money, until he disobeys the order. Therefore an order to pay or stand committed is improper. The order to stand committed can not be entered until a failure to pay the money.⁸⁵ A judgment should not be in the alternative; as where the court sentenced the defendant "to pay a fine of forty dollars and in default thereof be imprisoned thirty days."⁸⁶

§ 1787. **Order of commitment void.**—Under a statute requiring the evidence in a contempt proceeding to be reduced to writing and filed, an order committing the defendant before this is done is void, and a

⁸¹ Ex parte O'Brien, 127 Mo. 477, 30 S. W. 158; In re Crosher, 11 N. Y. Supp. 504, 25 Abb. N. C. 89. See Ex parte Kearby, 35 Tex. Cr. 531, 34 S. W. 635.

⁸² Ex parte Kearby, 35 Tex. Cr. 531, 34 S. W. 635.

⁸³ In re Pierce, 44 Wis. 411; Matter of Patterson, 99 N. C. 407, 6 S. E. 643; Ex parte Edwards, 11 Fla. 174; In re Jacobs, 5 Hun (N. Y.) 428. See P. v. Jacobs, 66 N. Y. 8.

⁸⁴ Cunningham v. Colonial Mortg. Co., 57 Kan. 678, 47 Pac. 830; Ex

parte Langdon, 25 Vt. 680; S. v. Judges, 32 La. 1256.

⁸⁵ First Nat. Bank v. Fitzpatrick, 80 Hun 75, 30 N. Y. Supp. 15. See Tolleson v. People's Sav. Bank, 85 Ga. 171, 11 S. E. 599.

⁸⁶ In re Deaton, 105 N. C. 59, 11 S. E. 244; Turner v. Smith, 90 Mich. 309, 51 N. W. 282. See Clements v. Tillman, 79 Ga. 451, 5 S. E. 194, 11 Am. St. 441. Compare P. v. Sickles, 59 Hun 342, 13 N. Y. Supp. 101; In re Rosenberg, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299.

subsequent filing of the evidence will not give validity to the order of committal.⁸⁷

§ 1788. Modifying order of commitment.—The court sentenced the defendant to pay a fine, and also committed him to imprisonment for five days. After the defendant had served the five days, the court attempted to modify the order in reference to the payment of the fine: Held that the court had no authority to do so.⁸⁸

§ 1789. Judgment void—Habeas corpus.—Where the trial or inferior court acts without jurisdiction in committing a person on a charge of contempt, a court of review will always give relief by *habeas corpus*.⁸⁹ But if the court in committing a person for contempt had jurisdiction in the premises, a court of review will refuse to entertain a writ of *habeas corpus* to correct mere errors.⁹⁰

ARTICLE XI. PUNISHMENT; PENALTY.

§ 1790. Extent of punishment—Discretionary.—The extent of punishment for contempt, that is, the amount of the fine imposed or time of imprisonment, is in the sole discretion of the court.⁹¹ The court in assessing a fine or fixing the term of imprisonment as a punishment for contempt, will be governed by the nature of the act constituting the contempt, whether willful or not, the damage resulting to the opposite party, the interests involved or affected, and the like.⁹²

⁸⁷ Dorgan v. Granger, 76 Iowa 156, 40 N. W. 697.

⁸⁸ In re Barry, 94 Cal. 562, 29 Pac. 1109.

⁸⁹ P. v. O'Neil, 47 Cal. 109; Ex parte O'Brien, 127 Mo. 477, 30 S. W. 158. See Cooper v. P., 13 Colo. 337, 373, 22 Pac. 790; P. v. Owens, 8 Utah 20, 28 Pac. 871; Wyatt v. P., 17 Colo. 252, 28 Pac. 961; S. v. Fagin, 28 La. 887; In re Havlik, 45 Neb. 747, 64 N. W. 234; P. v. Grant, 13 Civ. Proc. (N. Y.) 308; Ex parte Lawler, 28 Ind. 241; Ex parte Kearby, 35 Tex. Cr. 531, 34 S. W. 635; P. v. Thomas, 3 Hill (N. Y.) 169; Jamison v. S., 37 Ark. 445, 40 Am. R. 103; Matter of Cameron, 44 Kan. 64, 24 Pac. 90; Com. v. McDuffy, 126 Mass. 467. *Contra*, P. v. Smith, 5 Park. Cr. (N. Y.) 490.

⁹⁰ Clark v. P., Breese (Ill.) 340; In re Bissell, 40 Mich. 63; Shattuck v. S., 51 Miss. 50, 24 Am. R. 624; Ex parte Holman, 28 Iowa 88, 4 Am. R. 159; Phillips v. Welch, 12 Nev. 158.

⁹¹ Rogers Mfg. Co. v. Rogers, 38 Conn. 121. See P. v. Delvecchio, 18 N. Y. 352; Livingston v. Swift, 23 How. Pr. (N. Y.) 1.

⁹² In re North Bloomfield Gravel Min. Co., 27 Fed. 795; In re Klugman, 49 How. Pr. (N. Y.) 484; Scott v. City of Detroit, 59 Mich. 43, 26 N. W. 220, 791; De Beaukelaer v. P., 25 Ill. App. 460 (excessive); Miller v. P., 10 Ill. App. 400 (excessive); Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co., 74 Iowa 585, 38 N. W. 496; P. v. Bouchard, 27 N. Y. Supp. 201, 6 Misc. 459; In re Cartwright, 114 Mass. 230; S. v.

§ 1791. **Fine may equal damages.**—A party to a cause, or other person causing damage to the adverse party, by violating an injunction or other order of the court, may, under the statute, be fined to the extent of such damage, with costs, as an indemnity to the injured party.⁹³ But if the injunction or restraining order be wrongfully procured and one which ought not to have been granted, the party, though guilty of contempt, can not be required to make good any loss sustained by the adverse party, especially where the granting of the injunction proved to be the means of damage to the party charged with contempt.⁹⁴

§ 1792. **Costs; counsel fees included.**—In some jurisdictions counsel fees in the contempt proceeding, and costs, incurred by the injured party, may be taxed as part of the fine imposed against the defendant as a punishment for contempt.⁹⁵

§ 1793. **Discharged on paying costs.**—Where a party stands in contempt of court for his failure to do or not to do some particular act as ordered by the court, and an attachment issues for his arrest to answer to a charge of contempt, he, on appearing and showing that

Knight, 3 S. Dak. 509, 54 N. W. 412, 44 Am. St. 809; Bate Refrig. Co. v. Gillett, 30 Fed. 683; Iowa Barb Steel Wire Co. v. Southern Barbed Wire Co., 30 Fed. 615; S. v. Sparks, 27 Tex. 705; U. S. v. Kane, 23 Fed. 748; Sullivan v. Judah, 4 Paige (N. Y.) 444; Morss v. Domestic Sewing Mach. Co., 38 Fed. 482; P. v. St. Louis, etc., R. Co., 19 Abb. N. C. (N. Y.) 1; Com. v. Sheehan, 81 Pa. St. 132; In re Morris, 45 Hun (N. Y.) 167; Albertson v. The P. I. Nevius, 48 Fed. 927; Hutton v. Lockridge, 21 W. Va. 254 (costs); In re Moore, 63 N. C. 397 (costs); McQuade v. Emmons, 38 N. J. L. 397; In re Tift, 11 Fed. 463; Power v. Athens, 19 Hun (N. Y.) 165; Nieuwankamp v. Ullman, 47 Wis. 168, 2 N. W. 131.

⁹³ Meyer v. Dreysspring, 23 N. Y. Supp. 315, 3 Misc. 560; In re Morris, 13 Civ. Proc. (N. Y.) 56; Albany City Bank v. Schermerhorn, 9 Paige (N. Y.) 372, 38 Am. D. 551; Stephenson v. Hanson, 67 How Pr. (N. Y.) 305, 6 Civ. Proc. 43; Martin Cantine Co. v. Warshauer, 28 N. Y. Supp. 139, 23 Civ. Proc. 379; In re Pierce, 44

Wis. 411; Johns v. Davis, 2 Rob. (Va.) 729; P. v. Van Buren, 136 N. Y. 252, 32 N. E. 775, 63 Hun 635, 18 N. Y. Supp. 734; Chapel v. Hull, 60 Mich. 167, 26 N. W. 874; Matthews v. Spangenberg, 15 Fed. 813; Wells Fargo & Co. v. Oreg. Ry. & Nav. Co., 19 Fed. 20, 9 Sawy. 601; De Jonge v. Brenneman, 23 Hun (N. Y.) 332. But *contra*, see Falk v. Flint, 12 R. I. 14; Eads v. Brazelton, 22 Ark. 499, 55 Am. D. 88. See Levan v. Third District Court (Idaho), 43 Pac. 574.

⁹⁴ Kaehler v. Dobberpuhl, 56 Wis. 497, 14 N. W. 631; Wandling v. Thompson, 41 N. J. L. 142; Kaehler v. Halpin, 59 Wis. 40, 17 N. W. 868.

⁹⁵ Whitman v. Haines, 4 N. Y. Supp. 43, 51 Hun 640; Van Valkenburgh v. Doolittle, 4 Abb. N. C. (N. Y.) 72; S. v. Durein, 46 Kan. 695, 27 Pac. 148; Brett v. Brett, 33 Hun (N. Y.) 547; Stahl v. Ertel, 62 Fed. 920. *Contra*, O'Rourke v. Cleveland, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. R. 719; S. v. Irwin, 8 Blackf. (Ind.) 567; Powers v. Athens, 19 Hun (N. Y.) 165.

he has complied or is ready to comply with the order, may have the proceeding dismissed on the payment of costs.⁹⁶

§ 1794. **Striking answer, unauthorized.**—The supreme court of the District of Columbia has no authority to strike the defendant's answer from the files, "for contempt," and give judgment for the plaintiff by default, for want of answer. The only punishment that the court can inflict for contempt is limited by statute to a fine or imprisonment.⁹⁷

§ 1795. **Several acts—One punishment.**—Several acts of contempt committed in the same transaction, at the same time, are but a single offense, such as the refusal of a witness to answer numerous questions on the same point of inquiry. The court has jurisdiction in such case to impose but one penalty, and not several penalties for each refusal of the witness to answer.⁹⁸

ARTICLE XII. APPEAL; WRIT OF ERROR.

§ 1796. **Review not allowed.**—Under the common law, a judgment in a contempt proceeding rendered by a court of competent jurisdiction is final, and can not be reviewed by a court of review.⁹⁹ In the review of a judgment in a contempt case in the state of Colorado, the only question that can be investigated is the jurisdiction of the court.¹⁰⁰ See the following cases holding that no appeal can be taken from a judgment in a contempt cause:¹ But there are many cases to the contrary. See the following:²

⁹⁶ *Vincent v. Daniel*, 59 Ala. 602; *East New Brunswick & N. B. Turnpike Co. v. Raritan River R. Co.* (N. J. L.), 18 Atl. 670; *Wallis v. Talmadge*, 10 Paige (N. Y.) 443. See *P. v. Miller*, 29 N. Y. Supp. 305, 9 Misc. 1.

⁹⁷ *Hovey v. Elliott*, 145 N. Y. 126, 39 N. E. 841.

⁹⁸ *Maxwell v. Rives*, 11 Nev. 213. See *S. v. Judge of Civil District Court*, 47 La. 701, 17 So. 288. Compare *O'Rourke v. Cleveland*, 49 N. J. Eq. 577, 25 Atl. 367, 31 Am. R. 719.

⁹⁹ *Watson v. Williams*, 36 Miss. 331; *Tyler v. Hamersley*, 44 Conn. 393, 26 Am. R. 471.

¹⁰⁰ *Bloom v. P.*, 23 Colo. 416, 48 Pac. 519; *Percival v. S.*, 45 Neb. 741, 64 N. W. 221, 50 Am. R. 568.

¹ *Natoma Water, etc., Co. v. Hancock* (Cal.), 36 Pac. 100; *In re Cooper*, 32 Vt. 253; *S. v. Towle*, 42 N. H. 540; *In re Whitmore*, 9 Utah 441, 35 Pac. 524; *Hunter v. S.*, 6 Ind. 423; *Ex parte Hardy*, 68 Ala. 303; *S. v. Judge Civil District Court*, 40 La. 434, 4 So. 131; *In re Gannon*, 69 Cal. 541, 11 Pac. 240; *Phillips v. Welch*, 12 Nev. 158; *P. v. Owens*, 8 Utah 20, 28 Pac. 871; *Currier v. Mueller*, 79 Iowa 316, 44 N. W. 555; *In re Vance*, 88 Cal. 262, 26 Pac. 101; *Teller v. P.*, 7 Colo. 451, 4 Pac. 48.

² *Lester v. P.*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. St. 375; *Haines v. P.*, 97 Ill. 161; *S. v. Allen*, 14 Wash. 684, 45 Pac. 644; *Boon v. McGucken*, 67 Hun 251, 22 N. Y. Supp. 424; *Rawson v. Rawson*, 35

§ 1797. **Appeals: writ of error.**—The court will entertain appeals from a judgment or order in contempt proceedings because of its appellate jurisdiction in criminal cases.³ Contempt cases may be reviewed on writ of error by a court of review.⁴

§ 1798. **In civil contempt, appeal allowed.**—In some jurisdictions, if the contempt proceeding comes within the civil class of contempts, an appeal lies from the final order as in other civil cases, or a writ of error will lie.⁵ But the people can not prosecute an appeal or writ of error, a contempt case being in the nature of a criminal proceeding.⁶ A contempt proceeding instituted for the purpose of enforcing the rights of the opposite party, such as to compel the payment of money to him, is civil in its nature. An appeal lies from a judgment for contempt in such proceeding.⁷

§ 1799. **Prosecution may appeal.**—In Illinois, the people, as well as the defendant, may take an appeal in contempt proceedings which are civil in their nature, though brought in the name of the people.⁸

§ 1800. **Appeal not allowed.**—Where a person is adjudged guilty of contempt committed in the presence of the court, he can not take an appeal; but otherwise, if committed out of the presence of the court.⁹

§ 1801. **Appeal from final order.**—In contempt proceedings, where an appeal is allowed by law, such appeal must be from a final order

Ill. App. 507; *Leopold v. P.*, 140 Ill. 552, 30 N. E. 348; *Haines v. Haines*, 35 Mich. 138; *Brinkley v. Brinkley*, 47 N. Y. 40; *Baldwin v. Miles*, 58 Conn. 496, 20 Atl. 618; *S. v. Newton*, 62 Ind. 517; *In re Daves*, 81 N. C. 72; *Warner v. S.*, 81 Tenn. 52.

³ *S. v. Nathans*, 49 S. C. 199, 27 S. E. 52. See *Wyatt v. P.*, 17 Colo. 252, 28 Pac. 961; *S. v. Knight*, 3 S. D. 509, 54 N. W. 412.

⁴ *Haines v. P.*, 97 Ill. 167; *Bowers v. Green*, 1 Scam. (Ill.) 42; *Stokeley v. Com.*, 1 Va. Cas. 330; *Stuart v. P.*, 3 Scam. (Ill.) 395; *Yates v. P.*, 6 Johns. (N. Y.) 337; *Ex parte Langdon*, 25 Vt. 680; *S. v. Davis*, 18 Ohio C. C. 479.

⁵ *Lester v. P.*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. R. 375; *Blake v. Blake*, 80 Ill. 525; *Tolman*

v. Jones, 114 Ill. 147, 28 N. E. 464; *Walton v. Develing*, 61 Ill. 206; *P. v. Diedrich*, 141 Ill. 669, 30 N. E. 1038.

⁶ *P. v. Neill*, 74 Ill. 68.

⁷ *Snow v. Snow*, 13 Utah 15, 43 Pac. 620; *S. v. Willis*, 61 Minn. 120, 63 N. W. 169; *S. v. Giles*, 10 Wis. 101; *Hagerman v. Tong Lee*, 12 Nev. 331; *S. v. Horner*, 16 Mo. App. 191. See *S. v. Dent*, 29 Kan. 416.

⁸ *P. v. Weigley*, 155 Ill. 491, 40 N. E. 300; *P. v. Diedrich*, 141 Ill. 665, 30 N. E. 1038; *Lester v. P.*, 150 Ill. 408, 23 N. E. 387, 37 N. E. 1004, 41 Am. R. 375.

⁹ *S. v. Woodfin*, 5 Ired. (N. C.) 199, 42 Am. D. 161; *Brooks v. Fleming*, 53 Tenn. 331; *Brizendine v. S.*, 103 Tenn. 677, 54 S. W. 982; *In re Deaton*, 105 N. C. 59, 11 S. E. 244.

in the case. An order adjudging a person to be in contempt, without fixing the penalty, is not final.¹⁰ An order reciting that "the court now assesses a fine of \$100 against the defendant, reserving the right to remit all or any part of said fine at any time before the final disposition of the cause," is not a final order from which an appeal can be taken.¹¹

§ 1802. Action by court of review.—The action of the court in instituting contempt proceedings and inflicting punishment for a violation of its orders, is discretionary with the court, and will not be interfered with by a court of review in the absence of a clear abuse of such discretion.¹²

§ 1803. Determining jurisdiction.—When necessary to determine the jurisdictional facts in contempt proceedings, the court will not be limited to the record itself, but will inquire into the evidence not in the record.¹³

§ 1804. Power to pardon.—The power of the president of the United States to grant pardons for "offenses" includes contempts of the court, either civil or criminal contempts.¹⁴ And the governor of a state, also, has the same pardoning power in such cases.¹⁵

¹⁰ *Springfield v. Edwards*, 84 Ill. 627, 634; *Menage v. Lustfield*, 30 Minn. 487, 16 N. W. 398; *Schwab v. Coots*, 44 Mich. 463, 7 N. W. 61; *Sercomb v. Catlin*, 123 Ill. 556, 21 N. E. 606, 15 Am. R. 147; *Buel v. Street*, 9 Johns. (N. Y.) 443; *Semrow v. Semrow*, 26 Minn. 9, 46 N. W. 446; *McEwen v. McEwen*, 55 Ill. App. 340.

¹¹ *Home Electric, etc., Co. v. Globe, etc., Co.*, 145 Ind. 174, 44 N. E. 191; *Brinkley v. Brinkley*, 47 N. Y. 40.

¹² *Haines v. Haines*, 35 Mich. 138; *Williams v. Lampkin*, 53 Ga. 200; *Tucker v. Keen*, 60 Ga. 410; *Brown v. Brown*, 4 Ind. 627, 58 Am. D. 641;

Cochrane v. Ingersoll, 73 N. Y. 613; *Murray v. Berry*, 113 N. C. 46, 18 S. E. 78; *S. v. Archer*, 48 Iowa 310; *Wakefield v. Moore*, 65 Ga. 268; *Howard v. Durand*, 36 Ga. 346, 91 Am. D. 767.

¹³ *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580.

¹⁴ *In re Mullee*, 7 Blatchf. (U. S.) 23; *Drayton Case*, 5 Op. Att.-Gen. 574; *Dixon's Case*, 3 Op. Att.-Gen. 622.

¹⁵ *Ex parte Hickey*, 4 S. & M. (Miss.) 751; *S. v. Sauvinet*, 24 La. 119, 13 Am. R. 115. *Contra*, *Taylor v. Goodrich* (Tex. Cr.), 40 S. W. 515.

CHAPTER XL.

COMPOUNDING OFFENSES.

ART. I. Definition and Elements,	§§ 1805-1806
II. Matters of Defense,	§§ 1807-1811
III. Indictment,	§§ 1812-1813

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1805. **Compounding defined.**—If a person injured receives anything of value in consideration of agreeing to stifle criminal proceedings, he puts himself in a position to hinder the administration of justice, and his act in thus agreeing not to prosecute may constitute the crime of compounding a criminal offense.¹ Compounding a crime consists in taking goods or other amends on an agreement not to prosecute. Compounding a felony is, at common law, equally criminal with the felony, and is also a misdemeanor against public justice. The material facts are knowledge of the actual commission of a crime, the taking of the money or property of another, and the intent to conceal or compound the felony.²

§ 1806. **Compromise—When allowed.**—By statutory provision in some of the states, minor offenses may be compromised where made by approval of the court in which pending.³

ARTICLE II. MATTERS OF DEFENSE.

§ 1807. **Promise to repay, no offense.**—A mere promise to pay or repay money embezzled is not an agreement to compound the offense.⁴

¹ 4 Bl. Com. 133.

² Underhill Cr. Ev., § 458, citing 4 Bl. Com. 136; P. v. Bryon, 103 Cal. 675, 37 Pac. 754.

³ McDaniel v. S., 27 Ga. 197; Geier v. Shade, 109 Pa. St. 180; Reg. v.

Lovett, 11 Cox C. C. 602; S. v. Hunter, 14 La. 71.

⁴ Smith v. Crego, 7 N. Y. Supp. 86, 54 Hun 22. See Treadwell v. Tordert, 122 Ala. 297, 25 So. 216.

§ 1808. **Breaking compounding agreement.**—The fact that the person with whom the defendant compounded an offense afterwards, in violation of his agreement, instituted a prosecution for the offense so compounded, is no defense to the charge of compounding such offense.⁵

§ 1809. **That offense had been committed not essential.**—That an offense had actually been committed by the person from whom the money or other consideration was received is not essential.⁶

§ 1810. **Agent only—No defense.**—It is no defense to a charge of compounding a criminal offense that the defendant acted as the agent of another and received no benefit himself.⁷

§ 1811. **Giving promissory note.**—The giving of a promissory note as the consideration for compromising a criminal offense is sufficient to constitute the offense, even though such note can not be collected by law.⁸

ARTICLE III. INDICTMENT.

§ 1812. **Indictment sufficient.**—Under a statute making it a criminal offense for any “person who, having knowledge of the actual commission of a crime, takes money or property of another,” under an agreement to settle or conceal such offense, an information or indictment charging that the crime of grand larceny had been committed by a certain person (naming him), and that the defendant, knowing of the commission of said crime by said person, did receive from the person named twenty dollars, upon the agreement that the defendant would compound and conceal said crime, is sufficient.⁹

§ 1813. **Knowledge, essential.**—In charging a person with the offense of compounding a crime, the indictment must allege that the defendant knew of the commission of the crime so compounded.¹⁰

⁵ S. v. Ash, 33 Or. 86, 54 Pac. 184.

⁶ S. v. Carver, 69 N. H. 216, 39 Atl. 973; Tribly v. S., 42 Ohio St. 205; Reg. v. Best, 9 C. & P. 368. See P. v. Buckland, 13 Wend. (N. Y.) 592.

⁷ S. v. Ruthven, 58 Iowa 121, 12 N. W. 235. See S. v. Ash, 33 Or. 86, 54 Pac. 184.

⁸ Com. v. Pease, 16 Mass. 91; Underhill Cr. Ev., § 458.

⁹ P. v. Bryon, 103 Cal. 675, 37 Pac. 754; Watt v. S., 97 Ala. 72, 11 So. 901.

¹⁰ S. v. Henning, 33 Ind. 189.

CHAPTER XLI.

ESCAPE; RESCUE.

ART.	I. Definition and Elements,	§§ 1814-1819
	II. Matters of Defense,	§§ 1820-1825
	III. Indictment,	§§ 1826-1830
	IV. Evidence,	§ 1831

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1814. **Rescue defined.**—Rescue is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offense in the stranger so rescuing as it would have been in a gaoler to have voluntarily permitted an escape.¹

§ 1815. **Escape defined.**—A person who, being a prisoner in lawful confinement or custody, regains his liberty, with or without force, prior to his legal discharge, or who, having a prisoner lawfully in his custody, suffers him to regain his liberty, before his legal discharge, is guilty of escape.² And persons who aid or assist are alike guilty.³

§ 1816. **Common law offense.**—At common law, and frequently by statute, a person who conveys disguises, weapons, etc., into a jail, with the intent to facilitate the escape of a prisoner, or in any way assists in an escape, is guilty of a felony.⁴

¹ 4 Bl. Com. 131; 2 McClain Cr. L., Ala. 39; Randall v. S., 53 N. J. L. § 930. 488, 22 Atl. 46; Butler v. Washburn, 25 N. H. 251.

² Underhill Cr. Ev., § 462; 4 Bl. Com. 129; Com. v. Farrell, 5 Allen (Mass.) 130; 2 Hawk. P. C., ch. 18; S. v. Davis, 14 Nev. 446; S. v. Brown, 82 N. C. 585; White v. S., 13 Tex. 133; 2 McClain Cr. L., § 930; Ex parte Clifford, 29 Ind. 106; Floyd v. S., 79

Williams v. S., 24 Tex. App. 17, 5 S. W. 655; Ash v. S., 81 Ala. 76, 1 So. 558.

⁴ Underhill Cr. Ev., § 464, citing Wilson v. S., 61 Ala. 151, 154.

§ 1817. **Knowledge essential.**—Before a person charged with the offense of unlawfully aiding a prisoner to escape can be held criminally liable, it must appear that the defendant knew the prisoner was in the custody of the law, and that the act done was intended to assist the prisoner in making his escape.⁵

§ 1818. **Trusted prisoner escaping.**—A prisoner, while serving a term of imprisonment, by making his escape when trusted by the officer to go outside the prison walls, is guilty of an escape.⁶ Evidence that the defendant fled while outside the prison walls, on duty, is sufficient to sustain an indictment charging that the prisoner escaped from the penitentiary. The variance is not material.⁷

§ 1819. **Officer negligent is guilty.**—An officer having prisoners in charge who neglects to secure the doors, bolts, and locks of the jail in the way they were designed to be used, most likely to prevent prisoners from escaping, is guilty of escape.⁸

ARTICLE II. MATTERS OF DEFENSE.

§ 1820. **Breaking jail.**—If a person who is unlawfully imprisoned breaks jail and regains his liberty, he is not guilty of any criminal offense; nor is it an offense to assist or permit one to escape who is unlawfully imprisoned.⁹

§ 1821. **Imprisoned by process of federal court.**—It is a good defense to a charge of unlawfully aiding a prisoner to escape that the prisoner is imprisoned by virtue of process of the federal court; that he is a prisoner of the United States, though confined in a state jail.¹⁰

⁵ S. v. Lawrence, 43 Kan. 128, 23 Pac. 157; Walker v. S., 91 Ala. 32, 10 So. 30; Com. v. Filburn, 119 Mass. 299; S. v. Porter, 26 Mo. 201. See also Riley v. S., 16 Conn. 47; S. v. Errickson, 32 N. J. L. 421; Randall v. S., 53 N. J. L. 488, 22 Atl. 46.

⁶ Jenks v. S., 63 Ark. 312, 39 S. W. 361; Newberry v. S., 7 Ohio Cir. D. 622, 15 Ohio C. C. 208.

⁷ Jenks v. S., 63 Ark. 312, 39 S. W. 361. See Com. v. Eversole, 98 Ky. 638, 17 Ky. L. 1166, 33 S. W. 1107.

⁸ Garver v. Ter., 5 Okla. 342, 49 Pac. 470; Shattuck v. S., 51 Miss. 575; S. v. Hunter, 94 N. C. 829. See also Smith v. S., 76 Ala. 69; S. v. Sparks, 78 Ind. 166; Meehan v. S., 46 N. J. L. 355.

⁹ Housh v. P., 75 Ill. 487; P. v. Ah Teung, 92 Cal. 421, 28 Pac. 577; S. v. Leach, 7 Conn. 452; S. v. Jones, 78 N. C. 420. See S. v. Murray, 15 Me. 100; S. v. Beebe, 13 Kan. 595.

¹⁰ Trammel v. S., 111 Ala. 77, 20 So. 631.

§ 1822. **Officer not liable for act of assistant.**—On a charge against an officer for allowing a prisoner to escape through negligence, he will not be held criminally responsible for the negligence of his assistant in permitting such prisoner to escape, if, in selecting and appointing his assistant, he used due and proper care.¹¹

§ 1823. **Defective commitment immaterial.**—It is no defense to a charge of unlawful escape that the commitment may be irregular or informal; but otherwise if the commitment is without authority and void.¹²

§ 1824. **Arrest—Warrant not present.**—It is no defense to the prosecution of an officer for unlawfully permitting a prisoner to escape that the officer did not have the warrant in his possession at the time of making the arrest or that it was lost.¹³

§ 1825. **Guilt or innocence immaterial.**—The guilt or innocence of the prisoner, or whether he has been indicted or not, is not material and is no defense to a charge of unlawful escape. If the prisoner was lawfully committed and escapes or is permitted to escape, that is sufficient to constitute the offense, although he may be innocent.¹⁴

ARTICLE III. INDICTMENT.

§ 1826. **Offense for which held, essential.**—An indictment for the offense of escape should set out the criminal offense for which the defendant is imprisoned.¹⁵ An indictment charging the offense of unlawful escape must aver in the words of the statute that the prisoner was “confined in the jail or prison, on a charge or conviction for felony” or misdemeanor.¹⁶

¹¹ *S. v. Lewis*, 113 N. C. 622, 18 S. E. 69.

¹² *S. v. James*, 37 Conn. 355.

¹³ *Pentecost v. S.*, 107 Ala. 81, 18 So. 146.

¹⁴ *Com. v. Miller*, 2 Ashm. (Pa.) 68; *Holland v. S.*, 60 Miss. 939; *S. v. Bates*, 23 Iowa 96. See *S. v. Lewis*, 19 Kan. 260, 27 Am. R. 113; *S. v. Murray*, 15 Me. 100.

¹⁵ *S. v. Jones*, 78 N. C. 420; *P. v. Hamaker*, 92 Mich. 11, 52 N. W. 82; *S. v. Hilton*, 26 Mo. 199; *S. v. Ritchie*, 107 N. C. 857, 12 S. E. 251. But see *S. v. Johnson*, 93 Mo. 73, 5 S. W. 699.

¹⁶ *Trammel v. S.*, 111 Ala. 77, 20 So. 631.

§ 1827. **Indictment bad**—"Unto."—An indictment alleging that the defendant conveyed instruments "unto" the jail instead of into the jail, with intent to procure an escape, is fatally defective.¹⁷

§ 1828. **Knowledge essential.**—Where knowledge or intent is an essential element of the offense, an indictment charging the offense should set out such knowledge or intent by proper averments.¹⁸

§ 1829. **Duplicity—Aided, assisted.**—An indictment charging that the defendant, aided, assisted, and suffered a prisoner to escape is not bad for duplicity.¹⁹

§ 1830. **Indictment sufficient.**—An indictment which alleges that the defendant did intentionally assist a certain prisoner to escape who was confined on a charge of misdemeanor, by drilling a hole through the walls of the jail, sufficiently states the offense, and need not aver for what purpose such drilling was done.²⁰

ARTICLE IV. EVIDENCE.

§ 1831. **Legality of custody, burden.**—If the legality of the custody of a prisoner is attacked, the burden of proof to convince the jury of the legality of the custody is upon the state.²¹

¹⁷ P. v. Rathbun, 105 Mich. 699, 63 N. W. 973.

¹⁸ Walker v. S., 91 Ala. 32, 10 So. 30; Com. v. Filburn, 119 Mass. 297. See S. v. Ritchie, 107 N. C. 857, 12 S. E. 251.

¹⁹ Clemons v. S., 4 Lea (Tenn.) 23.

²⁰ Marshall v. S., 120 Ala. 390, 25 So. 208. See generally, King v. S. (Fla.), 28 So. 206.

²¹ Underhill v. Cr. Ev., § 465, citing S. v. Hollon, 22 Kan. 580; S. v. Jones, 78 N. C. 420; S. v. Baldwin, 80 N. C. 391; 2 Bish. Cr. L., § 1065.

CHAPTER XLII.

TAMPERING WITH WITNESS.

ART. I.	What Constitutes Offense,	§§ 1832-1833
II.	Matters of Defense,	§§ 1834-1835
III.	Evidence; Variance,	§§ 1836-1837

ARTICLE I. WHAT CONSTITUTES OFFENSE.

§ 1832. **Common law offense.**—A willful and corrupt attempt to prevent the attendance of a witness before a lawful tribunal is an offense at common law. The essence of the offense is the attempt to interfere with and obstruct the administration of justice.¹

§ 1833. **Bribing witness to absent himself.**—By statute in the state of Minnesota it is made criminal to bribe a witness to absent himself from the trial of the case in which he is a witness.²

ARTICLE II. MATTERS OF DEFENSE.

§ 1834. **Intimidating witness after suit ended.**—On a charge of endeavoring to intimidate and impede a witness from attending court, it is a good defense that the unlawful conduct of the accused in assaulting such witness took place some time after the prosecution in which the witness appeared against the accused, had ended.³

§ 1835. **Witness not subpoenaed immaterial.**—That the witness whom the defendant attempted to prevent from appearing and testifying had not been subpoenaed in some pending case is not material and no defense.⁴

¹ Underhill Cr. Ev., § 448, citing S. v. Holt, 84 Me. 509, 24 Atl. 951; Perrow v. S., 67 Miss. 365, 7 So. 349. See also S. v. Carpenter, 20 Vt. 9; S. v. Ames, 64 Me. 386; Com. v. Reynolds, 14 Gray (Mass.) 87; U. S. v. Kee, 39 Fed. 603; S. v. Baller, 26 W. Va. 90, 94; Gandy v. S., 23 Neb. 436, 36 N. W. 817.
² S. v. Sargent, 71 Minn. 28, 73 N. W. 626.
³ U. S. v. Thomas, 47 Fed. 807.
⁴ S. v. Desforges, 47 La. 1167, 17 So. 811; S. v. Horner, 1 Marv. (Del.)

ARTICLE III. EVIDENCE; VARIANCE.

§ 1836. **Persuading witness.**—On a charge of attempting by persuasion to prevent a witness from testifying before a grand jury, it is proper to show that the defendant falsely represented that he had been sent to request the witness not to testify as such witness.⁵

§ 1837. **No variance.**—Evidence that the defendant incited, aided, and advised a witness not to permit an attachment to be served on him for his default in appearing as such witness supports an indictment charging the defendant with aiding, advising, and inciting the witness not to obey a subpoena.⁶

504, 26 Atl. 73, 41 Atl. 139; S. v. Keyes, 8 Vt. 57, 67; S. v. Holt, 84 Me. 509, 24 Atl. 951.

* S. v. Desforges, 47 La. 1167, 17 So. 811.

⁶ Perrow v. S., 67 Miss. 365, 7 So. 349.

PART FIVE

OFFENSES AGAINST PUBLIC HEALTH

CHAPTER XLIII.

ADULTERATION OF FOOD.

ART. I. Definition and Elements,	§§ 1838-1848
II. Matters of Defense,	§§ 1849-1853
III. Indictment,	§§ 1854-1858
IV. Evidence; Variance,	§§ 1859-1862

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1838. **Common law misdemeanor.**—By the common law, and also frequently by statute, the mingling of unwholesome ingredients with food, or the selling or offering for sale of adulterated or impure articles of food, is a misdemeanor.¹

§ 1839. **Food defined.**—The word “food” includes anything eaten or drunk for nourishment, but under the statute is restricted to man.²

§ 1840. **Police power—Oleomargarine—Vinegar.**—The manufacture or sale of oleomargarine, butterine, lard compounds, and the like, may be prohibited absolutely, under the police power, although such articles may not be injurious to health, when used as food.³ A statute

¹ Underhill Cr. Ev., § 480; S. v. Newton, 45 N. J. L. 469.

² Com. v. Hartman, 6 Pa. Dist. R. 136. See also Meyer v. S., 54 Ohio St. 242, 43 N. E. 164.

³ Com. v. Huntley, 156 Mass. 236, 30 N. E. 1127; Powell v. Com., 114 Pa. St. 265, 7 Atl. 913; Powell v. Pennsylvania, 127 U. S. 678, 8 S. Ct. 992, 1257; S. v. Addington, 77 Mo.

which forbids the sale of vinegar, or other article used as food, below a certain grade or standard, is within the police power, and the court will not declare it invalid merely because it may seem unreasonable in the test required to determine the standard of the article sold.⁴

§ 1841. Statute constitutional.—A state statute forbidding the manufacture “out of any oleaginous substance or any compounds of the same, other than that produced from unadulterated milk, or cream from the same, any article designed to take the place of butter or cheese produced from unadulterated milk or cream,” or who shall sell or offer to sell such adulterated article, does not deprive any person of life, liberty, or property, without due process of law, and in no manner violates any of the provisions of the constitution of the United States.⁵

§ 1842. Sale by clerk holds principal.—An unlawful sale of imitation butter, made by the clerk of the defendant in his store, is a sale by the defendant, if made in the ordinary course of business.⁶

§ 1843. “Milk” includes skimmed milk, or cream.—A statute which forbids the sale of milk “to which water or any foreign substance has been added,” includes skimmed milk which has been colored by adding annatto to it.⁷ The term “milk” used in a statute relating to adulteration of food is broad enough to include cream; that is, to adulterate cream is to adulterate milk.⁸

110; *Com. v. Shirley*, 152 Pa. St. 170, 25 Atl. 819.

⁴*P. v. Worden Grocer Co.*, 118 Mich. 604, 77 N. W. 315; *Com. v. Huntley*, 156 Mass. 236, 30 N. E. 1127; *S. v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Cook v. S.*, 110 Ala. 40, 20 So. 360. See *Armour Packing Co. v. Snyder*, 84 Fed. 136; *Powell v. Com.*, 114 Pa. St. 265, 7 Atl. 913; *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 7 Am. C. R. 32; *S. v. Marshall*, 64 N. H. 549, 15 Atl. 210; *P. v. Girard*, 145 N. Y. 105, 39 N. E. 823; *Palmer v. S.*, 39 Ohio St. 236.

⁵*In re Brosnahan*, 4 McCrary 1, 4 Am. C. R. 16; *Powell v. Com.*, 114 Pa. St. 265, 7 Atl. 913; *Powell v. Pennsylvania*, 127 U. S. 678, 8 S. Ct. 992, 1257, 7 Am. C. R. 32.

⁶*S. v. Bockstruck*, 136 Mo. 335, 38

S. W. 317; *Prather v. U. S.*, 9 App. D. C. 82; *Com. v. Proctor*, 165 Mass. 38, 42 N. E. 335; *Com. v. Warren*, 160 Mass. 533, 36 N. E. 308. *Contra*, *Heider v. S.* (Ohio Com. Pl.), 4 Ohio Dec. 227. And the manager, agent or servant who sells adulterated articles is guilty: *Bissman v. S.*, 54 Ohio St. 242, 43 N. E. 164; *Meyer v. S.*, 54 Ohio St. 242, 43 N. E. 164. But if a clerk or servant sell an adulterated article of food, contrary to the express instructions of his principal, then the principal is not liable: *Kearley v. Taylor*, 17 Cox C. C. 328. See *Brown v. Foot*, 61 L. J. M. C. 110.

⁷*Com. v. Wetherbee*, 153 Mass. 159, 26 N. E. 414.

⁸*Com. v. Gordon*, 159 Mass. 8, 33 N. E. 709.

§ 1844. **Adulterated drugs includes whiskey.**—A statute which forbids the sale of adulterated food and drugs includes adulterated whiskey and beer, whether sold as a commodity or beverage.⁹

§ 1845. **Selling at meals, a violation.**—Under a statute forbidding the sale of adulterated milk, a sale made by the glass at a restaurant or *cafe* by a servant, in the ordinary course of service, in serving meals, is within the statute.¹⁰

§ 1846. **Having in store unmarked.**—Having oleomargarine in a store with other articles for sale is sufficient to sustain a conviction, under a statute forbidding the "selling or offering to sell" oleomargarine, unless the same be plainly marked, stating what it is.¹¹

§ 1847. **Coloring vinegar.**—If, in the manufacture of vinegar, it is passed through roasted malt for the sole purpose of coloring the vinegar, and this process gives the vinegar an artificial coloring matter, it is in violation of the statute prohibiting artificial coloring of vinegar.¹²

§ 1848. **Inspecting herds.**—Where a city is authorized by statute to regulate and license the sale of milk, and given power to require milk dealers to permit their herds to be inspected, from which milk is obtained, such inspection may be made, though the herds are outside the city.¹³

ARTICLE II. MATTERS OF DEFENSE.

§ 1849. **Article sold not as genuine.**—The accused by selling oleomargenous substance, which is not made from milk and is not the product of the dairy, commits no offense under a statute forbidding the manufacture of any substance "not produced from milk or cream and not the product of the dairy, with intent to sell the same as butter made from unadulterated milk or cream," unless the sale was made with the intent to dispose of the substance as genuine butter.¹⁴

⁹ S. v. Hutchinson, 56 Ohio 82, 46 N. E. 71.

¹⁰ Com. v. Vieth, 155 Mass. 442, 29 N. E. 577; Com. v. Miller, 131 Pa. St. 118, 18 Atl. 938; Com. v. Warren, 160 Mass. 533, 36 N. E. 308.

¹¹ S. v. Dunbar, 13 Or. 591, 11 Pac. 298.

¹² Weller v. S., 53 Ohio 77, 40 N. E. 1001.

¹³ S. v. Nelson, 66 Minn. 166, 68 N. W. 1066.

¹⁴ P. v. Laning, 57 N. Y. Supp. 1057, 40 App. Div. 227.

§ 1850. **Mere possession, no offense.**—Mere possession of adulterated milk found in a milk wagon on the street, “intended for delivery down town,” is not sufficient to constitute a “sale or offer to sell” such milk, there being no evidence that such delivery was to be a sale.¹⁵

§ 1851. **Article made out of state.**—It is no defense to an indictment charging that the defendant served oleomargarine in his restaurant as food, that it was made in another state, where such article was not served in the original package.¹⁶

§ 1852. **Knowledge immaterial.**—It is no defense to a charge for selling an article of adulterated food forbidden by law, that the defendant did not know that the article sold was below the standard and forbidden, unless knowledge of such adulterated condition of the article is made an element of the offense by statutory definition.¹⁷

§ 1853. **Fancy bread—No defense.**—On a charge of selling bread unlawfully it is no defense that the bread sold by the accused was fancy bread.¹⁸

ARTICLE III. INDICTMENT.

§ 1854. **“Human food,” not essential.**—An information for a violation of a statute providing “against the adulteration of food and drugs” is not required to contain an averment that the article sold or offered for sale was to be used as human food.¹⁹

§ 1855. **Substance used is essential.**—In charging adulteration of food in violation of a statute which forbids the manufacture or sale of any adulterated food by adding any substance so as to reduce or

¹⁵ P. v. Wright, 43 N. Y. Supp. 290, 11 N. Y. Cr. 479. See P. v. Koch, 44 N. Y. Supp. 387, 19 Misc. 634.

¹⁶ Hancock v. S., 89 Md. 724, 43 Atl. 934; Rasch v. S., 89 Md. 755, 43 Atl. 931; S. v. Collins, 67 N. H. 540, 42 Atl. 51. See Fox v. S., 89 Md. 381, 43 Atl. 775; Wright v. S., 88 Md. 436, 41 Atl. 795.

¹⁷ P. v. Worden Grocer Co., 118 Mich. 604, 77 N. W. 315; P. v. Snowberger, 113 Mich. 86, 71 N. W. 497;

P. v. Eddy, 12 N. Y. Supp. 628, 59 Hun 615; Com. v. Vieth, 155 Mass. 442, 29 N. E. 577; Com. v. Warren, 160 Mass. 533, 36 N. E. 308; Sanchez v. S., 27 Tex. App. 15, 10 S. W. 756; P. v. Cipperly, 101 N. Y. 634, 4 N. E. 107.

¹⁸ Com. v. McArthur, 152 Mass. 522, 25 N. E. 836.

¹⁹ S. v. Kelly, 54 Ohio 166, 43 N. E. 163.

injuriously affect its quality or strength, or "by substituting any cheaper or inferior substance," an indictment should allege the particular substance with which the food was adulterated and the manner of such adulteration.²⁰

§ 1856. **Animal fat or vegetable oils.**—Under a statute forbidding the sale of "any article manufactured from animal fat, or animal or vegetable oils in imitation of natural butter not produced from pure milk or cream," an indictment charging the sale of two pounds of oleomargarine, sufficiently states the offense.²¹

§ 1857. **Possession of diseased meat.**—An information charging that the defendant had in his possession the meat of a diseased animal with intent to sell the same, sufficiently states the offense under a statute prohibiting any person from having "in his possession the meat of any diseased animal with intent to sell it;" and the information need not allege intent to sell such meat in the state.²²

§ 1858. **Negating exception.**—Under a statute forbidding the manufacture or sale of substitutes for butter, containing a provision that the act shall not prohibit the coloring of such substitute manufactured for sale outside of the state, an indictment charging a violation need not negative the exception mentioned.²³

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1859. **Chemical analysis, competent.**—The result of a chemical analysis of a sample of milk or other article of food alleged to be adulterated, is competent evidence though not conclusive as to the quality of the article tested. Such evidence may be met and discredited the same as other evidence.²⁴

²⁰ *Dorsey v. S.*, 38 Tex. Cr. 527, 44 S. W. 514.

²¹ *Rasch v. S.*, 89 Md. 755, 43 Atl. 931. See *Cook v. S.*, 110 Ala. 40, 20 So. 360; *S. v. Henderson*, 15 Wash. 598, 47 Pac. 19.

²² *Brown v. S.*, 14 Ind. App. 24, 42 N. E. 244; *Moeschke v. S.*, 14 Ind. App. 393, 42 N. E. 1029.

²³ *S. v. Bockstruck*, 136 Mo. 335, 38 S. W. 317. See also *S. v. Luther*, 20 R. I. 472, 40 Atl. 9; *S. v. Hutchinson*, 55 Ohio St. 573, 45 N. E. 1043.

²⁴ *Com. v. Spear*, 143 Mass. 172, 9 N. E. 632; *Com. v. Nichols*, 10 Allen (Mass.) 199; *S. v. Groves*, 15 R. I. 208, 2 Atl. 384; *P. v. Salisbury*, 37 N. Y. Supp. 420.

§ 1860. **Oleomargarine—Color.**—In a prosecution for the unlawful sale of oleomargarine it is proper to show in evidence that the article sold was of the color of yellow butter, under a statute prohibiting the sale of imitation butter.²⁵

§ 1861. **Possession of impure milk.**—An indictment for selling impure milk or exposing it for sale, is not sustained by evidence that the defendant had impure milk in his possession.²⁶

§ 1862. **Jurisdiction, state or federal.**—A state government can not interfere with the national government in furnishing oleomargarine to be used as food for the inmates of a national home for federal soldiers located in such state. The state legislature has no constitutional power to interfere with national institutions located in the states.²⁷

²⁵ Cook v. S., 110 Ala. 40, 20 So. 360.

²⁶ Polinsky v. P., 73 N. Y. 65. See Com. v. Luscomb, 130 Mass. 42.

²⁷ In re Thomas, 87 Fed. 453; State of Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453.

CHAPTER XLIV.

MEDICINE AND DENTISTRY.

ART. I.	Statutory Provisions Regulating, . . .	§§ 1863-1871
	II. Matters of Defense,	§§ 1872-1881
	III. Indictment,	§§ 1882-1887
	IV. Evidence; Variance,	§§ 1888-1890

ARTICLE I. STATUTORY PROVISIONS REGULATING.

§ 1863. **Regulating practice—Police power.**—It is a proper exercise of the police power to regulate the practice of medicine by requiring a person to pass a satisfactory examination under the board of health and receive a certificate as a practitioner.¹

§ 1864. **Statute valid—Persons excepted.**—A statute regulating the practice of medicine which excepts from its provisions physicians who have been practicing medicine ten years in the state, is not invalid and does not confer upon such excepted persons any "special privilege, immunity or franchise."²

§ 1865. **Statute valid—Regulating pharmacy.**—A statute relating to pharmacy which prohibits persons except registered pharmacists from compounding and selling medicines is constitutional.³ But a statute which prohibits any person except a registered pharmacist from selling patent or proprietary medicines and domestic remedies, is invalid where it does not call for the exercise of any

¹ In re Roe Chung, 9 N. M. 130, 49 Pac. 952. See Com. v. Wilson, 19 Pa. Co. C. R. 521, 6 Pa. Dist. 628; S. v. Call, 121 N. C. 643, 28 S. E. 517. ² Williams v. P., 121 Ill. 84, 88, 11 N. E. 881. See also Wert v. Clutter, 37 Ohio St. 347; S. v. Dent, 25 W. Va. 1. ³ Noel v. P., 187 Ill. 587, 597, 58 N. E. 616; Saddler v. P., 188 Ill. 243, 58 N. E. 906; Overland v. P., 187 Ill. 625, 58 N. E. 1095.

scientific skill of the pharmacist in determining the qualities or properties of such patent medicines as is required in the compounding of medicines. It is class legislation.⁴

§ 1866. Venders of drug, license.—A statute requiring itinerant venders of certain drugs, medicines or like kind of goods, to procure a license from the proper authorities, to sell such goods, is a proper exercise of the police power and not an infringement of personal rights.⁵

§ 1867. Statute on dentistry valid.—A statute regulating the practice of dentistry is not an abridgment of the privileges or immunities of citizens under the constitution.⁶

§ 1868. Statute relating to dentistry.—The statute of Illinois regulating the practice of dentistry, and providing for a penalty for violations to be recovered in an action in the name of the people, is a civil and not criminal statute; hence the people may appeal the same as in any other civil suit.⁷

§ 1869. Can not recover for services—When.—By statutory provisions in some of the states a physician practicing without a proper certificate and without possessing the qualifications prescribed by statute, can not recover for professional services.⁸ Before a physician can enforce the collection of his claims for professional services he must first have fully complied with the law relating to the procuring a certificate authorizing him to practice and the recording of the same.⁹

§ 1870. Specialist not itinerant.—A statute which provides that any itinerant vender of any drug, who shall by writing or printing profess to cure diseases by any drug, must have a license, has no application to a physician advertising himself as a specialist using his own medicine.¹⁰

⁴ Noel v. P., 187 Ill. 587, 597, 58 N. E. 616; S. v. Donaldson, 41 Minn. 74, 42 N. W. 781.

⁵ S. v. Wheelock, 95 Iowa 577, 64 N. W. 620. See P. v. Moorman, 86 Mich. 433, 49 N. W. 263.

⁶ Com. v. Gibson, 7 Pa. Dist. R. 386.

⁷ P. v. Kelly, 187 Ill. 333, 58 N. E. 373.

⁸ Haworth v. Montgomery, 91 Tenn. 16, 18 S. W. 399; Davidson v. Bohlman, 37 Mo. App. 576.

⁹ Maxwell v. Swigart, 48 Neb. 789, 67 N. W. 789.

¹⁰ S. v. Bonham, 96 Iowa 252, 65 N. W. 154.

ARTICLE II. MATTERS OF DEFENSE.

§ 1871. **Midwives included.**—The unlawful practice of medicine without the qualifications prescribed by law, includes midwifery.¹¹

§ 1872. **Osteopathy not included.**—Under a statute regulating the practice of medicine, which forbids any one to prescribe any “drug or medicine or other agency” for the treatment of disease without a certificate from the proper board authorizing him to practice, the system of “osteopathy” practiced by rubbing and kneading the body is not included.¹² But to “treat or operate upon,” includes rubbing the affected part.¹³

§ 1873. **“Christian Science” not included.**—A statute regulating the practice of medicine has no application to the treatment administered by the system called Christian Science.¹⁴

§ 1874. **Domestic remedies not included.**—Under a statute which permits domestic remedies to be sold by persons who may not be pharmacists, an article or drug may become so well known and of such general use that it will be regarded as a domestic remedy, although prepared by professional and skillful chemists.¹⁵

§ 1875. **No compensation—Defense.**—The practice of medicine by a person without compensation for his services is not a violation of the law, though he is unauthorized to practice.¹⁶ The prosecution having introduced evidence tending to prove that the defendant practiced medicine unlawfully by giving advice as to the use of certain drugs which he sold, it was competent for him to show in rebuttal that he was not paid for advice but for the drug only.¹⁷

§ 1876. **Statute applies to “manager” only.**—A statute requiring the manager of a drug business to procure a proper certificate of quali-

¹¹ P. v. Arendt, 60 Ill. App. 89.

¹² S. v. Leffring, 61 Ohio St. 39, 55 N. E. 168. See Eastman v. P., 71 Ill. App. 236.

¹³ Jones v. P., 84 Ill. App. 453.

¹⁴ Evans v. S., 6 Ohio N. P. 129. See S. v. Mylod, 20 R. I. 632, 40 Atl. 753. *Contra*, S. v. Buswell, 40 Neb. 158, 58 N. W. 728.

¹⁵ P. v. Fisher, 83 Ill. App. 114.

See Westchester Co. v. Dressner, 48 N. Y. Supp. 953.

¹⁶ S. v. Pirlot, 20 R. I. 273, 38 Atl. 656; Nelson v. S., 97 Ala. 79, 12 So. 421. See S. v. Call, 121 N. C. 643, 28 S. E. 517; P. v. Lee Wah, 71 Cal. 80, 11 Pac. 851.

¹⁷ Com. v. St. Pierre, 175 Mass. 48, 55 N. E. 482.

fication before he is authorized to conduct such business, has no application to the owner of the business who carries it on by his manager.¹⁸

§ 1877. Sale of drug unauthorized by owner.—The owner of a drug store is not liable for an unlawful sale of drugs or medicines made by a person in his employ who is not a registered pharmacist or assistant, under a statute which forbids sales of such articles, except by pharmacists, where such sale was made without the knowledge or consent of the owner of the store.¹⁹ But the clerk or agent who is not a qualified pharmacist making any such sale is liable.²⁰

§ 1878. Fee paid, but board neglected to issue certificate.—A pharmacist having made application to the board of pharmacy and paid the proper fee for a certificate of qualification to authorize him to carry on his business, can not be held liable in a criminal prosecution, if the board neglects to issue the certificate.²¹

§ 1879. Clerk failing to record certificate.—The fact that a clerk failed to properly record the certificate of a doctor of medicine, who filed it and paid the proper fee for having it recorded, will not render the doctor liable to a charge of practicing without a license.²²

§ 1880. Manager essential.—Under a statute forbidding any person, except persons having certificates as pharmacists, to carry on "as manager any retail drug or chemical store," a conviction can not be had unless the defendant was in fact "manager" of "a retail store."²³

§ 1881. Practicing under one having license.—A person practicing medicine without a license as required by statute, becomes liable, although he may have practiced under the direction of a physician and surgeon duly licensed to practice.²⁴

ARTICLE III. INDICTMENT.

§ 1882. Indictment—Without license.—Under a statute making it unlawful for any person to practice medicine without a license, an

¹⁸ Com. v. Johnson, 144 Pa. St. 377, 22 Atl. 703.

¹⁹ S. v. Robinson, 55 Minn. 169, 56 N. W. 594. See Haas v. P., 27 Ill. App. 416.

²⁰ Pharmaceutical Soc. v. Wheedon, L. R. 24 Q. B. D. 683.

²¹ Carberry v. P., 39 Ill. App. 506.

²² Price v. S., 40 Tex. Cr. 428, 50 S. W. 700. See Mayor, etc., of City of N. Y. v. Bigelow, 34 N. Y. Supp. 92, 13 Misc. 42.

²³ Com. v. Zacharias, 181 Pa. St. 126, 37 Atl. 185.

²⁴ S. v. Paul, 56 Neb. 369, 76 N. W. 861.

indictment charging that the defendant "practiced medicine" without a license, is sufficient.²⁵

§ 1883. Indictment must aver some act.—Under a statute prohibiting the practice of medicine without a license, and which enumerates various acts which shall be regarded as "practicing medicine" an indictment charging the offense must allege some one of the acts so enumerated; that is, that the defendant prescribed for a consideration, or did some other act as a physician.²⁶

§ 1884. "Unlawfully and willfully" practiced, essential.—Under the statute of Missouri, charging in the indictment that the accused "did unlawfully practice, by being a practitioner and doctor of medicine and surgery, and engaged in said business without first having filed for record" a proper certificate from the state board of health, permitting him to practice, is defective, in not containing an averment that the defendant unlawfully and willfully so practiced.²⁷

§ 1885. Indictment—With or without compensation.—Where the practice of medicine without a license, either for or without compensation for services, is made unlawful, an indictment charging the offense need not contain an averment that the defendant so practiced for compensation.²⁸

§ 1886. Indictment—Need not negative permit.—An indictment charging the unlawful practice of dentistry is not required to negative the granting of a permit, that being a matter of defense.²⁹

§ 1887. Publicly professing is essence.—By a statute of Iowa, an itinerant vender of any drug, "who shall by writing or printing, or any other method publicly profess to treat diseases" shall procure a

²⁵ Whitlock v. Com., 89 Va. 337, 15 S. E. 893. See Jones v. S., 49 Neb. 609, 68 N. W. 1034.

²⁶ S. v. Carey, 4 Wash. 424, 30 Pac. 729; Dee v. S., 68 Miss. 601, 9 So. 356. See S. v. Van Doran, 109 N. C. 864, 14 S. E. 32.

²⁷ S. v. Hathaway, 106 Mo. 236, 17 S. W. 299.

²⁸ Whitlock v. Com., 89 Va. 337, 15 S. E. 893.

²⁹ Ferner v. S., 151 Ind. 247, 51 N. E. 360; P. v. Allen, 122 Mich. 123, 80 N. W. 991 (dentistry); P. v. Curtis, 95 Mich. 212, 54 N. W. 767. See McCann v. S., 40 Tex. Cr. 111, 48 S. W. 512; O'Connor v. S., 46 Neb. 157, 64 N. W. 719.

license. An indictment is not required to aver that the accused sold any drug. To "publicly profess" is the essence of the offense.³⁰

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1888. **Prima facie evidence—"Doctor."**—On a charge for the unlawful practice of medicine, the fact that the defendant at the time of delivering a bottle of medicine gave a card containing his name as Dr., was sufficient to make out a *prima facie* case, under a statutory rule that the use of the title "doctor" or "Dr." shall be *prima facie* evidence of such unlawful practice.³¹

§ 1889. **Proof as to no license.**—On a charge of practicing medicine without a license, the prosecution is not required to prove that the defendant had no license. The burden is on the defendant to show that he was authorized to practice.³²

§ 1890. **Acting as physician or surgeon.**—On a charge of unlawfully practicing medicine as a physician and surgeon, proof that the defendant acted either as a physician or surgeon will sustain the charge.³³

³⁰ S. v. Bair, 92 Iowa 28, 60 N. W. 486.

³¹ Mayer v. S., 64 N. J. L. 323, 45 Atl. 624. Pharmacy; evidence not sufficient: Good v. P., 184 Ill. 396, 56 N. E. 369.

³² P. v. Boo Doo Hong, 122 Cal. 606, 55 Pac. 402; Com. v. St. Pierre, 175 Mass. 48, 55 N. E. 482; S. v. Hathaway, 115 Mo. 36, 21 S. W. 1081.

³³ Com. v. St. Pierre, 175 Mass. 48, 55 N. E. 482.

CHAPTER XLV.

PUBLIC NUISANCES.

ART. I.	Definition and Elements,	§§ 1891-1900
II.	Matters of Defense,	§§ 1901-1906
III.	Indictment,	§§ 1907-1912
IV.	Abating; Suppressing,	§§ 1913-1914

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1891. **Nuisance defined.**—To cause or suffer the carcass of any animal or any offal, filth or noisome substance to be collected, deposited or to remain in any place to the prejudice of others, is a public nuisance.¹

§ 1892. **Injurious factory.**—Trades and business which generally produce ill effects upon the adjacent owners of property, such as tanneries, smelting works, rendering and soap factories, are *prima facie* nuisances; and no place can be held to be convenient for the exercise of such noxious trades, if injurious results ensue therefrom to others.²

§ 1893. **Disorderly houses.**—“All disorderly inns or ale-houses, bawdy-houses, gaming houses, stage plays, unlicensed booths and stages for rope dancers, mountebanks and the like are public nuisances.”³

§ 1894. **Obstructing highways.**—Annoyances in highways, bridges and public rivers by rendering the same inconvenient or dangerous

¹ Seacord v. P., 121 Ill. 629, 13 N. E. 194. See 3 Greenl. Ev., § 184; ⁴ E. 194; S. v. Woodbury, 67 Vt. 602, Bl. Com. 167.
³ 2 Atl. 495. ⁴ Bl. Com. 168. See “Obstruct-

² Seacord v. P., 121 Ill. 635, 13 N. E. 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

to pass, either positively, by actual obstructions, or negatively by want of reparations, are nuisances.⁴

§ 1895. Polluting rivers—Obstructing water course.—Any public highway, such as a navigable river, is a "public place," and under an indictment charging a nuisance in a public place, evidence of the pollution of a navigable river constitutes an offense.⁵ The obstruction of a common water course by a dam or other obstruction causing refuse and debris to collect and lodge in a pond created by such dam, thereby causing and creating decomposition of vegetable and animal matter, engendering malaria, is a nuisance.⁶

§ 1896. Poisoning water course.—Under a statute providing that "the corrupting or rendering unwholesome or impure the water of any river," shall constitute a nuisance, the throwing of impurities and poisons into a river to the injury of persons, is an offense.⁷

§ 1897. Public swearing.—Public swearing is a nuisance at common law, but to be indictable, it must be in a public place and an annoyance to the public.⁸

§ 1898. Annoyance to public.—If the nuisance annoys the community in general and not merely some particular person, it is indictable.⁹

§ 1899. Injurious to public, to more than one.—Under the statute, in order that a nuisance shall amount to a criminal offense, it must be to the injury of some of the citizens of the state.¹⁰ But it has been held that injury to one person is sufficient to sustain the charge.¹¹ It must appear from the evidence that some one or more persons were

⁴ 4 Bl. Com. 167.

⁵ *S. v. Wabash Paper Co.*, 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949.

⁶ *P. v. Pelton*, 55 N. Y. Supp. 815, 36 App. Div. 450; *P. v. Pelton*, 159 N. Y. 537, 53 N. E. 1129; *P. v. Page*, 56 N. Y. Supp. 834, 58 N. Y. Supp. 239, 39 App. Div. 110.

⁷ *S. v. Smith*, 82 Iowa 423, 48 N. W. 727.

⁸ *Com. v. Linn*, 158 Pa. St. 22, 27 Atl. 843, 9 Am. C. R. 415; *S. v. Chrisp*, 85 N. C. 528; *S. v. Powell*,

70 N. C. 67, 2 Green C. R. 732; *S. v. Pepper*, 68 N. C. 259.

⁹ *S. v. Rankin*, 3 S. C. 438, 1 Green C. R. 510; 4 Bl. Com. 167; *Rex v. White*, 1 Burr. 337; 3 Greenl. Ev., § 186; *S. v. Luce*, 9 Houst. (Del.) 396, 32 Atl. 1076.

¹⁰ *S. v. Houck*, 73 Ind. 37; *Lippman v. City of South Bend*, 84 Ind. 276.

¹¹ *S. v. Wolfe*, 112 N. C. 889, 17 S. E. 528; *Com. v. Hopkins*, 133 Mass. 381.

actually annoyed while passing along the road where the nuisance was located before a conviction can be sustained.¹²

§ 1900. Agent liable with principal.—If the master intrust to his servant the management and control of the business of selling intoxicating liquors, and he carries it on in the absence of his employer, both may be convicted of keeping a nuisance.¹³

ARTICLE II. MATTERS OF DEFENSE.

§ 1901. Intent immaterial.—It matters not what care may be exercised or what motive may prompt one in conducting his business, such motives will not excuse him from the charge.¹⁴ It is not material whether the defendant intended the prejudicial results to others or not, if such result flows from his unlawful act in collecting and depositing the prohibited noisome substances.¹⁵

§ 1902. Greater convenience, no defense.—It is now well settled that the circumstance that the thing complained of furnishes, upon the whole, a greater convenience or benefit to the public than it takes away, is no answer to an indictment for a nuisance.¹⁶

§ 1903. Others contributing.—The fact that the persons or some of them named in the indictment may have voluntarily contributed to creating the nuisance, that is, contributed to the business causing the nuisance, will be no defense or excuse to the defendant.¹⁷

§ 1904. License, or long usage no defense.—A license from the board of health permitting the accused to manufacture "fertilizers and materials," is no protection and no defense, if he, in fact, created a

¹² *S. v. Wolf*, 112 N. C. 889, 895, 17 S. E. 528; *Com. v. Hopkins*, 133 Mass. 381; *S. v. Smith*, 82 Iowa 423, 48 N. W. 727.

¹³ *Com. v. Merriam*, 148 Mass. 427, 19 N. E. 405; *S. v. Bell*, 5 Port. 365; *Com. v. Brady*, 147 Mass. 583, 18 N. E. 568; *Com. v. Mann*, 4 Gray (Mass.) 213.

¹⁴ *S. v. Portland*, 74 Me. 268; *S. v. Boll*, 59 Mo. 321; *Moses v. S.*, 58 Ind. 185.

¹⁵ *Seacord v. P.*, 121 Ill. 631, 13

N. E. 194; 2 McClain Cr. L., § 1176. And see *S. v. Ryan*, 81 Me. 107, 16 Atl. 406.

¹⁶ *Seacord v. P.*, 121 Ill. 636, 13 N. E. 194; *S. v. Kaster*, 35 Iowa 221; *Chute v. S.*, 19 Minn. 271; *Hart v. Mayor*, 9 Wend. (N. Y.) 571; 2 Roscoe Cr. Ev., star p. 816; 3 Greenl. Ev. (Redf. ed.), § 187.

¹⁷ *Seacord v. P.*, 121 Ill. 634, 13 N. E. 194; *Smith v. Phillips*, 8 Phil. (Pa.) 10; *Wood on Nuisance*, 553; 2 McClain Cr. L., § 1175.

public nuisance.¹⁸ An adverse user which is known to have originated without right within the memory of persons now living, will not alone make legal a public nuisance or bar the public of their rights.¹⁹

§ 1905. Direct cause essential.—The thing charged in the indictment as being a nuisance, must be the direct and proximate cause of the nuisance, otherwise it is no offense.²⁰

§ 1906. Hides and tallow in city.—It is not sufficient to say that the accused violated the ordinance by maintaining a nuisance within the limits of the city, in this, that the defendant kept a large quantity of hides, tallow, and other substances which emitted a disagreeable odor.²¹

ARTICLE III. INDICTMENT.

§ 1907. Allegation of facts.—When a thing is not of itself a nuisance, but becomes so by its special circumstances, this must be alleged in the indictment. Thus, if the nuisance is a public show, corrupting to the public morals, so much of the facts of its indecency, barbarity, or the like must be stated as will enable the court to discern its indictable character; so, for instance, to allege the keeping of a bawdy-house sufficiently shows its indictable character. Keeping a “disorderly house” is a common law nuisance, and it is necessary that the indictment should contain facts to show that a common nuisance has been created or permitted. This is done by alleging such facts as show that the accused maintains, promotes or continues what is noisome and offensive or hurtful to the public, or is a public outrage against common decency or common morality, plainly tending to corrupt the morals, honesty and good habits of the people.²²

¹⁸ *Garrett v. S.*, 49 N. J. L. 94, 693, 7 Atl. 29, 7 Am. C. R. 470. See *P. v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285.

¹⁹ *S. v. Franklin Falls Co.*, 49 N. H. 254; *Douglass v. S.*, 4 Wis. 403; *P. v. Detroit White Lead Works*, 82 Mich. 471, 46 N. W. 735; *Com. v. Upton*, 6 Gray (Mass.) 473; *S. v. Rankin*, 3 S. C. 438, 1 Green C. R. 511; *Mills v. Hall*, 9 Wend. (N. Y.) 315.

²⁰ *S. v. Holman*, 104 N. C. 861, 10 S. E. 758.

²¹ *Lippman v. City of South Bend*, 84 Ind. 276.

²² *Seacord v. P.*, 121 Ill. 629, 13 N. E. 194; *P. v. Rosenberg*, 138 N. Y. 410, 34 N. E. 285; *Com. v. Davis*, 11 Gray (Mass.) 48; 2 Bish. Cr. Proc. (3d ed.), § 865; *S. v. Dame*, 60 N. H. 479, 4 Am. C. R. 445; 2 Bish. Cr. L., § 813.

²³ 3 Greenl. Ev., § 185; *Beard v. S.*, 71 Md. 275, 17 Atl. 1044, 8 Am. C. R. 174.

§ 1908. **Describing location.**—In an indictment for keeping or maintaining a nuisance in a building, its location need not be specifically described. It is sufficient if it is alleged to be in a certain town in the county.²⁴ In charging a nuisance to be so near a public road as to annoy persons traveling thereon, it is only necessary to state in the indictment the location of the nuisance, without describing the road by its termini or otherwise.²⁵

§ 1909. **Conclusion of indictment.**—If the indictment, charging a nuisance, states all the essential facts constituting the offense under the law, it is sufficient and need not contain the words, "to the common nuisance of all the good citizens of the commonwealth residing in the neighborhood or passing by" the place of such nuisance.²⁶

§ 1910. **Duplicity.**—It is proper to allege in the indictment the various acts enumerated in the statute, which go to make up the offense.²⁷

§ 1911. **Alleging profanity.**—The defendant was charged in the indictment that he did at divers times in the streets of the town of Lumberton, "profanely curse and swear and take the name of Almighty God in vain, to the common nuisance of the good people of the state then and there being and residing." Held that it stated no offense.²⁸

§ 1912. **Sufficiency, as to abating.**—An order abating a nuisance not being a necessary part of the judgment, an indictment need not be drawn in such manner as will warrant an order abating the nuisance.²⁹

ARTICLE IV. ABATING; SUPPRESSING.

§ 1913. **Private person abating.**—A private person may of his own motion, abate a public nuisance where the existence thereof is a source

²⁴ *Com. v. Tolman*, 149 Mass. 229, 21 N. E. 377; *Seacord v. P.*, 121 Ill. 629, 13 N. E. 194; *S. v. Cox*, 82 Me. 417, 19 Atl. 857.

²⁵ *Com. v. McCormick*, 5 Pa. Dist. R. 535.

²⁶ *Com. v. Enright*, 17 Ky. L. 1183, 33 S. W. 1111; *Com. v. Goulding*, 135

Mass. 552; *Com. v. Howe*, 13 Gray (Mass.) 26; 3 Greenl. Ev., § 185.

²⁷ *S. v. Spurbeck*, 44 Iowa 667; *S. v. Hart*, 34 Me. 36.

²⁸ *S. v. Powell*, 70 N. C. 67, 2 Green C. R. 732.

²⁹ *S. v. Barnes*, 20 R. I. 525, 40 Atl. 374. See *Com. v. Megibben Co.*, 101 Ky. 195, 19 Ky. L. 291, 40 S. W. 694.

of special injury to him, provided he can do so without a breach of the peace.³⁰ But a private person can not of his own motion abate a strictly public nuisance if it is not of special injury to him.³¹

§ 1914. Power to suppress.—Under the English municipal corporation act, where the powers conferred are similar to those conferred by statute, it is held that the power to suppress nuisances, is confined to the suppression and prohibition of acts which, if done, must necessarily and inevitably cause a nuisance, and does not empower the city council to impose penalties for the doing of things which may or may not be a nuisance according to circumstances.³²

³⁰ *S. v. White*, 18 R. I. 473, 28 Atl. 968, 9 Am. C. R. 76; *S. v. Flannagan*, 67 Ind. 140; *Clark v. Lake St. Clair*, etc., Ice Co., 24 Mich. 508; *S. v. Parrott*, 71 N. C. 311, 2 Green C. R. 756; *Day v. Day*, 4 Md. 262, 270; 3 Bl. Com. 5.

³¹ *S. v. White*, 18 R. I. 473, 28 Atl. 968, 9 Am. C. R. 76; *Brown v. Perkins*, 12 Gray (Mass.) 89; *S. v. Parrott*, 71 N. C. 311, 2 Green C. R. 756;

S. v. Smith, 82 Iowa 423, 48 N. W. 727.

³² *Poyer v. Village of DesPlaines*, 18 Ill. App. 225, 5 Am. C. R. 573; *Darst v. P.*, 51 Ill. 286; *S. v. Carpenter*, 60 Conn. 97, 22 Atl. 497; *P. v. Hanrahan*, 75 Mich. 611, 42 N. W. 1124; *Welch v. Stowell*, 2 Doug. (Mich.) 332; *Cronin v. P.*, 82 N. Y. 318; *S. v. Earnhardt*, 107 N. C. 789, 12 S. E. 426.

PART SIX

OFFENSES AGAINST PUBLIC MORALS

CHAPTER XLVI.

ABORTION.

ART.	I. Essential Elements,	§§ 1915-1919
	II. Matters of Defense,	§§ 1920-1924
	III. Indictment,	§§ 1925-1930
	IV. Evidence; Variance,	§§ 1931-1946
	V. Venue; Verdict,	§§ 1947-1948

ARTICLE I. ESSENTIAL ELEMENTS.

§ 1915. **Object of statute.**—The abortion statute aims at professional abortionists and at those who by the use of any means intend to produce abortions, but not at those who with no such purpose in view, should by some violent act produce such a result.¹

§ 1916. **Death resulting is murder.**—“If a woman be with child and any person gives her a potion to destroy the child within her and she takes it and it works so strongly that it kills her, this is murder; for it was given not to cure her of a disease, but unlawfully to destroy her child within her, and therefore he that gives a potion to this end must take the hazard, and if it kill the mother it is murder.”²

¹ Slattery v. P., 76 Ill. 219; 2 Mc- Moore, 25 Iowa 128, 95 Am. D. 776; Clain Cr. L., § 1146. S. v. Dickinson, 41 Wis. 299, 2 Am.

² 1 Hale P. C. 430; 1 East P. C. C. R. 9.
230; Smith v. S., 33 Me. 48; S. v.

§ 1917. **"With quick child."**—It is said by most respectable authorities that the procuring or attempting to procure a miscarriage or abortion was not an offense at common law, if the pregnant woman had not herself felt the child alive and quick within her, and consented to the act.³ "Quick with child" is having conceived. "With quick child" is when the child has quickened.⁴

§ 1918. **Poisonous or noxious thing; "savin."**—The thing administered or prescribed to procure the miscarriage of a woman then pregnant with child, must be noxious in its nature; but it is not necessary to prove that it will produce that effect. The words of the statute are any "poison or other noxious thing."⁵ But it has been held, on a charge of administering to a woman pregnant with child, and advising her to take or swallow a poison, drug, medicine or noxious thing, with intent to cause a miscarriage, it does not devolve upon the prosecution to allege or prove that the drug or medicine given was a "noxious thing."⁶ A small quantity of savin, not sufficient to do more than produce a little disturbance in the stomach, is not a noxious thing within the meaning of the statute.⁷

ARTICLE II. MATTERS OF DEFENSE.

§ 1919. **The mother not accomplice.**—It is well settled that the person on whom the operation for procuring an abortion is alleged to have been performed, is not an accomplice.⁸

§ 1920. **Drug or powder harmless.**—Upon an indictment charging the defendant with depositing in the mail a certain powder designed

³ S. v. Dickinson, 41 Wis. 299, 2 Am. C. R. 9 (citing Com. v. Bangs, 9 Mass. 387; Smith v. S., 33 Me. 48; Com. v. Parker, 9 Metc. (Mass.) 263, 43 Am. Dec. 396; S. v. Cooper, 22 N. J. L. 52, 51 Am. D. 248; P. v. McDowell, 63 Mich. 229, 30 N. W. 68; Mitchell v. Com., 78 Ky. 204, 39 Am. R. 227. *Contra*, Mills v. Com., 1 Harris (Pa.) 631-4; Com. v. Wood, 77 Mass. 85; S. v. Fitzgerald, 49 Iowa 260, 31 Am. R. 148. See Com. v. Demain, 6 Pa. L. J. 29; S. v. Slagle, 82 N. C. 653; Wilson v. S., 2 Ohio St. 319; Underhill Cr. Ev., § 344.

⁴ Reg. v. Wycherley, 8 C. & P. 262. See Rex v. Phillips, 3 Camp. 77; Taylor v. S., 105 Ga. 846, 33 S. E. 190 ("quick").

⁵ S. v. Geddicke, 43 N. J. L. 86, 4 Am. C. R. 9; Powe v. S., 48 N. J. L. 34, 2 Atl. 662. See S. v. Morrow, 40 S. C. 221, 18 S. E. 853; Reg. v. Hen-nah, 13 Cox C. C. 548.

⁶ Com. v. Morrison, 16 Gray (Mass.) 224; S. v. Vawter, 7 Blackf. (Ind.) 592.

⁷ Q. v. Perry, 2 Cox C. C. 223; Reg. v. Isaacs, L. & C. 220.

⁸ Com. v. Follansbee, 155 Mass. 274, 277, 29 N. E. 471; Com. v. Boynton, 116 Mass. 343; Com. v. Brown, 121 Mass. 69; S. v. Owens, 22 Minn. 238; Dunn v. P., 29 N. Y. 533. See P. v. Murphy, 101 N. Y. 126, 4 N. E. 326; Underhill Cr. Ev., § 346. *Contra*, P. v. Josselyn, 39 Cal. 393.

and intended for the prevention of conception or procuring of abortion, he can not show as a matter of defense that the powder which he deposited in the mail would not in fact have any tendency to prevent conception or procure abortion, and that its harmless character was known to him.⁹

§ 1921. **Woman consenting.**—That the woman consented that an abortion might be performed on her, is no defense.¹⁰

§ 1922. **Woman threatening suicide.**—That the woman threatened to commit suicide unless relieved of the child, is no justification.¹¹

§ 1923. **Merely advising no offense.**—Merely advising a woman to take a noxious drug or medicine with intent to procure a miscarriage is not an offense; the advice must be acted upon before the offense is complete.¹²

§ 1924. **Sending drug by mail.**—Sending a drug by mail to a pregnant woman to be taken by her for the purpose of producing a miscarriage is evidence tending to prove an administration of such drug.¹³

ARTICLE III. INDICTMENT.

§ 1925. **Name of drug.**—Under the statute, it is not necessary to state the name of the medicine, drug or substance in the indictment, nor describe it as a noxious thing.¹⁴ If the drug or instrument be unknown it may be alleged in the indictment as unknown.¹⁵

§ 1926. **Administering drug.**—An indictment charging in the language of the statute that the defendant did unlawfully and felon-

⁹ U. S. v. Bott, 11 Blatchf. 346, 2 Green C. R. 239. See Underhill Cr. Ev., § 345, citing Com. v. Corkin, 136 Mass. 429; P. v. Seaman, 107 Mich. 348, 65 N. W. 203. Further as to using the mails for such purpose, see Jones v. S., 70 Md. 326, 17 Atl. 89.

¹⁰ Com. v. Snow, 116 Mass. 47; Com. v. Wood, 77 Mass. 85.

¹¹ Hatchard v. S., 79 Wis. 357, 48 N. W. 330.

¹² Lamb v. S., 67 Md. 524, 10 Atl. 208, 298; P. v. Phelps, 133 N. Y. 267, 30 N. E. 1012. See Dougherty v. P., 1 Colo. 514.

¹³ S. v. Moothart, 109 Iowa 130, 80 N. W. 301.

¹⁴ S. v. Vawter, 7 Blackf. (Ind.) 592; S. v. Fitzgerald, 49 Iowa 260, 31 Am. R. 148, 3 Am. C. R. 2; Dougherty v. P., 1 Colo. 514; Watson v. S., 9 Tex. App. 237; S. v. Van Houten, 37 Mo. 357; S. v. Reed, 45 Ark. 333; Reg. v. Goodall, 2 Cox C. C. 41. See Cave v. S., 33 Tex. Cr. 335, 26 S. W. 503; S. v. Morrow, 40 S. C. 221, 18 S. E. 853.

¹⁵ Baker v. P., 105 Ill. 452; Com. v. Thompson, 159 Mass. 56, 33 N. E. 1111; S. v. Wood, 53 N. H. 434.

iously procure the woman to take the drug mentioned, with intent to cause a miscarriage, is sufficient. It is not necessary to allege that the woman swallowed the drug.¹⁷ The offense is complete as soon as the medicine is administered with the intent alleged.¹⁸

§ 1927. **Pregnancy immaterial.**—Under the statute it is not necessary to allege in the indictment that the woman was pregnant or that the defendant knew or believed she was pregnant.¹⁹

§ 1928. **Manner of using instrument.**—An indictment alleged that the defendant “did administer and use on” and “did use on and administer to” the female a certain instrument, without stating how or in what manner the instrument was used “or administered,” whether by forcing, thrusting and inserting said instrument into the private parts or in some other manner. Held fatally defective.²⁰ The indictment alleging that the defendant “did use a certain instrument, the name of which instrument is to the jurors unknown, by forcing and thrusting the instrument aforesaid into the body and womb,” with the intent to procure a miscarriage, is sufficient, where the instrument is unknown.²¹

§ 1929. **Alleging intent—“Attempt.”**—The statute of Illinois is as follows: “Whoever by means of any instrument, medicine, drug or other means whatever, causes any woman pregnant with child, to abort or miscarry or attempts to procure or produce an abortion or miscarriage unless the same were done to preserve the mother’s life,

¹⁷ S. v. Owens, 22 Minn. 238; S. v. Murphy, 27 N. J. L. 112; S. v. Moot-hart, 109 Iowa 130, 80 N. W. 301. See Dougherty v. P., 1 Colo. 514.

¹⁸ S. v. Hollenbeck, 36 Iowa 112.

¹⁹ Com. v. Tibbetts, 157 Mass. 519, 32 N. E. 910; Com. v. Taylor, 132 Mass. 261. See S. v. Howard, 32 Vt. 380; Com. v. Noble, 165 Mass. 13, 42 N. E. 328; Com. v. Surles, 165 Mass. 59, 42 N. E. 502; Reg. v. Titley, 14 Cox C. C. 502. But see Powe v. S., 48 N. J. L. 34, 2 Atl. 662. See Reg. v. Goodall, 2 Cox C. C. 41. A conviction for a conspiracy to commit an abortion on a woman who believed herself to be with child will be sustained, though in fact she was not pregnant: Reg. v. Whitchurch,

L. R. 24 Q. B. D. 420, 8 Am. C. R. 1. See Reg. v. Goodchild, 2 C. & K. 293.

²⁰ Cochran v. P., 175 Ill. 31, 51 N. E. 845. Indictment held sufficient: S. v. Sherwood, 75 Ind. 15; P. v. Stockham, 1 Park. Cr. (N. Y.) 424; Holland v. S., 131 Ind. 568, 31 N. E. 359; Baker v. P., 105 Ill. 452; Com. v. Wood, 77 Mass. 85; Navarro v. S., 24 Tex. App. 378, 6 S. W. 542; Rhodes v. S., 128 Ind. 189, 27 N. E. 866. Form: Howard v. P., 185 Ill. 552, 57 N. E. 441; S. v. Quinn, 2 Pen. (Del.) 339, 45 Atl. 544. Indictment not sufficient: S. v. Crook, 16 Utah 212, 51 Pac. 1091.

²¹ Com. v. Jackson, 81 Mass. 187; Com. v. Snow, 116 Mass. 47.

shall be imprisoned in the penitentiary," from one to ten years. An indictment is not defective, under this statute, in not alleging that the act was done or drug given "with intent" to produce an abortion or miscarriage. The word "attempt" in the statute necessarily includes intent. The indictment properly alleging an "attempt" is, therefore, sufficient.²²

§ 1930. Exceptions, when to negative.—Where an act is made criminal, with exceptions embraced in the same clause of the statute which defines the offense so as to be descriptive of the offense, it is necessary to negative the exception in the indictment, but this need not be done in the exact words of the statute; equivalent words will be sufficient. The words, "it not then and there being necessary to cause such miscarriage for the preservation of the life of the mother," is equivalent to, "unless the same were done as necessary for the preservation of the mother's life."²³ But "maliciously and without lawful justification," is not equivalent to, "unless the same is necessary to preserve her life."²⁴

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1931. Necessary to save life.—The prosecution will not be required to prove that the abortion was not necessary to save the life of the mother; that is a matter of defense.²⁵ The burden is on the defendant to show that the abortion was necessary to save the life of the woman, but he is not required to establish this fact beyond a reasonable doubt.²⁶

§ 1932. Correspondence between parties.—Any correspondence between the defendant and the woman on whom an abortion was at-

²² *Scott v. P.*, 141 Ill. 195, 204, 30 N. E. 329; *S. v. Lee*, 69 Conn. 186, 37 Atl. 75; *S. v. Stevenson*, 68 Vt. 529, 35 Atl. 470. See *S. v. Montgomery*, 71 Iowa 630, 33 N. W. 143; *Smith v. S.*, 33 Me. 48.

²³ *Beasley v. P.*, 89 Ill. 571; *Willey v. S.*, 52 Ind. 246; *S. v. McIntyre*, 19 Minn. 93; *S. v. Aiken*, 109 Iowa 643, 80 N. W. 1073.

²⁴ *S. v. Stokes*, 54 Vt. 179. See *S. v. Meek*, 70 Mo. 355, 35 Am. R. 427; *S. v. Leeper*, 70 Iowa 748, 30 N. W. 501.

²⁵ *P. v. McGonegal*, 62 Hun. (N. Y.)

622, 17 N. Y. Supp. 147; *Moody v. S.*, 17 Ohio St. 110. See *S. v. Watson*, 30 Kan. 281, 1 Pac. 770; *Hatchard v. S.*, 79 Wis. 357, 48 N. W. 380. *Contra*, *S. v. Glass*, 5 Or. 73; *S. v. Aiken*, 109 Iowa 643, 80 N. W. 1073; *S. v. Clements*, 15 Or. 237, 14 Pac. 410; *S. v. Schuerman*, 70 Mo. App. 518.

²⁶ *S. v. Stevenson*, 68 Vt. 529, 35 Atl. 470; *Underhill Cr. Ev.*, § 347, citing *S. v. McCoy*, 15 Utah 136, 49 Pac. 420; *S. v. Lee*, 69 Conn. 186, 37 Atl. 75.

tempted, relating to the means used to produce a miscarriage, is competent.²⁷

§ 1933. Defendant furnishing means.—That the defendant furnished the woman with the means of producing an abortion and gave her instructions how to use or apply the means so furnished, may be shown in evidence.²⁸

§ 1934. Several attempts competent.—Different attempts of the accused to commit an abortion on the same woman at different times, are competent, as tending to show his knowledge of the woman's pregnancy and his intention to commit an abortion upon her, whether such attempts were prior or subsequent to the particular act charged in the indictment.²⁹

§ 1935. Statements of deceased; *res gestae*.—Statements made by the deceased which are part of the *res gestae* are competent, such as that she had found out that she was in the family way and that she had called to see the defendant about it; that she was going to get medicine from him; that she had made arrangements with him to have an operation.³⁰ But dying declarations of the deceased which are not part of the *res gestae* are incompetent.^{30a}

§ 1936. Declarations of co-conspirator.—If the woman not only consents to the operation, but actually seeks and adopts means in furtherance of it, her declarations may be admitted against the accused, as the declarations against a fellow conspirator made to promote the common design.³¹

§ 1937. Woman's statement to physician.—Statements made by the woman to a physician at the time of his examination as to her bodily feelings and symptoms of pregnancy are admissible in evidence as

²⁷ *S. v. Moothart*, 109 Iowa 130, 80 N. W. 301. See *Com. v. Mitchell*, 6 Pa. Supr. 369, 41 W. N. C. 455.

²⁸ *Jones v. S.*, 70 Md. 326, 17 Atl. 89; *Com. v. Blair*, 126 Mass. 40. See *McCaughy v. S.* (Ind. 1901), 59 N. E. 169.

²⁹ *Scott v. P.*, 141 Ill. 195, 213, 30 N. E. 329; *Com. v. Corkin*, 136 Mass. 429; *King v. S.*, 35 Tex. Cr. 472, 34 S. W. 282; 2 *McClain Cr. L.*, § 1151; *S. v. Smith*, 99 Iowa 26, 68 N. W. 428; *Underhill Cr. Ev.*, § 345; *Lamb v. S.*, 66 Md. 285, 287, 7 Atl. 399.

³⁰ *S. v. Dickinson*, 41 Wis. 299, 2 Am. C. R. 3; *S. v. Pearce*, 56 Minn. 226, 57 N. W. 652, 1065; *Rhodes v. S.*, 128 Ind. 189, 27 N. E. 866; *Com. v. Leach*, 156 Mass. 99, 30 N. E. 163; *P. v. Davis*, 56 N. Y. 96. See *Underhill Cr. Ev.*, § 348; *P. v. Olmstead*, 30 Mich. 431.

^{30a} *S. v. Meyer*, 64 N. J. L. 382, 45 Atl. 779, 47 Atl. 486.

³¹ *Underhill Cr. Ev.*, § 348, citing *Solander v. P.*, 2 Colo. 48, 64.

part of the facts on which his opinion is founded.³² A physician who attended the woman after the alleged abortion, was examined as a witness, and on being asked his opinion whether the birth occurred from natural or artificial causes, said that an abortion had been committed; but his opinion was based on what the woman said to him together with his personal examination of her. Held competent.³³

§ 1938. **Woman's condition; defendant's action.**—Evidence of the woman's physical condition and treatment, her relations with the defendant, both before and after the alleged abortion, a detailed history of her illness from the beginning to the end, are all proper matters of evidence; also anything he may have said or done in connection therewith may be shown in evidence.³⁴

§ 1939. **Hearsay evidence.**—Two persons were jointly indicted for attempting to produce an abortion. One was tried alone. A woman testified for the prosecution that the defendant, who was not put on trial, told her at her house that he had got medicine for the woman on whom the abortion was attempted and that the other defendant told him to get it and he would pay for it. Held incompetent and error.³⁵

§ 1940. **Result of post-mortem.**—The result of a *post-mortem* examination by a competent physician is proper to be given in evidence; and his opinion in relation to any instrument, drug or means used in procuring an abortion, or whether an abortion, in fact, had been procured, causing the death of the woman, may be given in evidence.³⁶

§ 1941. **Privilege of woman.**—It has been held that a physician who has visited and treated a woman professionally after an alleged

³² *S. v. Gedicke*, 43 N. J. L. 86, 4 Am. C. R. 7; *Barber v. Merriam*, 11 Allen (Mass.) 322; 1 Greenl. Ev., § 102.

³³ *P. v. Murphy*, 101 N. Y. 126, 4 N. E. 326, 6 Am. C. R. 195.

³⁴ *P. v. Aiken*, 66 Mich. 460, 33 N. W. 821; *Com. v. Wood*, 11 Gray (Mass.) 85; *Com. v. Follansbee*, 155 Mass. 274, 29 N. E. 471.

³⁵ *Samples v. P.* 121 Ill. 550, 13 N. E. 536. See *S. v. Gunn*, 106 Iowa 120, 76 N. W. 510.

³⁶ *Com. v. Leach*, 156 Mass. 99, 30 N. E. 163; *Hauk v. S.*, 148 Ind. 238, 46 N. E. 127, 47 N. E. 465; *Williams*

v. S. (Tex.), 19 S. W. 897; *Com. v. Thompson*, 159 Mass. 56, 33 N. E. 1111; *Underhill Cr. Ev.*, § 350. The facts in the following cases held sufficient to sustain convictions: *Earl v. P.*, 99 Ill. 124; *S. v. Montgomery*, 71 Iowa 630, 33 N. W. 143; *Com. v. Drake*, 124 Mass. 21; *P. v. Van Zile*, 73 Hun 534, 26 N. Y. Supp. 390; *Williams v. S.* (Tex.), 19 S. W. 897. See also *Reg. v. Hollis*, 12 Cox C. C. 463, 1 Green C. R. 142. Held not sufficient: *Slattery v. P.*, 76 Ill. 219; *S. v. Forsythe*, 78 Iowa 595, 43 N. W. 548; *Cook v. P.*, 177 Ill. 146, 52 N. E. 273.

abortion, will not be permitted to disclose any fact he may have learned while attending her, during the time she is living; but he may testify if she is dead.³⁸

§ 1942. Accomplice, when not.—An intimate friend of the deceased, knowing her pregnancy and desire for relief, by merely accompanying her to the house of the accused, without aiding or advising the commission of the crime, is not an accomplice.³⁹

§ 1943. Secreting dead body of child.—Where the evidence showed the birth of a child and that while alive its mother endeavored to conceal its birth by depositing it alive in a field, leaving it to die from exposure, it was held that the evidence would not support a conviction for the secret disposition of the dead body of her child.⁴⁰ The indictment must aver and the proof show that the child was dead at the time it was concealed.⁴¹

§ 1944. Concealing birth.—A concealment may be attempted by one who is unable to keep the knowledge of the fact from others whose assistance is necessary and upon whom secrecy is enjoined.⁴²

§ 1945. Several instruments used.—Where an indictment alleges that an attempt had been made to produce a miscarriage with several different instruments, it is not necessary to prove that the defendant used all the instruments described. Proof of the use of one is sufficient.⁴³

§ 1946. Variance—Force or consent; drug or violence.—An information charging that the act of abortion was performed by "force and violence," is supported by evidence that the woman gave her consent to the act causing miscarriage.⁴⁴ If, in fact, an abortion was caused by the use of instruments involving the application of force rather than by drugs taken as alleged, yet if the defendant advised the

³⁸ Underhill Cr. Ev., § 351, citing *P. v. Murphy*, 101 N. Y. 126, 4 N. E. 326; *Pierson v. P.*, 79 N. Y. 424.

³⁹ *P. v. McGonegal*, 136 N. Y. 62, 32 N. E. 616, 42 N. Y. St. 307, 62 Hun 622, 17 N. Y. Supp. 147.

⁴⁰ *Reg. v. May*, 10 Cox C. C. 448.

⁴¹ *Douglass v. Com.*, 8 Watts (Pa.) 535; *Boyles v. Com.*, 2 S. & R. (Pa.) 40.

⁴² *S. v. Hill*, 58 N. H. 475; *Reg. v.*

George, 11 Cox C. C. 41. See the following cases on the concealment of the birth or death of a child: *Reg. v. Morris*, 2 Cox C. C. 489; *S. v. Kirby*, 57 Me. 30.

⁴³ *Scott v. P.*, 141 Ill. 195, 30 N. E. 229; 2 McClain Cr. L., § 1150. See *S. v. Lilly (W. Va.)*, 35 S. E. 837.

⁴⁴ *P. v. Abbott*, 116 Mich. 263, 74 N. W. 529.

use of the drugs, a conviction should be sustained; the offense consists of the use of the means mentioned.⁴⁵

ARTICLE V. VENUE; VERDICT.

§ 1947. **Venue, jurisdiction.**—When medicine is administered with intent to procure a miscarriage the offense is complete regardless of the result. The offense charged in the indictment being completed by administering the medicine with the intent specified, in a county named, it follows that the court in another county would have no jurisdiction to try the case.⁴⁶

§ 1948. **Death resulting—Manslaughter.**—If death be the result of an attempt to produce an abortion, a conviction for manslaughter will be sustained, though the statute provides that the person so offending shall be deemed guilty of murder.⁴⁷ If the woman was pregnant and the accused unlawfully produced an abortion, and sickness ensued from the unlawful act, resulting in death, a verdict of manslaughter will be sustained; and it is not material whether the woman was quick with child or not.⁴⁸

⁴⁵ S. v. Morrow, 40 S. C. 221, 18 S. E. 853. 9 S. W. 509, 810. See S. v. Dickinson, 41 Wis. 299; Howard v. P., 185 Ill. 552, 57 N. E. 441.

⁴⁶ S. v. Jones, 36 Iowa 608; S. v. Buster, 90 Mo. 514, 2 S. W. 834; S. v. Hollenbeck, 36 Iowa 112. ⁴⁸ Yundt v. P., 65 Ill. 374; Peoples v. Com., 87 Ky. 487, 10 Ky. L. 517, 9 S. W. 509, 810; S. v. McNab, 20

⁴⁷ Earll v. P., 73 Ill. 332; Peoples v. Com., 87 Ky. 487, 10 Ky. L. 517, N. H. 160.

CHAPTER XLVII.

ADULTERY.

ART.	I. Definition and Elements,	§§ 1949-1952
	II. Matters of Defense,	§§ 1953-1957
	III. Indictment,	§§ 1958-1964
	IV. Evidence; Variance; Witnesses,	§§ 1965-1978

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1949. **What constitutes adultery.**—The offense of adultery consists in living in a state of open and notorious cohabitation and adultery. “Notorious cohabitation” is a material element of the offense.¹ The “living together” must be open and notorious, to constitute adultery under the statute.² If a married man lives openly and notoriously with a married or an unmarried woman, he is guilty of the offense of adultery.³

¹ P. v. Gates, 46 Cal. 52, 2 Green C. R. 425; Wright v. S., 5 Blackf. (Ind.) 358, 35 Am. D. 126; Ex parte Thomas, 103 Cal. 497, 37 Pac. 514; S. v. Johnson, 69 Ind. 85; Carrotti v. S., 42 Miss. 334, 97 Am. D. 465; S. v. Chandler, 132 Mo. 155, 33 S. W. 797; Wright v. S., 108 Ala. 60, 18 So. 941; Schoudel v. S., 57 N. J. L. 209, 30 Atl. 598; Quartemas v. S., 48 Ala. 269.

² Miner v. P., 58 Ill. 60, 1 Green C. R. 656; Bird v. S., 27 Tex. App. 635, 11 S. W. 641; Clouser v. Clapper, 59 Ind. 548; S. v. Crouner, 56 Mo. 147, 2 Green C. R. 616; S. v. Marvin, 12 Iowa 499; P. v. Gates, 46 Cal. 52; Kinard v. S., 57 Miss. 132;

Searls v. P., 13 Ill. 597; Taylor v. S., 36 Ark. 84; S. v. Fellows, 50 Wis. 65, 6 N. W. 239; Walker v. S., 104 Ala. 56, 16 So. 7; S. v. Miller, 42 W. Va. 215, 24 S. E. 882; S. v. Donovan, 61 Iowa 278, 16 N. W. 130; S. v. Taylor, 58 N. H. 331; Underhill Cr. Ev., § 380. See Sweeney v. S., 59 Neb. 269, 80 N. W. 815.

³ S. v. Fellows, 50 Wis. 65, 6 N. W. 239; S. v. Hutchinson, 36 Me. 261; Com. v. Call, 38 Mass. 509, 32 Am. D. 284; Kendrick v. S., 100 Ga. 360, 28 S. E. 120; S. v. Taylor, 58 N. H. 331; Com. v. Lafferty, 6 Gratt. (Va.) 672. See S. v. Chandler, 96 Ind. 591; S. v. Armstrong, 4 Minn. 335; S. v. Lash, 16 N. J. L. 380, 32 Am. D. 397.

§ 1950. Marriage, essential.—It is essential that one of the parties must have been lawfully married to another person, at the time of the adulterous conduct.⁴

§ 1951. Consent of woman, not essential.—The man may be guilty of adultery, although at the time of having sexual intercourse he did not have the consent of the woman.⁵

§ 1952. Fornication—What constitutes it.—To sustain a charge of fornication it must appear that the defendant was single and unmarried, for the meaning of the term "fornication" is carnal and illicit intercourse of an unmarried person with the opposite sex.⁶ On a charge of adultery against a woman with a man to whom she had been married, where the evidence shows that he had married another woman, the state must show that the defendant knew of such former marriage.⁷

ARTICLE II. MATTERS OF DEFENSE.

§ 1953. Advice—When no defense.—The defendants applied to a justice of the peace for advice as to whether they had a right to marry each other, informing the justice that the husband of the woman had married another woman. The justice advised them that under that state of facts they could lawfully marry, and relying upon that advice they were married. Held no defense to a charge of adultery.⁸

§ 1954. Mere familiarities; merely soliciting.—The crime of adultery can not be sustained by proof of familiarities or by a single act of illicit intercourse or a number of such acts without living together; nor would living together without illicit intercourse constitute the

⁴ Webb v. S., 24 Tex. App. 164, 5 S. W. 651; Ter. v. Whitcomb, 1 Mont. 359; Banks v. S., 96 Ala. 78, 11 So. 404; S. v. Rood, 12 Vt. 396; White v. S., 74 Ala. 31; S. v. Winkley, 14 N. H. 480; Buchanan v. S., 55 Ala. 154; Hull v. Hull, 2 Strob. Eq. (S. C.) 174.

⁵ Com. v. Bakeman, 131 Mass. 577, 41 Am. R. 248; Mathews v. S., 101 Ga. 547, 29 S. E. 424; S. v. Donovan, 61 Iowa 278, 16 N. W. 130; S. v. Sanders, 30 Iowa 582.

⁶ Ter. v. Whitcomb, 1 Mont. 359,

2 Am. C. R. 160; S. v. Chandler, 96 Ind. 591; Kendrick v. S., 100 Ga. 360, 28 S. E. 120; Hood v. S., 56 Ind. 263, 2 Am. C. R. 172, 26 Am. R. 21.

⁷ Banks v. S., 96 Ala. 78, 11 So. 404. See S. v. Cody, 111 N. C. 725, 16 S. E. 408; Vaughan v. S., 83 Ala. 55, 3 So. 530. But see Owens v. S., 94 Ala. 97, 10 So. 669.

⁸ S. v. Goodenow, 65 Me. 30, 1 Am. C. R. 44; S. v. Whitcomb, 52 Iowa 85, 2 N. W. 970, 35 Am. R. 258; Cutter v. S., 36 N. J. L. 125.

offense.⁹ Merely soliciting another to commit adultery is not an offense.¹⁰

§ 1955. Marrying after divorce.—A man who has been divorced for his own fault, will not be guilty of adultery by marrying and living with a second wife.¹¹

§ 1956. Void divorce, no defense.—A decree of divorce entered by a court having no jurisdiction, is void; such decree affords no protection to one charged with the offense of adultery.¹²

§ 1957. Proof showing bigamy.—It is no defense to a charge of adultery that the evidence may show the defendants are guilty of bigamy.¹³

ARTICLE III. INDICTMENT.

§ 1958. Statutory words sufficient.—An indictment substantially in the language of the statute, whether in the precise words or not, is sufficient.¹⁴

§ 1959. Marriage essential.—Adultery being criminal intercourse between a married person and one of the opposite sex whether married or single, the marriage of such person must be alleged and proven.¹⁵ But it is not necessary to allege to whom the party is married.¹⁶ Nor is it necessary to allege that the persons committing the offense were male and female.¹⁷

⁹ *Miner v. P.*, 58 Ill. 60; *Crane v. P.*, 168 Ill. 406, 48 N. E. 54; *Hilton v. S.* (Tex. Cr.), 53 S. W. 113; *Mitten v. S.*, 24 Tex. App. 346, 6 S. W. 196; *Sweeney v. S.*, 59 Neb. 269, 80 N. W. 815; *Taylor v. S.*, 36 Ark. 84, 4 Am. C. R. 30; *S. v. Crowner*, 56 Mo. 147, 2 Green C. R. 617; *S. v. Coffee*, 75 Mo. App. 88; *S. v. Wiltsey*, 103 Iowa 54, 72 N. W. 415; *Smith v. S.*, 39 Ala. 554; *Bodiford v. S.*, 86 Ala. 67, 5 So. 559; *Clouser v. Clapper*, 59 Ind. 548. See *S. v. Byrum* (Neb.), 83 N. W. 207.

¹⁰ *S. v. Butler*, 8 Wash. 194, 35 Pac. 1093; *Smith v. Com.*, 54 Pa. St. 209, 93 Am. D. 686. See *S. v. Avery*, 7 Conn. 267, 18 Am. D. 105.

¹¹ *S. v. Weatherly*, 43 Me. 258, 69

Am. D. 59; *Com. v. Putnam*, 1 Pick. (Mass.) 136.

¹² *S. v. Fleak*, 54 Iowa 429, 6 N. W. 689. See *S. v. Watson*, 20 R. I. 354, 39 Atl. 193.

¹³ *Owens v. S.*, 94 Ala. 97, 10 So. 669; *Hildreth v. S.*, 19 Tex. App. 195.

¹⁴ *Crane v. P.*, 168 Ill. 396, 48 N. E. 54; *S. v. Tally*, 74 N. C. 322.

¹⁵ *Miner v. P.*, 58 Ill. 60; *Tucker v. S.*, 35 Tex. 113; *Ter. v. Whitcomb*, 1 Mont. 358.

¹⁶ *Hildreth v. S.*, 19 Tex. App. 195; *Moore v. Com.*, 6 Metc. (Mass.) 243; *Davis v. Com.* (Pa.), 7 Atl. 194.

¹⁷ *S. v. Lashley*, 84 N. C. 755; *McLeod v. S.*, 35 Ala. 397. See *Holland v. S.*, 14 Tex. App. 182.

§ 1960. **Joint indictment.**—The law is well settled that the parties to the crime of adultery may be jointly indicted.¹⁸

§ 1961. **Joining different offenses.**—Several distinct acts of adultery may be charged in different counts in the same indictment.¹⁹

§ 1962. **Indictment sufficient.**—The indictment charged that the defendant has been and still does lewdly and lasciviously associate and cohabit with one C. M. J., a single woman, he, the said defendant (naming him), during all the time aforesaid being a married man and having a lawful wife living: Held sufficient.²⁰

§ 1963. **Indictment defective.**—The indictment alleging that the defendant did commit the crime of adultery with a certain woman, naming her, by having carnal knowledge of her body, she, the said woman being then and there a married woman and having a husband alive, is defective in that it does not show with certainty that the said woman was not the wife of the defendant.²¹ But if the indictment alleges that the woman with whom the defendant is charged with committing the offense is the lawful wife of another man, then it sufficiently alleges that she is not the lawful wife of the defendant.²²

§ 1964. **Duplicity.**—Where an indictment charged the defendant with committing the offense of adultery on the first day of July and “on divers other days between that day and the fifth day of June” of the same year, it was held bad for duplicity, adultery not being a continuing offense as charged in the indictment.²³ But in Iowa the continuing element is regarded as surplusage.²⁴

¹⁸ *S. v. Bartlett*, 53 Me. 446; *S. v. Dingee*, 17 Iowa 232; *Com. v. Elwell*, 43 Mass. 190, 35 Am. D. 398. Or one of the parties may be indicted alone: *S. v. Watson*, 20 R. I. 354, 39 Atl. 193; *S. v. Dingee*, 17 Iowa 232; *Disharoon v. S.*, 95 Ga. 351, 22 S. E. 698; *S. v. Cox*, N. C. T. R. 165; *Bigby v. S.*, 44 Ga. 344. See *Solomon v. S.*, 39 Tex. Cr. 140, 45 S. W. 706.

¹⁹ *Ketchingham v. S.*, 6 Wis. 426; *Bailey v. S.*, 36 Neb. 808, 55 N. W. 241.

²⁰ *S. v. Clark*, 54 N. H. 456, 1 Am. C. R. 41. See *S. v. Bridgman*, 49

Vt. 202, 24 Am. R. 124; *Names v. S.*, 20 Ind. App. 168, 50 N. E. 401.

²¹ *Moore v. Com.*, 47 Mass. 243, 39 Am. D. 724; *Tucker v. S.*, 35 Tex. 113; *Clay v. S.*, 3 Tex. App. 499. *Contra, S. v. Clark*, 54 N. H. 456.

²² *Com. v. Reardon*, 60 Mass. 78; *Helfrich v. Com.*, 33 Pa. St. 68, 75 Am. D. 579; *S. v. Hutchinson*, 36 Me. 261.

²³ *Com. v. Fuller*, 163 Mass. 499, 40 N. E. 764.

²⁴ *S. v. Briggs*, 68 Iowa 419, 27 N. W. 358.

ARTICLE IV. EVIDENCE; VARIANCE; WITNESSES.

§ 1965. **Single or married state presumed.**—The *status* of marriage being once proved, is presumed to continue until death or divorce separates the parties.²⁵ And so, the single state will be presumed to continue until testimony to the contrary is introduced.²⁶

§ 1966. **Proving marriage—Reputation.**—On the trial of one charged with adultery the testimony of persons who were present at the former marriage is competent to prove such marriage.²⁷ Previous marriage may be proven by reputation in all cases where it occurs incidentally, but such proof alone is not sufficient to establish the fact of marriage.²⁸ Evidence that the defendant was reputed to be a married man is not sufficient proof of marriage.²⁹

§ 1967. **Proving marriage by record.**—Proving or attempting to prove the marriage of the defendant to the woman alleged to be his wife by a copy of the marriage record will not exclude other proof of such marriage.³⁰

§ 1968. **Marriage contract or certificate competent.**—A marriage contract in writing existing between the parties, or a marriage certificate, is competent to show the previous marriage.³¹ Where a marriage certificate is introduced to prove the marriage of the defendant there must be other evidence to show that he is the same person named in the certificate.³²

²⁵ P. v. Stokes, 71 Cal. 263, 12 Pac. 71, 8 Am. C. R. 17; Underhill Cr. Ev., § 383.

²⁶ Gaunt v. S., 50 N. J. L. 490, 14 Atl. 600, 8 Am. C. R. 298. See Lewis v. P., 37 Mich. 518, 2 Am. C. R. 75; S. v. McDuffie, 107 N. C. 885, 12 S. E. 83. *Contra*, Hopper v. S., 19 Ark. 143.

²⁷ Lord v. S., 17 Neb. 526, 23 N. W. 507; Mills v. U. S., 1 Pinn. (Wis.) 73; S. v. Clark, 54 N. H. 456; Com. v. Dill, 156 Mass. 226, 30 N. E. 1016; Underhill Cr. Ev., §§ 44, 383; Owens v. S., 94 Ala. 97, 10 So. 669.

²⁸ U. S. v. Higgerson, 46 Fed. 750; 1 Bish. Mar. & D., §§ 438, 540; 1 Greenl. Ev., §§ 103, 104, 107; U. S. v.

Tenny (Ariz.), 8 Pac. 295; Harman v. Harman, 16 Ill. 85.

²⁹ Minor v. P., 58 Ill. 59; Wood v. S., 62 Ga. 406; S. v. Hodgskins, 19 Me. 155, 36 Am. D. 742.

³⁰ P. v. Stokes, 71 Cal. 263, 12 Pac. 71; Boger v. S., 19 Tex. App. 91; Com. v. Littlejohn, 15 Mass. 163; Underhill Cr. Ev., § 44; S. v. Clark, 54 N. H. 456; Thomas v. S. (Tex.), 26 S. W. 724.

³¹ S. v. Behrman, 114 N. C. 797, 19 S. E. 220; S. v. Isenhardt, 32 Or. 170, 52 Pac. 569.

³² S. v. Brink, 68 Vt. 659, 35 Atl. 492; P. v. Isham, 109 Mich. 72, 67 N. W. 819; Underhill Cr. Ev., § 383.

§ 1969. Declarations competent.—Declarations or statements made by the defendant, either orally or in writing, such as a letter written to the woman alleged to be his wife, are competent as tending to prove that she is his wife.³³ Where the man and woman are jointly indicted for adultery any admissions or confessions made by one of them is competent only against the one making the same.³⁴ What the defendant said to his wife as to his whereabouts on the night in question is competent, as well as what his wife said causing him to make a statement.³⁵

§ 1970. Confession of defendant.—The defendant's plea of guilty to the complaint before the examining magistrate afforded no evidence whatever of an existing legal marriage on the part of the woman, there being no allegation in the complaint of such marriage.³⁶

§ 1971. Hearsay—Woman's statement.—Statements made by the woman involved, not in the presence of the defendant, that she was a married woman, that her husband was living at a certain place, are not competent against the defendant.³⁷

§ 1972. Evidence of marriage—Sufficiency.—The only direct proof adduced at the trial of the marriage of the parties charged with the offense was that of the woman defendant, which was as follows: I was married to Seth Littlefield two years ago by Charles Littlefield at his house. I have not seen my husband since I married him: Held not sufficient proof of a legal marriage on her part, there being no proof that the person performing the marriage had any authority to solemnize marriages.³⁸

³³ *P. v. Imes*, 110 Mich. 250, 68 N. W. 157; *Owens v. S.*, 94 Ala. 97, 10 So. 669; *Cook v. S.*, 11 Ga. 53, 56 Am. D. 410; *S. v. Medbury*, 8 R. I. 543; *S. v. McDonald*, 25 Mo. 176; *Crawford's Case*, 7 Me. 57; *Underhill Cr. Ev.*, § 383. See *Com. v. Morrissey*, 175 Mass. 264, 56 N. E. 285; *S. v. Butts*, 107 Iowa 653, 78 N. W. 687; *Gillett Indirect & Col. Ev.*, § 16.

³⁴ *S. v. Rinehart*, 106 N. C. 787, 11 S. E. 512; *Frost v. Com.*, 48 Ky. 362; *Gore v. S.*, 58 Ala. 391; *S. v. Berry*, 24 Mo. App. 466; *S. v. McGuire*, 50 Iowa 153.

³⁵ *S. v. Austin*, 108 N. C. 780, 13 S. E. 219.

³⁶ *S. v. Bowe*, 61 Me. 171, 2 Green C. R. 461.

³⁷ *Whicker v. S.* (Tex. Cr.), 55 S. W. 47.

³⁸ The evidence in the following cases was held sufficient to prove the marriage of the defendant: *S. v. Clark*, 54 N. H. 456; *Powell v. S.* (Tex. Cr.), 44 S. W. 504; *Henderson v. S.* (Tex. Cr.), 45 S. W. 707. But not sufficient in the following: *S. v. Hodgskins*, 19 Me. 155, 36 Am. D. 742; *Webb v. S.*, 24 Tex. App. 164.

§ 1973. **Evidence of divorce.**—Where the defendant, on a charge of adultery, relied upon a divorce from his wife as a defense, and the decree of such divorce not showing affirmatively that the court rendering it had jurisdiction, it is proper to show that the court did not in fact have jurisdiction to grant the decree.⁴¹

§ 1974. **Unchastity of woman, competent.**—On the trial of a man charged with adultery it is competent to show that the general reputation of the female involved was that of an unchaste woman.⁴²

§ 1975. **Other acts of adultery.**—Prior acts of improper familiarity or of adultery between the parties, whether occurring in the same jurisdiction or not, and even subsequent acts which tend to show a continued illicit relation between them, may be shown in evidence as characterizing the acts and conduct of the parties as to the particular offense charged in the indictment.⁴³

§ 1976. **Other acts incompetent.**—The rule of law is that where the charge is one act of adultery only in a single count, to which evidence has been given, the prosecution is not permitted afterwards to introduce evidence of other acts committed at different times and places.⁴⁴ But evidence of other acts of adultery than that alleged in the indictment are competent to show the disposition and conduct of the accused in reference to the act charged.⁴⁵ But evidence of other

5 S. W. 651; *S. v. Bowe*, 61 Me. 171 (confession); *Ham's Case*, 11 Me. 391 (admission); *P. v. Isham*, 109 Mich. 72, 67 N. W. 819 (confession); *S. v. Coffee*, 39 Mo. App. 56 (reputation).

⁴¹ *S. v. Fleak*, 54 Iowa 429, 6 N. W. 689.

⁴² *Com. v. Gray*, 129 Mass. 474, 37 Am. R. 378; *Blackman v. S.*, 36 Ala. 295.

⁴³ *Crane v. P.*, 168 Ill. 399, 48 N. E. 54; *Snover v. S.*, 64 N. J. L. 65, 44 Atl. 850; *Proper v. S.*, 85 Wis. 615, 55 N. W. 1035; *Callison v. S.*, 37 Tex. Cr. 211, 39 S. W. 300; 2 Greenl. Ev., § 47; *S. v. Bridgman*, 49 Vt. 202; *P. v. Patterson*, 102 Cal. 239, 36 Pac. 436; *Lefforge v. S.*, 129

Ind. 551, 29 N. E. 34; *P. v. Skutt*, 96 Mich. 449, 56 N. W. 11; *Com. v. Bell*, 166 Pa. St. 405, 31 Atl. 123; *Com. v. Nichols*, 114 Mass. 285; *S. v. Pippin*, 88 N. C. 646; *S. v. Henderson*, 84 Iowa 161, 50 N. W. 758; *Underhill Cr. Ev.*, § 381.

⁴⁴ 2 Greenl. Ev., § 47; *S. v. Donovan*, 61 Iowa 278, 16 N. W. 130, 4 Am. C. R. 28; *S. v. Bates*, 10 Conn. 372. See *S. v. Smith*, 108 Iowa 440, 79 N. W. 115.

⁴⁵ *S. v. Briggs*, 68 Iowa 416, 27 N. W. 358; *Underhill Cr. Ev.*, § 384; *S. v. Bridgman*, 49 Vt. 202, 20 Am. R. 124; *S. v. Williams*, 76 Me. 480; *S. v. Guest*, 100 N. C. 410, 6 S. E. 253. See *S. v. Marvin*, 35 N. H. 22; *Brevaldo v. S.*, 21 Fla. 789.

acts of intimacy two years before the offense charged in the indictment is not competent, being too remote.⁴⁶

§ 1977. Variance—Living together.—Evidence that the offense was committed while “living together” will not support an indictment charging that the offense was committed “without living together.”⁴⁷

§ 1978. Witness—Wife incompetent.—On a charge of adultery the wife of the defendant is not a competent witness against her husband and is also incompetent to make the complaint against him.⁴⁸ But in some jurisdictions the wife is made a competent witness by statute.⁴⁹

⁴⁶ *P. v. Hendrickson*, 53 Mich. 525, 19 N. W. 169; *P. v. Davis*, 52 Mich. 569, 18 N. W. 362; *P. v. Fowler*, 104 Mich. 449, 62 N. W. 572. *Contra*, *S. v. Potter*, 52 Vt. 33; *S. v. Guest*, 100 N. C. 410, 6 S. E. 253. The evidence in the following cases was held sufficient to sustain convictions of adultery: *S. v. Chancy*, 110 N. C. 507, 14 S. E. 780; *P. v. Montague*, 71 Mich. 447, 39 N. W. 585; *S. v. Rinehart*, 106 N. C. 787, 11 S. E. 512; *Starke v. S.*, 97 Ga. 193, 23 S. E. 832; *Com. v. Holt*, 121 Mass. 61; *S. v. Ean*, 90 Iowa 534, 58 N. W. 898; *Com. v. Mosier*, 135 Pa. St. 221, 19 Atl. 943. But not sufficient in the following: *S. v. Pope*, 109 N. C. 849,

13 S. E. 700; *Weems v. S.*, 84 Ga. 461, 11 S. E. 503; *S. v. Chaney*, 110 Iowa 199, 81 N. W. 454; *S. v. Way*, 6 Vt. 311; *S. v. Waller*, 80 N. C. 401. ⁴⁷ *Wood v. S.* (Tex. Cr.), 57 S. W. 235.

⁴⁸ *S. v. Berlin*, 42 Mo. 572; *Thomas v. S.*, 14 Tex. App. 70; *Miner v. P.*, 58 Ill. 59, 1 Green C. R. 656; *Com. v. Jailer*, 1 Grant (Pa.) 218. See *Starke v. S.*, 97 Ga. 193, 23 S. E. 832; *In re Smith*, 2 Okl. 153, 37 Pac. 1099; *Underhill Cr. Ev.*, § 382.

⁴⁹ *S. v. Hazen*, 39 Iowa 649; *S. v. Vollander*, 57 Minn. 225, 58 N. W. 878; *S. v. Briggs*, 68 Iowa 416, 27 N. W. 358.

CHAPTER XLVIII.

BIGAMY.

ART.	I. Definition and Elements,	§§ 1979-1982
	II. Matters of Defense,	§§ 1983-1991
	III. Indictment,	§§ 1992-1998
	IV. Evidence; Variance,	§§ 1999-2007
	V. Witnesses,	§§ 2008-2009

ARTICLE I. DEFINITION AND ELEMENTS.

§ 1979. **Bigamy defined.**—It is the unlawful marriage during the existence of a previous marriage which constitutes the crime of bigamy, although the defendant may never have had carnal knowledge of the second woman and may have been immediately arrested after the second marriage.¹ Bigamy may be defined as the crime of going through the marriage ceremony with another while a former husband or wife is living and not divorced, knowing or having reason to believe that the former spouse is still alive. The material facts are the first and second marriage and the fact that the first consort was alive and undivorced at the date of the void marriage.”²

§ 1980. **When complete.**—Cohabitation or sexual intercourse under the second marriage is not essential to establish bigamy. The offense is complete when the unlawful marriage is consummated.³

¹ *Nelms v. S.*, 84 Ga. 467, 10 S. E. 1087, 20 Am. R. 377; 3 Greenl. Ev., § 203; 4 Bl. Com. 164; *Gise v. Com.*, 81 Pa. St. 428; *Beggs v. S.*, 55 Ala. 478, 29 N. W. 451; *Nelms v. S.*, 84 Ga. 466, 10 S. E. 1087, 20 Am. R. 377; *S. v. Patterson*, 2 Ired. (N. C.) 346, 38 Am. D. 699. See *P. v. McQuaid*, 85 Mich. 123, 48 N. W. 161.

² *Underhill Cr. Ev.*, § 398, citing *Halbrook v. S.*, 34 Ark. 511, 517; *P. v. Chase*, 27 Hun (N. Y.) 256, 260.

³ *Scoggins v. S.*, 32 Ark. 205; *Gise*

§ 1981. **Marriage by consent.**—Marriage by consent, without solemnization, followed by mutual assumption of marital rights, duties and obligations, is a legal marriage, and is sufficient foundation for a charge of bigamy on a second marriage.*

§ 1982. **Common law marriage.**—In some of the states the courts hold that a marriage legal at common law is, recognized as valid and binding.⁵ When a marriage, legal at common law, is sought to be shown on which to base a conviction for bigamy, all the elements to constitute such common law marriage must be proven. There must be evidence of a contract *per verba de presenti* with proof of cohabitation.⁶

ARTICLE II. MATTERS OF DEFENSE.

§ 1983. **Advice before second marriage.**—Advice given by a lawyer or other person, and relied upon by the accused, that because he and his wife were by mutual consent separated and living apart he might marry again, is no defense to a charge of bigamy.⁷

§ 1984. **Belief that marriage was void.**—That the defendant believed his marriage to his wife was void and that he was released from his marriage to her because of her absence, is no defense to a charge of bigamy.⁸

§ 1985. **Second marriage void.**—The fact that the second marriage has taken place between parties who, if single, would be incapable of contracting marriage, constitutes no defense to a charge of bigamy.⁹

§ 1986. **Marriage good without ceremony.**—The fact that the minister who solemnized the marriage rites was not properly ordained

* P. v. Beevers, 99 Cal. 286, 33 Pac. 844, 9 Am. C. R. 142. See Dale v. S., 88 Ga. 552, 15 S. E. 287.

⁵ Hiler v. P., 156 Ill. 519, 41 N. E. 181 (citing Port v. Port, 70 Ill. 484; Hebblethwaite v. Hepworth, 98 Ill. 126; Cartwright v. McGown, 121 Ill. 388, 12 N. E. 737); S. v. Robbins, 6 Ired. (N. C.) 23, 44 Am. D. 64. But see P. v. Mendenhall, 119 Mich. 404, 78 N. W. 325.

⁶ Hiler v. P., 156 Ill. 521, 41 N. E. 181. See P. v. Beevers, 99 Cal. 286,

33 Pac. 844, 9 Am. C. R. 142; Hayes v. P., 25 N. Y. 390; S. v. Bittick, 103 Mo. 183, 15 S. W. 325. See also S. v. Gonce, 79 Mo. 600, 4 Am. C. R. 68.

⁷ S. v. Hughes, 58 Iowa 165, 11 N. W. 706; P. v. Weed, 96 N. Y. 625, 1 N. Y. Cr. 349.

⁸ Medrano v. S., 32 Tex. Cr. 214, 22 S. W. 684, 40 Am. R. 775.

⁹ P. v. Brown, 34 Mich. 339, 22 Am. R. 531.

as such minister can not avail as a defense. It is well settled that his open claim of being a minister, and the fact that he was generally understood and recognized as such, are all that is necessary.¹⁰ A marriage is good without any ceremony and by the mere consent of the parties, if they intend marriage, and that intent sufficiently appears; provided, such consent and intent must be followed up by actual cohabitation thereunder as man and wife.¹¹

§ 1987. Religious belief—Polygamous.—The religious belief of a person can not be accepted as a defense on a charge of bigamy or polygamous marriage.¹²

§ 1988. Void divorce.—If the particular decree of divorce upon which the accused relied was illegal and void, because made by a court having no jurisdiction, it was no defense against the consequences of a second marriage, whatever may have been his belief or motives in respect of the validity of the decree. His mistake was one of law and not of fact.¹³

§ 1989. First marriage void.—It is a good defense to a charge of bigamy that the first marriage was void, though otherwise if merely voidable.¹⁴ The accused married a second time while his lawful wife was living, and from whom he had not been divorced. After his first wife had died he deserted his second wife and married a third one. On a charge of bigamy for marrying the third wife he was entitled to an acquittal, because his second marriage was void.¹⁵

¹⁰ Taylor v. S., 52 Miss. 84, 2 Am. C. R. 15, citing Hayes v. P., 25 N. Y. 390, 5 Park. Cr. (N. Y.) 325, 82 Am. D. 364. See also Robinson v. Com., 6 Bush (Ky.) 309; S. v. Davis, 109 N. C. 780, 14 S. E. 55; Carmichael v. S., 12 Ohio St. 553; S. v. Abbey, 29 Vt. 60, 67 Am. D. 754.

¹¹ Taylor v. S., 52 Miss. 84, 2 Am. C. R. 15; Kirk v. S., 65 Ga. 159. See McReynolds v. S., 5 Cold. (Tenn.) 18; Williams v. S., 67 Ga. 260; Scoggins v. S., 32 Ark. 205.

¹² Reynolds v. U. S., 98 U. S. 145; U. S. v. Reynolds, 1 Utah 226; Church, etc., v. U. S., 136 U. S. 1, 10 S. Ct. 792.

¹³ S. v. Armington, 25 Minn. 29; Davis v. Com., 13 Bush (Ky.) 318; Tucker v. P., 122 Ill. 583, 13 N. E. 809. See also P. v. Dowell, 25 Mich.

247; Russell v. S., 66 Ark. 185, 49 S. W. 821. When divorce is a defense, see Thompson v. S., 28 Ala. 12; Hood v. S., 56 Ind. 263, 26 Am. R. 21. See also the following cases: Van Fossen v. S., 37 Ohio S. 317, 41 Am. R. 507; P. v. Dawell, 25 Mich. 247, 12 Am. R. 260; P. v. Baker, 76 N. Y. 78, 32 Am. R. 274.

¹⁴ Beggs v. S., 55 Ala. 108; P. v. McQuaid, 85 Mich. 123, 48 N. W. 161; S. v. Moore, 1 Ohio Dec. R. 171. See Walls v. S., 32 Ark. 565; P. v. Slack, 15 Mich. 193. See also P. v. Beevers, 99 Cal. 286, 33 Pac. 844; Shaffer v. S., 20 Ohio 1; S. v. Cone, 86 Wis. 498, 57 N. W. 50; Underhill Cr. Ev., § 398; Tucker v. P., 122 Ill. 583, 13 N. E. 809.

¹⁵ S. v. Moore, 1 Ohio Dec. R. 171, 3 West. Law J. 134; Halbrook v. S.,

§ 1990. Prohibited from second marriage.—Where a divorced person is prohibited from marrying again without leave of the court, but goes into another state and is there lawfully married to a second woman, he will not be guilty of bigamy in taking such second wife into the state prohibiting such marriage and there living with her.¹⁶

§ 1991. Seven years absence.—The accused married a second husband within seven years after she had been deserted by her first husband, in good faith and upon reasonable grounds believing her first husband to be dead: Held a good defense.¹⁷ If, at the time of the trial of the accused, seven years have elapsed and the woman has not been heard from, the law presumes that she is dead.¹⁸

ARTICLE III. INDICTMENT.

§ 1992. Lawful wife living.—On a charge of bigamy it is not necessary to allege in the indictment that the lawful wife of the defendant was still living at the time of the second marriage. The indictment alleging that the marriage relation entered into by the lawful marriage still exists, is sufficient.¹⁹

§ 1993. Second and first marriage.—The indictment failing to allege the existence of the second marriage, is fatally defective.²⁰ The indictment alleging that the defendant unlawfully, willfully and feloniously, being a married man, did marry a certain woman, naming her, during the life of his first wife, naming her, and stating her maiden name, he, the said defendant, then and there, well knowing that his said first wife was still living, and he, the said defendant, not

34 Ark. 511, 36 Am. R. 17. See *P. v. Chase*, 27 Hun (N. Y.) 256.

¹⁶ *Com. v. Lane*, 113 Mass. 458, 18 Am. R. 509; *Com. v. Graham*, 157 Mass. 73, 31 N. E. 706.

¹⁷ *Queen v. Tolson*, L. R. 23 Q. B. Div. 168, 8 Am. C. R. 59; *Squire v. S.*, 46 Ind. 459, 2 Green C. R. 727; *Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. R. 468; *S. v. Stank*, 10 W. L. B. (Ohio) 17; *Reg. v. Moore*, 13 Cox C. C. 544, 2 Am. C. R. 608. *Contra*, *Jones v. S.*, 67 Ala. 84; *Underhill Cr. Ev.*, § 401.

See *P. v. Meyer*, 8 N. Y. St. 256; *Reynolds v. S.*, 58 Neb. 49, 78 N. W. 483.

¹⁸ *Squire v. S.*, 46 Ind. 459, 2 Green C. R. 728. See 4 Bl. Com. 164; *Barber v. S.*, 50 Md. 161.

¹⁹ *S. v. Hughes*, 58 Iowa 165, 11 N. W. 706; *Hiler v. P.*, 156 Ill. 511, 41 N. E. 181; *Kopke v. P.*, 43 Mich. 41, 4 N. W. 551; *S. v. Armington*, 25 Minn. 29. See *Cathron v. S.*, 40 Fla. 468, 24 So. 496.

²⁰ *In re Watson*, 19 R. I. 342, 33 Atl. 873.

having been at the time of his second marriage lawfully divorced from his first wife, sufficiently avers the marriage to his first wife.²¹

§ 1994. Negating exception.—In drawing an indictment for bigamy it is not necessary to negative the exceptions of the statute unless the exceptions are part of the description of the offense and in the same clause.²² Where the statute provides that the absence of the husband or wife when not heard from for a number of years, usually seven, shall be a defense to a charge of bigamy, such absence need not be negated in the indictment.²³

§ 1995. Marrying after divorce.—Where a statute provides that a divorced person who is the guilty party in such divorce case, shall be guilty of bigamy if he marries again during the lifetime of his divorced wife, the indictment must allege such divorce and that the defendant was the guilty party in such divorce, and all other acts necessary to bring the case within the terms of the statute.²⁴

§ 1996. Must allege woman, not wife.—Under a statute which forbids either the divorced husband or wife marrying any other person within a stated period of time from the date of the decree divorcing them, an indictment charging bigamy for marrying another person within the prohibited time is defective in failing to negative the fact that the alleged bigamous wife was a person other than the wife of the defendant at the time the second marriage occurred.²⁵

§ 1997. First wife living—Averment.—An indictment alleging that the defendant at the time of his second marriage "well knew that his first wife was living," is not equivalent to the averment that such wife was living.²⁶

§ 1998. First marriage—Time and place, and name.—In an indictment for bigamy it is not necessary to allege the time and place of the

²¹ *S. v. Davis*, 109 N. C. 780, 14 S. E. 55.

²² *Stanglein v. S.*, 17 Ohio St. 453; *S. v. Williams*, 20 Iowa 98; *Kopke v. P.*, 43 Mich. 41, 4 N. W. 551; *S. v. Abbey*, 29 Vt. 60, 67 Am. D. 754; *Com. v. Jennings*, 121 Mass. 47, 23 Am. R. 249; *Fleming v. P.*, 27 N. Y. 329, 5 Park. Cr. (N. Y.) 353.

²³ *Fleming v. P.*, 27 N. Y. 329; *Kopke v. P.*, 43 Mich. 41, 4 N. W.

551; *Barber v. S.*, 50 Md. 161; *S. v. Williams*, 20 Iowa 98.

²⁴ *Com. v. Richardson*, 126 Mass. 34, 2 Am. C. R. 612.

²⁵ *Niece v. Ter.*, 9 Okl. 535, 60 Pac. 300.

²⁶ *Prichard v. P.*, 149 Ill. 50, 36 N. E. 103; *Hiler v. P.*, 156 Ill. 515, 41 N. E. 181; *S. v. Jenkins*, 139 Mo. 535, 41 S. W. 220; *McAfee v. S.*, 38 Tex. Cr. 124, 41 S. W. 627.

first marriage.²⁷ But the time and place of the first marriage must be proved if alleged in the indictment.²⁸ It is not necessary to allege in the indictment the name of the person whom the defendant first married.²⁹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 1999. **Proof of marriage by cohabitation.**—Marriage, in a prosecution for bigamy, may be proved by cohabitation and confessions, but the proof must be clear, strong and convincing. And it is not absolutely necessary that the prosecution shall produce either the record of marriage or the testimony of some person who witnessed the ceremony.³⁰ The existence of the marriage relations may be shown by general reputation in the community where the parties reside.³¹

§ 2000. **Proof of marriage by declarations.**—In a prosecution for bigamy it is competent to prove the former marriage by the admissions and declarations of the defendant. Such is the rule by the weight of authority, but in Massachusetts, Minnesota, Connecticut and New York a contrary doctrine has been expressed.³² Marriage may be

²⁷ *Com. v. McGrath*, 140 Mass. 296, 6 N. E. 515; *S. v. Hughes*, 58 Iowa 165, 11 N. W. 706; *S. v. Nadal*, 69 Iowa 478, 29 N. W. 451; *P. v. Giese*, 61 Cal. 53; *S. v. Hughes*, 35 Kan. 626, 12 Pac. 28, 57 Am. R. 19; *S. v. Bray*, 13 Ired. (N. C.) 289; *S. v. Armington*, 25 Minn. 29. *Contra*, *Davis v. Com.*, 13 Bush (Ky.) 318, 2 Am. C. R. 163; *Williams v. S.*, 44 Ala. 24; 3 Greenl. Ev., § 204; *S. v. La Bore*, 26 Vt. 765. See *Faustre v. Com.*, 92 Ky. 34, 13 Ky. L. 347, 17 S. W. 189.

²⁸ *Tucker v. P.*, 117 Ill. 88, 7 N. E. 51.

²⁹ *Watson v. S.*, 13 Tex. App. 76; *Hutchins v. S.*, 28 Ind. 34. *Contra*, *Davis v. Com.*, 13 Bush (Ky.) 318.

³⁰ *Langtry v. S.*, 30 Ala. 536; *Williams v. S.*, 54 Ala. 131, 25 Am. R. 665; *Wolverton v. S.*, 16 Ohio 173, 47 Am. D. 373; *S. v. Seals*, 16 Ind. 352; *South v. P.*, 98 Ill. 265; *S. v. Armington*, 25 Minn. 29; *Com. v. Jackson*, 11 Bush (Ky.) 679; *Halbrook v. S.*, 34 Ark. 511, 36 Am. R. 17; *P. v. Wentworth*, 4 N. Y. Cr. 207;

Dumas v. S., 14 Tex. App. 464, 46 Am. R. 241; *S. v. Ulrich*, 110 Mo. 350, 19 S. W. 656; *U. S. v. Harris*, 5 Utah 436, 17 Pac. 75; *S. v. Hilton*, 3 Rich. L. (S. C.) 434, 45 Am. D. 783; *Stanglein v. S.*, 17 Ohio St. 453; *S. v. Nadal*, 69 Iowa 478, 29 N. W. 451. But see *Green v. S.*, 21 Fla. 403, 58 Am. R. 670; *Underhill Cr. Ev.*, § 404.

³¹ *U. S. v. Higgerson*, 46 Fed. 750; *Patterson v. S.*, 17 Tex. App. 102; *U. S. v. Tenney* (Ariz.), 8 Pac. 295. See *U. S. v. Langford*, 2 Idaho 519, 21 Pac. 409.

³² *Squire v. S.*, 46 Ind. 459, 2 Green C. R. 725; *Lowery v. P.*, 172 Ill. 470, 50 N. E. 165; *Miles v. U. S.*, 103 U. S. 304; *Wolverton v. S.*, 16 Ohio 173; *S. v. Gallagher*, 20 R. I. 266, 38 Atl. 655; *O'Neale v. Com.*, 17 Gratt. (Va.) 583; *S. v. Melton*, 120 N. C. 591, 26 S. E. 933; *Underhill Cr. Ev.*, § 403, citing *Gahagan v. P.*, 1 Park. Cr. (N. Y.) 378, 383; *P. v. McQuaid*, 85 Mich. 123, 48 N. W. 161; *Hayes v. P.*, 25 N. Y. 390; *S. v. Nadal*, 69 Iowa 478, 29 N. W. 451;

proved by reputation, declaration and conduct of the parties and other circumstances usually accompanying that relation. Correspondence between the parties, addressing each other as husband and wife, is competent.³³

§ 2001. **Witnesses at marriage.**—The testimony of witnesses at the marriage is competent to show marriage, or a marriage certificate is competent.³⁴ But the testimony of witnesses who were present at the ceremony can not overcome positive proof that the marriage was illegal and void under the laws of the country where the ceremony was performed.³⁵

§ 2002. **Proving wife living.**—On an indictment for bigamy the prosecution must prove to the satisfaction of the jury that the wife or husband was alive at the time of the second marriage. This fact must be proven beyond a reasonable doubt.³⁶

§ 2003. **Correspondence as evidence.**—On a charge of bigamy, letters written by the defendant to his first wife, or to others relating to her, are admissible to show the relation he bore to her.³⁷

§ 2004. **Proving former marriage.**—On the trial of a charge of bigamy, a petition for divorce which had been filed by the defendant is competent evidence to prove the former marriage between the parties.³⁸

§ 2005. **Public records competent.**—Registers of births and marriages made pursuant to the statutes of any of the states are

S. v. Roswell, 6 Conn. 446; *S. v. Johnson*, 12 Minn. 476; *S. v. Cooper*, 103 Mo. 266, 15 S. W. 327.

³³ *Tucker v. P.*, 122 Ill. 592, 13 N. E. 809; *Waldrop v. S.* (Tex. Cr.), 53 S. W. 130; *Taylor v. S.*, 52 Miss. 84, 2 Am. C. R. 17; *S. v. Swartz*, 18 Ohio C. C. 892.

³⁴ *Com. v. Hayden*, 163 Mass. 453, 9 Am. C. R. 410, 40 N. E. 846; *S. v. Hughes*, 58 Iowa 165, 11 N. W. 706. See *Jackson v. P.*, 2 Scam. (Ill.) 232; *Underhill Cr. Ev.*, § 402.

³⁵ *Canale v. P.*, 177 Ill. 219, 52 N. E. 310.

³⁶ *Squire v. S.*, 46 Ind. 459, 2 Green C. R. 725; *Parker v. S.*, 77 Ala. 47; *Com. v. Hayden*, 163 Mass. 453, 40

N. E. 846, 47 Am. R. 468; *Crane v. S.*, 94 Tenn. 86, 28 S. W. 317; *Mitchell v. Com.*, 78 Ky. 204; *Hiler v. P.*, 156 Ill. 511, 41 N. E. 181; *P. v. Feilen*, 58 Cal. 218, 41 Am. R. 258; *S. v. Goodrich*, 14 W. Va. 834; *Gorman v. S.*, 23 Tex. 646.

³⁷ *Com. v. Hayden*, 163 Mass. 453, 40 N. E. 846, 47 Am. R. 468; *Tucker v. P.*, 122 Ill. 583, 13 N. E. 809; *Com. v. Caponi*, 155 Mass. 534, 30 N. E. 82.

³⁸ *Adkinson v. S.*, 34 Tex. Cr. 296, 30 S. W. 357; *P. v. Beevers*, 99 Cal. 286, 33 Pac. 844; *S. v. Goodrich*, 14 W. Va. 834. See *S. v. Ashley*, 37 Ark. 403.

competent evidence.³⁹ If the registers of births and marriages are not made by public authority and under the sanction of official duty, they, or exemplified copies of them, are not competent evidence.⁴⁰ On a charge of bigamy the record evidence of marriage is admissible, and not in violation of the constitutional provision that the defendant has the right to meet the witnesses face to face.⁴¹

§ 2006. Children born, competent.—Evidence that children were born to the defendant by his alleged bigamous wife is competent on a charge of bigamy.⁴²

§ 2007. Variance, when.—The indictment alleged the marriage of the accused to his first wife and that while she was still his wife he unlawfully married a second woman. The evidence showed that the accused had been lawfully married to his first wife and that she afterwards procured a divorce from him for his misconduct and that after the divorce he then married the second wife: Held a variance.⁴³

ARTICLE V. WITNESSES.

§ 2008. Competency of witness.—To test the competency of the second wife as a witness, she may be examined on her *voir dire*, as to the void marriage.⁴⁴ "If the first marriage is clearly proved, and not controverted, then the person with whom the second marriage was had, may be admitted as a witness to prove the second marriage as well as other facts, not tending to defeat the first, or to legalize the second."⁴⁵ The first wife is not a competent witness against her husband on a charge of bigamy; nor can she make complaint against

³⁹ 1 Greenl. Ev., § 484; Tucker v. P., 117 Ill. 91, 7 N. E. 51; 3 Greenl. Ev., § 204; S. v. Matlock, 70 Iowa 229, 30 N. W. 495; Johnson v. S., 60 Ark. 308, 30 S. W. 31; S. v. White, 19 Kan. 445.

⁴⁰ Tucker v. P., 117 Ill. 91, 7 N. E. 51; Bryant v. Kelton, 1 Tex. 434; Underhill Cr. Ev., § 405.

⁴¹ Tucker v. P., 122 Ill. 592, 13 N. E. 809; Jackson v. P., 2 Scam. (Ill.) 232; Underhill Cr. Ev., § 405.

⁴² Waldrop v. S. (Tex. Cr.), 53 S. W. 130.

⁴³ Com. v. Richardson, 126 Mass. 34.

⁴⁴ S. v. Gordon, 46 N. J. L. 432, 4 Am. C. R. 4; Salter v. S., 92 Ala. 63, 9 So. 550; Seeley v. Engell, 13 N. Y. 542; 2 McClain Cr. L., § 1085.

⁴⁵ 3 Greenl. Ev., § 206; Lowery v. P., 172 Ill. 471, 50 N. E. 165; Com. v. Hayden, 163 Mass. 453, 40 N. E. 846, 47 Am. R. 468; Miles v. U. S., 103 U. S. 304. See 4 Bl. Com. 164; S. v. Nadal, 69 Iowa 478, 29 N. W. 451.

him on such charge. Bigamy is not that kind of injury to the wife which would render her testimony competent.⁴⁶

§ 2009. **Statute of limitations.**—It is very clear that at common law the crime of bigamy occurs and is complete when the second marriage is accomplished. It follows that the statute of limitations would commence to run from that time. This has never been questioned.⁴⁷

⁴⁶ *P. v. Quanstrom*, 93 Mich. 254, 181; 3 Greenl. Ev., § 206; 4 Bl. Com. 53 N. W. 165; *S. v. McCance*, 110 Mo. 164; *Underhill Cr. Ev.*, §§ 400, 406. 398, 19 S. W. 648; *Bassett v. U. S.*, But see *S. v. Sloan*, 55 Iowa 217, 7 137 U. S. 496, 11 S. Ct. 165; *S. v. N. W. 516.*
Hughes, 58 Iowa 165, 11 N. W. 706; ⁴⁷ *Gise v. Com.*, 81 Pa. St. 428.
Hiler v. P., 156 Ill. 511, 41 N. E.

CHAPTER XLIX.

BASTARDY.

ART.	I. Object of Proceedings,	§§ 2010-2013
	II. Matters of Defense,	§§ 2014-2018
	III. Complaint or Information,	§§ 2019-2030
	IV. Evidence; Verdict,	§§ 2031-2061
	V. Appeal,	§§ 2062-2063

ARTICLE I. OBJECT OF PROCEEDINGS.

§ 2010. **Statutory provisions.**—In perhaps all the states there are statutory provisions to compel the father to furnish support for his bastard child or pay the expenses incident to its birth, the object being to indemnify or protect the town or county as well as to afford support for the child.¹

§ 2011. **Bastardy—Civil case.**—In some, if not most of the states, a prosecution under the bastardy law is a civil and not a criminal proceeding, but is usually placed on the criminal docket.² The rules governing civil actions apply to bastardy proceedings.³

¹ S. v. Such, 53 N. J. L. 351, 21 Atl. 852; Hauskins v. P., 82 Ill. 193; Kelly v. P., 29 Ill. 290; Robinson v. S., 128 Ind. 397, 27 N. E. 750; Keniston v. Rowe, 16 Me. 38. See Burgen v. Straughan, 30 Ky. 583; Baker v. S., 65 Wis. 50, 26 N. W. 167.

² Scharf v. P., 134 Ill. 243, 24 N. E. 761; Maynard v. P., 135 Ill. 416, 25 N. E. 740; Bell v. Ter., 8 Okl. 75, 56 Pac. 853; Allison v. P., 45 Ill. 37; McCoy v. P., 71 Ill. 111; Mann v. P., 35 Ill. 467; Williams v. S., 117 Ala. 199, 23 So. 42; Rawlings v. P., 102 Ill. 478; Davis v. P., 50 Ill. 199;

Rich v. P., 66 Ill. 513; P. v. Nixon, 40 Ill. 30; Clark v. Carey, 41 Neb. 780, 60 N. W. 78, 9 Am. C. R. 119; Baker v. S., 65 Wis. 50, 26 N. W. 167; Underhill Cr. Ev., § 523. *Contra*, S. v. Ballard, 122 N. C. 1024, 29 S. E. 899; S. v. Bruce, 122 N. C. 1040, 30 S. E. 141.

³ S. v. Johnson, 89 Iowa 1, 56 N. W. 404; Hodge v. Sawyer, 85 Me. 285, 27 Atl. 153; S. v. Brewer, 38 S. C. 263, 16 S. E. 1001; Hodgson v. Nickell, 69 Wis. 308, 34 N. W. 118; Richardson v. P., 31 Ill. 170; S. v. Hickerson, 72 N. C. 421. See also

§ 2012. **Non-resident mother.**—A non-resident woman may maintain a suit for bastardy against the putative father of her child.⁴ A non-resident complainant will not be required to give bond for costs as in other cases.⁵

§ 2013. **Place of child's birth.**—In order to give the court jurisdiction it must appear that the child was born in the state where proceedings are instituted.⁶ And the proceedings should be commenced in the county where the defendant resides.⁷

ARTICLE II. MATTERS OF DEFENSE.

§ 2014. **Death of child during suit.**—The death of the child during the pendency of bastardy proceedings does not abate the action and in no manner releases the defendant.⁸ But if the child is born dead the action should be dismissed.⁹

§ 2015. **Death of mother.**—The death of the mother after commencing suit against the accused does not abate the action.¹⁰

§ 2016. **Twins born—Judgment.**—After commencing suit twins were born, and on conviction, judgment was properly entered against the defendant the same as if the mother had given birth to but one child.¹¹

Stoppert v. Nierle, 45 Neb. 105, 63 N. W. 382; S. v. Severson, 78 Iowa 653, 43 N. W. 533; S. v. Nichols, 29 Minn. 357, 13 N. W. 153; S. v. Edwards, 110 N. C. 511, 14 S. E. 741; Myers v. Stafford, 114 N. C. 234, 19 S. E. 764; P. v. Phalen, 49 Mich. 492, 13 N. W. 830; Dickerson v. Gray, 2 Blackf. (Ind.) 230; Harper v. S., 101 Ind. 109; Young v. Makepeace, 103 Mass. 50.

⁴Mings v. P., 111 Ill. 99; Clark v. Carey, 41 Neb. 780, 60 N. W. 78, 9 Am. C. R. 119; Kolbe v. P., 85 Ill. 336; Hill v. Wells, 23 Mass. 104; S. v. Gray, 8 Blackf. (Ind.) 274; Moore v. S., 47 Kan. 772, 28 Pac. 1072; McGary v. Bevington, 41 Ohio St. 280; La Plant v. P., 60 Ill. App. 340; Davis v. Carpenter, 172 Mass. 167, 51 N. E. 530. *Contra*, Graham v. Monsergh, 22 Vt. 543; Sutfin v. P., 43 Mich. 37, 4 N. W. 509.

⁵Kolbe v. P., 85 Ill. 337.

⁶Grant v. Barry, 91 Mass. 459; *Com. v. Bostwick*, 17 Pa. Co. Ct. R.

9; Tanner v. Allen, 16 Ky. 25; Egleson v. Battles, 26 Vt. 548. See Hodge v. Sawyer, 85 Me. 285, 27 Atl. 153. *Contra*, Sheay v. S., 74 Md. 52, 21 Atl. 607; Cooper v. S., 4 Blackf. (Ind.) 316.

⁷Carter v. Kilburn, 8 Ky. 463.

⁸Hauskins v. P., 82 Ill. 193; Hinton v. Dickinson, 19 Ohio St. 583; Satterwhite v. S., 32 Ala. 578; Jerdee v. S., 36 Wis. 170; Smith v. Lint, 37 Me. 546; Malson v. S., 75 Ind. 142; Hanisky v. Kennedy, 37 Neb. 618, 56 N. W. 208.

⁹S. v. Beatty, 61 Iowa 307, 16 N. W. 149; Helfer v. Nelson, 7 Ohio C. C. 263; Hauskins v. P., 82 Ill. 193, 196.

¹⁰P. v. Nixon, 45 Ill. 353; P. v. Smith, 17 Ill. App. 597; Dodge Co. v. Kemnitz, 28 Neb. 224, 44 N. W. 184. *Contra*, Rollins v. Chalmers, 49 Vt. 515.

¹¹Connolly v. P., 81 Ill. 379. See Davis v. S., 58 Ga. 170.

§ 2017. **Parties may compromise.**—Where the mother of the child and the putative father have made a fair settlement based upon a reasonable consideration, this will preclude her from maintaining a bastardy proceeding.¹² And the giving of a promissory note by the putative father to the mother of the child on condition that she will not institute bastardy proceedings is a good consideration, on settlement.¹³

§ 2018. **Settlement not a bar.**—See the following cases where such settlement is held not a bar to a prosecution for bastardy:¹⁴ Such settlement is not binding where the mother of the child was a minor when she made the settlement and gave a release.¹⁵

ARTICLE III. COMPLAINT OR INFORMATION.

§ 2019. **Complaint must be by mother.**—The statute of Illinois provides that the mother of the child must make the complaint against the putative father.¹⁶

§ 2020. **Complainant must be unmarried.**—Under the statute a complaint for bastardy will be defective if it fails to allege that the mother of the child was a single or unmarried woman.¹⁷ But under the statute of Florida, it is not necessary to allege that the complainant was a single woman before her delivery.¹⁸ Where a woman in a

¹² *Black Hawk v. Cotter*, 32 Iowa 125; *Martin v. S.*, 62 Ala. 119. See *Hendrix v. P.*, 9 Ill. App. 42; *P. v. Wheeler*, 60 Ill. App. 351; *Ingwaldson v. Skrivseth*, 7 N. D. 388, 75 N. W. 772; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Rohrheimer v. Winters*, 126 Pa. St. 253, 17 Atl. 606; *Coleman v. Frum*, 3 Scam. (Ill.) 378; *Baker v. Roberts*, 14 Ind. 552; *Getztaff v. Seliger*, 43 Wis. 297. See *Com. v. Davis*, 69 Ky. 295.

¹³ *Medcalf v. Brown*, 77 Ind. 476; *Hays v. McFarlan*, 32 Ga. 699; *Burgen v. Straughan*, 30 Ky. 583; *Abshire v. Mather*, 27 Ind. 381; *S. v. Noble*, 70 Iowa 174, 30 N. W. 396; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812.

¹⁴ *Com. v. Turner*, 34 Ky. 571; *S. v. Dougher*, 47 Minn. 436, 50 N. W. 475; *Sherman v. Johnson*, 20 Vt.

567; *Hale v. Turner*, 29 Vt. 350; *Com. v. Wicks*, 2 Pa. Dist. R. 17.

¹⁵ *S. v. Baker*, 89 Iowa 188, 56 N. W. 425; *Wilson v. Judge*, 18 Ala. 757; *Pickler v. S.*, 18 Ind. 266; *Malson v. S.*, 75 Ind. 142.

¹⁶ *Jones v. P.*, 53 Ill. 367; *Mann v. P.*, 35 Ill. 470; *Maynard v. P.*, 135 Ill. 416, 25 N. E. 740; *Billingsley v. Clelland*, 41 W. Va. 234, 23 S. E. 812; *Harter v. Johnson*, 16 Ind. 271; *Com. v. Cole*, 5 Mass. 519; *Burgen v. Straughan*, 30 Ky. 583; *Bowers v. Wood*, 143 Mass. 182, 9 N. E. 534.

¹⁷ *Maynard v. P.*, 135 Ill. 416, 25 N. E. 740; *E. D. P. v. S.*, 18 Fla. 175; *Andrew v. Catherine*, 16 Fla. 830; *Edwards v. Knight*, 8 Ohio 375. See *Walker v. S.*, 108 Ala. 56, 19 So. 353. *Contra*, *Robie v. McNiece*, 7 Vt. 419; *S. v. Peeples*, 108 N. C. 768, 13 S. E. 8. See *Smith v. S.*, 73 Ala. 11.

¹⁸ *Williams v. S.*, 18 Fla. 883.

state of pregnancy makes complaint, accusing one with being the father of her unborn child, she must be unmarried at the time of making the complaint.¹⁹ But under a different statute, see cases to the contrary.²⁰

§ 2021. Information—Father of child.—The information or complaint charging bastardy must allege that the defendant is the father of the child.²¹

§ 2022. Husband absent seven years.—The absence of a husband for seven years renders his wife an unmarried woman under the bastardy law. He will be presumed to be dead.²²

§ 2023. Complaint by divorced woman.—A divorced woman, who gives birth to a child which was begotten during her marriage, will be permitted to prosecute a bastardy proceeding and show that her divorced husband is not the father of the child.²³

§ 2024. Complaint by married woman.—If the complaining witness in a bastardy case is a married woman, it will be incumbent on the prosecution to show that she did not cohabit with her husband and had no opportunity to cohabit with him during the time the child might have been conceived.²⁴

§ 2025. Marriage after delivery.—The marriage of the mother of an illegitimate child after delivery, to one not the father, will not bar her making complaint against the father of such child.²⁵

§ 2026. Complaint may be oral.—The complaint in a bastardy proceeding need not be in writing unless required by statute.²⁶

¹⁹ *P. v. Volksdorf*, 112 Ill. 295; *S. v. Brill*, 3 Ohio N. P. 311, 6 Ohio Dec. 14; *S. v. Allison*, Phil. L. (N. C.) 346; *Sword v. Nestor*, 33 Ky. 453. See *Judge v. Kerr*, 17 Ala. 328.

²⁰ *Cuppy v. S.*, 24 Ind. 389; *S. v. Pettaway*, 3 Hawks (N. C.) 623; *S. v. Overseer*, 24 N. J. L. 533.

²¹ *Hudson v. S.*, 104 Ga. 723, 30 S. E. 947.

²² *Hall v. Com.*, 3 Ky. 479.

²³ *Schaffer v. Mueller*, 9 W. L. B. (Ohio) 287. See *Drennan v. Douglas*, 102 Ill. 341, 40 Am. R. 595.

²⁴ *S. v. Lavin*, 80 Iowa 555, 46 N.

W. 553; *Sullivan v. Kelly*, 85 Mass. 148. See *Com. v. Wentz*, 1 Ashm. (Pa.) 269; *Underhill Cr. Ev.*, § 526; *S. v. McDowell*, 101 N. C. 734, 7 S. E. 785.

²⁵ *P. v. Volksdorf*, 112 Ill. 295; *Miller v. Anderson*, 43 Ohio St. 473, 3 N. E. 605; *S. v. Shoemaker*, 62 Iowa 343, 17 N. W. 589; *Swett v. Stubbs*, 34 Me. 178; *Austin v. Pickett*, 9 Ala. 102. See *Judge v. Kerr*, 17 Ala. 328; *Dennison v. Page*, 29 Pa. St. 420.

²⁶ *Curran v. P.*, 35 Ill. App. 275; *Smith v. Hayden*, 60 Mass. 111;

§ 2027. **Complaint—Defects waived.**—Objections to the complaint must be made before trial, otherwise any defects will be waived.²⁷

§ 2028. **Complaint or indictment, sufficiency.**—In drawing an indictment under the statute of Pennsylvania it is not necessary to allege the birth of the illegitimate child.²⁸

§ 2029. **Complaint—Contrary to statute.**—It is not necessary that the complaint in a bastardy proceeding should conclude *contra formam statute*.²⁹ But it must be signed and verified under oath.³⁰

§ 2030. **Amendments permitted.**—A bastardy proceeding is within the statute allowing amendments the same as any other civil proceeding.³¹

ARTICLE IV. EVIDENCE; VERDICT.

§ 2031. **Preponderance sufficient.**—A preponderance of evidence is sufficient to sustain a conviction on a bastardy charge, it being a civil suit.³²

§ 2032. **Acts and statements of defendant.**—Any statements made by the defendant admitting the paternity of the child in question are

S. v. Overseer, 24 N. J. L. 533. *Contra*, *S. v. Simons*, 30 Vt. 620. See *Cross v. P.*, 10 Mich. 24; *Howard v. Overseer*, 1 Rand. (Va.) 464.

²⁷ *Cook v. P.*, 51 Ill. 145; *S. v. Johnson*, 89 Iowa 1, 56 N. W. 404; *Lena-hen v. Desmond*, 150 Mass. 292, 22 N. E. 903. See *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450.

²⁸ *Gorman v. Com.*, 124 Pa. St. 536, 17 Atl. 26.

²⁹ *Com. v. Moore*, 20 Mass. 194; *Hopkins v. Plainfield*, 7 Conn. 286.

³⁰ *Graves v. Adams*, 8 Vt. 130. See *Ramo v. Wilson*, 24 Vt. 517.

³¹ *Maynard v. P.*, 135 Ill. 430, 25 N. E. 740; *Harrison v. P.*, 81 Ill. App. 93; *P. v. Cole*, 113 Mich. 83, 71 N. W. 455; *Robie v. McNiece*, 7 Vt. 419; *S. v. Giles*, 103 N. C. 391, 9 S. E. 433; *Miller v. S.*, 110 Ala. 69, 20 So. 392; *Ford v. Smith*, 62 N. H. 419; *Gorman v. Com.*, 124 Pa. St. 536, 17 Atl. 26.

³² *P. v. Christman*, 66 Ill. 162; *Lewis v. P.*, 82 Ill. 104; *Allison v.*

P., 45 Ill. 38; *Bell v. S.*, 124 Ala. 94, 27 So. 414; *Mann v. P.*, 35 Ill. 467; *McFarland v. P.*, 72 Ill. 368; *Peak v. P.*, 76 Ill. 289; *Maloney v. P.*, 38 Ill. 62; *S. v. Severson*, 78 Iowa 653, 43 N. W. 533; *Edmond v. S.*, 25 Fla. 268, 6 So. 58; *Harper v. S.*, 101 Ind. 109; *Semon v. P.*, 42 Mich. 141, 3 N. W. 304; *S. v. Romaine*, 58 Iowa 46, 11 N. W. 721; *Stovall v. S.*, 56 Tenn. 597; *Miller v. S.*, 110 Ala. 69, 20 So. 392; *S. v. Bowen*, 14 R. I. 165; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *Dukehart v. Coughman*, 36 Neb. 412, 54 N. W. 680; *Altschuler v. Algaza*, 16 Neb. 631, 21 N. W. 401; *Young v. Makepiece*, 103 Mass. 50; *S. v. Bunker*, 7 S. D. 639, 65 N. W. 33; *Reynolds v. S.*, 115 Ind. 421, 17 N. E. 909. See *Knowles v. Scribner*, 57 Me. 495; *Underhill Cr. Ev.*, § 524. *Contra*, see *Van Tassel v. S.*, 59 Wis. 351, 18 N. W. 328; *Com. v. Wentz*, 1 Ashm. (Pa.) 269; *Schaffer v. Mueller*, 9 W. L. B. (Ohio) 287.

competent evidence against him.³³ An attempt or offer of the defendant to produce a miscarriage of the prosecutrix is competent evidence.³⁴

§ 2033. Letters by defendant to prosecutrix.—Letters written by the defendant to the prosecutrix showing intimacy between them, such as a request to meet him at a hotel, are competent.³⁵

§ 2034. Statements of third party.—The declarations of a third person, not made in the presence of the prosecutrix, that the defendant was the father of the child, are not admissible, being hearsay.³⁶

§ 2035. Preliminary proceedings as evidence.—The record of a preliminary examination in a bastardy proceeding is competent and may be given in evidence by either of the parties to the cause, or the contents thereof may be shown by parol evidence, if such record is lost.³⁷

§ 2036. Husband absent several years.—The absence of the husband for several years at a distant place, and having no opportunity to have sexual intercourse with his wife, is strong proof tending to rebut the presumption of legitimacy.³⁸

§ 2037. Intimacy between parties.—Acts or conduct of intimacy between the complainant and defendant are competent on a charge of bastardy—especially at about the time of conception.³⁹

³³ *Miller v. S.*, 110 Ala. 69, 20 So. 392; *Moore v. P.*, 13 Ill. App. 248. See *Fuller v. Hampton*, 5 Conn. 416; *Miene v. P.*, 37 Ill. App. 589; *Underhill Cr. Ev.*, § 533; *Dehler v. S.*, 22 Ind. App. 383, 53 N. E. 850.

³⁴ *Nicholson v. S.*, 72 Ala. 176; *McIlvain v. S.*, 80 Ind. 69; *Miller v. S.*, 110 Ala. 69, 20 So. 392.

³⁵ *Scharf v. P.*, 34 Ill. App. 400; *Sullivan v. Hurley*, 147 Mass. 387, 18 N. E. 3; *Walker v. S.*, 92 Ind. 474; *Beers v. Jackman*, 103 Mass. 192. See *La Matt v. S.*, 128 Ind. 123, 27 N. E. 346; *Williams v. S.*, 113 Ala. 58, 21 So. 463.

³⁶ *Farrell v. Weitz*, 160 Mass. 288, 35 N. E. 783; *Young v. Makepiece*, 103 Mass. 50. See *Prince v. Gund-*

away, 157 Mass. 417, 32 N. E. 653; *Underhill Cr. Ev.*, § 533; *Wilkins v. Metcalf*, 71 Vt. 103, 41 Atl. 1035.

³⁷ *Hoff v. Fisher*, 26 Ohio St. 8; *Underhill Cr. Ev.*, § 534, citing *Stoppert v. Nierles*, 45 Neb. 105, 63 N. W. 382.

³⁸ *Haworth v. Gill*, 30 Ohio St. 627; *Dean v. S.*, 29 Ind. 483; *Watts v. Owens*, 62 Wis. 512, 22 N. W. 720.

³⁹ *Strickler v. Grass*, 32 Neb. 811, 49 N. W. 804; *Miller v. S.*, 110 Ala. 69, 20 So. 392; *Marks v. S.*, 101 Ind. 353; *Baker v. S.*, 69 Wis. 38, 33 N. W. 52; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1024; *Gemmell v. S.*, 16 Ind. App. 154, 43 N. E. 909; *P. v. Schilling*, 110 Mich. 412, 68 N. W. 233; *Underhill Cr. Ev.*, § 528.

§ 2038. **Intimacy with other men.**—The defendant offered to prove that the prosecutrix called on another man and said: I am in a family way, and what are you going to do about it? Held error to exclude the offered evidence.⁴⁰ The prosecutrix having testified that she became pregnant on April 20, 1889, by the defendant, it was competent for him to show that she had been intimate with another man from the fall of the previous year, especially if the other man had testified to having sexual intercourse with her three or four times between March 20 and May 20, 1889.⁴¹

§ 2039. **Statement of woman.**—That the complaining witness had stated to others that it was necessary for girls to get in a family way in order to compel some young men to marry them, is held incompetent; but it might have been competent on impeachment had her attention been properly called to it on cross-examination.⁴²

§ 2040. **Other acts of intercourse.**—On a charge of bastardy it is competent to show repeated acts of sexual intercourse between the parties, prior to the time of the alleged conception, as tending to show the probability of such intercourse at subsequent times when opportunity offered.⁴³

§ 2041. **Intercourse with other men.**—On cross-examination the woman may be asked whether within the period of gestation she has had intercourse with other men, for the purpose of overcoming the probability of the accused being the father of her child.⁴⁴ If the mother of the child had sexual intercourse with other men at or about the time she became pregnant, the defendant may show the fact.⁴⁵

⁴⁰ McCoy v. P., 71 Ill. 112. See Common v. P., 23 Ill. App. 230.

⁴¹ Maynard v. P., 135 Ill. 433, 25 N. E. 740; Gaunt v. S., 52 N. J. L. 178, 19 Atl. 135; McCoy v. P., 65 Ill. 439; P. v. Kaminsky, 73 Mich. 637, 41 N. W. 833; Williams v. S., 113 Ala. 58, 21 So. 463. See S. v. Granger, 87 Iowa 355, 54 N. W. 79; Davison v. Cruse, 47 Neb. 829, 66 N. W. 823; Underhill Cr. Ev., § 532.

⁴² Johnson v. P., 140 Ill. 354, 29 N. E. 895.

⁴³ Ramey v. S., 127 Ind. 243, 26 N. E. 818; Houser v. S., 93 Ind. 228. See Holcomb v. P., 79 Ill. 409; S. v. Wheeler, 104 N. C. 893, 10 S. E. 491;

S. v. Smith, 47 Minn. 475, 50 N. W. 605; P. v. Keefer, 103 Mich. 83, 61 N. W. 338; Baker v. S., 69 Wis. 32, 33 N. W. 52; Norfolk v. Gaylord, 28 Conn. 309; Kremling v. Lallman, 16 Neb. 280, 20 N. W. 383.

⁴⁴ Holcomb v. P., 79 Ill. 414; Williams v. S., 113 Ala. 58, 21 So. 463; Davison v. Cruse, 47 Neb. 829, 66 N. W. 823; Humphrey v. S., 78 Wis. 569, 47 N. W. 836; Benham v. S., 91 Ind. 82; Underhill Cr. Ev., § 532.

⁴⁵ P. v. Kaminsky, 73 Mich. 637, 41 N. W. 833; Easdale v. Reynolds, 143 Mass. 126, 9 N. E. 13; Stoppert v. Nierle, 45 Neb. 105, 63 N. E. 382; Holcomb v. P., 79 Ill. 409; Meyncke

But if the defendant admits having intercourse with the woman about the same time others had intercourse with her, then evidence as to such others is not competent.⁴⁶

§ 2042. **Female out late with other men.**—It is competent to show that the prosecutrix was out late at night with men and boys during the month she claimed she became pregnant by the defendant.⁴⁷

§ 2043. **Exhibiting child as evidence.**—Some courts have held that an infant two years old may be exhibited to the jury, but a mere babe of two or three months can not be shown.⁴⁸

§ 2044. **Child's resemblance.**—Where both the accused and the child are before the jury, any resemblance or not between them may be considered by the jury in determining whether or not the accused is the father of the child, but the testimony of witnesses will not be heard on the question of any such resemblance.⁴⁹ Testimony to show a resemblance between the bastard child and the alleged father is not competent in a bastardy proceeding.⁵⁰

v. S., 68 Ind. 401; S. v. Warren, 124 N. C. 807, 32 S. E. 552; Hamilton v. P., 46 Mich. 186, 9 N. W. 247; S. v. Giles, 103 N. C. 391, 9 S. E. 433; Olson v. Peterson, 33 Neb. 358, 50 N. W. 155; S. v. Johnson, 89 Iowa 1, 56 N. W. 404; O'Brian v. S., 14 Ind. 469; Fall v. Overseer, 3 Munf. (Va.) 495; Underhill Cr. Ev., § 532.

⁴⁶ S. v. Bennett, 75 N. C. 305; Fall v. Overseer, 3 Munf. (Va.) 495. See Low v. Mitchell, 18 Me. 372; Baker v. S., 47 Wis. 111, 2 N. W. 110, 2 Am. C. R. 606.

⁴⁷ Maynard v. P., 135 Ill. 433, 25 N. E. 740. See S. v. Borie, 79 Iowa 605, 8 Am. C. R. 87, 44 N. W. 824; S. v. Karver, 65 Iowa 53, 5 Am. C. R. 89, 21 N. W. 161; Burris v. Court, 48 Neb. 179, 66 N. W. 1131; Humphrey v. S., 78 Wis. 569, 47 N. W. 836. But see Haverstick v. S., 6 Ind. App. 595, 32 N. E. 785, 34 N. E. 99. See also Houser v. S., 93 Ind. 228; S. v. Lavin, 80 Iowa 555, 46 N. W. 553; Gillett Indirect & Col. Ev., § 54.

⁴⁸ Gaunt v. S., 50 N. J. L. 490, 14 Atl. 600, 8 Am. C. R. 300; S. v. Smith, 54 Iowa 104, 6 N. W. 153, 37

Am. R. 192; Crow v. Jordan, 49 Ohio St. 655, 32 N. E. 750; Clark v. Bradstreet, 80 Me. 454, 15 Atl. 56; Hilton v. S. (Tex. Cr.), 53 S. W. 113 (adultery); Finnegan v. Dugan, 96 Mass. 197; Gilmanton v. Ham, 38 N. H. 108; Scott v. Donovan, 153 Mass. 378, 26 N. E. 871 (babe). *Contra*, S. v. Carter, 8 Wash. 272, 36 Pac. 29; Hanawalt v. S., 64 Wis. 84, 24 N. W. 489, 54 Am. R. 588; Overlock v. Hall, 81 Me. 348, 17 Atl. 169; Risk v. S., 19 Ind. 152.

⁴⁹ Gaunt v. S., 50 N. J. L. 490, 8 Am. C. R. 300, 14 Atl. 600; Jones v. Jones, 45 Md. 148; Paulk v. S., 52 Ala. 427; S. v. Woodruff, 67 N. C. 89; Garvin v. S., 52 Miss. 207; Underhill Cr. Ev., § 525; S. v. Britt, 78 N. C. 439.

⁵⁰ Keniston v. Rowe, 16 Me. 38; Gaunt v. S., 50 N. J. L. 490, 8 Am. C. R. 300, 14 Atl. 600; Eddy v. Gray, 86 Mass. 435; P. v. Carney, 29 Hun (N. Y.) 47. See Young v. Makepeace, 103 Mass. 50. *Contra*, S. v. Bowles, 7 Jones (N. C.) 579; Paulk v. S., 52 Ala. 427.

§ 2045. **Mulatto child born.**—It is competent to show in evidence that a mulatto child, could not, by the course of nature, be born from sexual intercourse between a white man and a white woman.⁵¹

§ 2046. **Chastity of woman: also of defendant.**—On a charge of bastardy the testimony of the complaining witness can not be impeached by showing her bad reputation for chastity.⁵² Evidence that the prosecuting witness was in the habit of associating with persons whose chastity was bad is not competent.⁵³ The good reputation of the defendant for chastity is not competent.⁵⁴

§ 2047. **Death of mother—Her evidence.**—In the event of the death of the mother of the child during the pendency of the proceedings, her examination taken in writing before the justice of the peace on the preliminary hearing may be read in evidence at the trial.⁵⁵

§ 2048. **Statements by mother at travail.**—Statements made by the mother of the child at the time of her travail are not competent to prove the charge of bastardy.⁵⁶ But by statutory provisions such statements become competent as a condition precedent to recovery.⁵⁷

§ 2049. **Proving "unmarried."**—The fact that the accused "kept company" with the prosecuting witness warrants the inference that she was an unmarried woman, without further proof, where the fact

⁵¹ *Bullock v. Knox*, 96 Ala. 195, 11 So. 339; *Watkins v. Carlton*, 10 Leigh (Va.) 560. See *Com. v. Whistelo*, 3 Wheeler Cr. Cas. (N. Y.) 194.

⁵² *Bookhout v. S.*, 66 Wis. 415, 28 N. W. 179; *Com. v. Moore*, 20 Mass. 194; *Davison v. Cruse*, 47 Neb. 829, 66 N. W. 823; *Rawles v. S.*, 56 Ind. 433; *Swisher v. Malone*, 31 W. Va. 442, 7 S. E. 439; *Paull v. Padelord*, 82 Mass. 263; *Duffies v. S.*, 7 Wis. 672; *Morse v. Pineo*, 4 Vt. 281; *Underhill Cr. Ev.*, § 531. *Contra*, *Short v. S.*, 4 Har. (Del.) 568; *Sword v. Nestor*, 33 Ky. 453.

⁵³ *Miller v. S.*, 110 Ala. 69, 20 So. 392; *Eddy v. Gray*, 86 Mass. 435. See *S. v. SeEVERS*, 108 Iowa 738, 78 N. W. 705.

⁵⁴ *Stoppert v. Nierle*, 45 Neb. 105,

63 N. W. 382; *Low v. Mitchell*, 18 Me. 372; *Houser v. S.*, 93 Ind. 228.

⁵⁵ *Broyles v. S.*, 47 Ind. 251; *Dodge County v. Kemnitz*, 28 Neb. 224, 44 N. W. 184, 38 Neb. 554, 57 N. W. 385; *Hicks v. S.*, 83 Ind. 483; *P. v. Schildwachter*, 87 Hun 363, 34 N. Y. Supp. 352.

⁵⁶ *S. v. Tipton*, 15 Mont. 74, 38 Pac. 222; *Richmond v. S.*, 19 Wis. 326. *Contra*, *Hawes v. Gustin*, 84 Mass. 402; *Savage v. Reardon*, 77 Mass. 376.

⁵⁷ *Tacey v. Noyes*, 143 Mass. 449, 9 N. E. 830; *Leonard v. Bolton*, 148 Mass. 66, 18 N. E. 879; *Mann v. Maxwell*, 83 Me. 146, 21 Atl. 844; *Harty v. Malloy*, 67 Conn. 339, 35 Atl. 259; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Underhill Cr. Ev.*, § 533.

is not disputed on the trial.⁵⁸ Or that she was engaged to marry the defendant and that she was unmarried at the time of the trial.⁵⁹

§ 2050. Proving date of conception.—The prosecution is not required to prove the exact day on which the woman became pregnant.⁶⁰ The precise date of the sexual intercourse resulting in pregnancy need not be proved as alleged in the complaint or indictment. If the sexual intercourse occurred any time within the period of proper gestation it is sufficient.⁶¹

§ 2051. Gestation not usual time.—A verdict will be sustained though the period of gestation was not the usual length of time according to the due course of nature.⁶²

§ 2052. Offer to compromise.—The fact that the party accused offered to compromise the suit, without any admission of the truth of the charge, is not competent against him.⁶³

§ 2053. Prosecutrix wife of defendant.—The defendant has a right, in defense to a charge of bastardy, to prove that the prosecutrix is his wife, and in such case direct proof of marriage is not required.⁶⁴

§ 2054. Mother as a witness.—In some jurisdictions the mother of the child is not a competent witness unless she accused the defendant with being the father, in the time of her travail.⁶⁵

⁵⁸ *Durham v. P.*, 49 Ill. 233; *Cook v. P.*, 51 Ill. 146. See *Johnson v. S.*, 55 Neb. 781, 76 N. W. 427.

⁵⁹ *La Plant v. P.*, 60 Ill. App. 340.

⁶⁰ *S. v. Ryan*, 78 Minn. 218, 80 N. W. 962.

⁶¹ *Ross v. P.*, 34 Ill. App. 21; *Neff v. S.*, 57 Md. 385; *Francis v. Rosa*, 151 Mass. 532, 24 N. E. 1024; *Beals v. Furbish*, 39 Me. 469; *Bassett v. Abbott*, 70 Mass. 69; *Holbrook v. Knight*, 67 Me. 244; *Spivey v. S.*, 8 Ind. 405; *P. v. Keefer*, 103 Mich. 83, 61 N. W. 338; *Holcomb v. P.*, 79 Ill. 415.

⁶² *Cook v. P.*, 51 Ill. 143; *Com. v. Hoover*, 3 Clark (Pa.) 514, 6 Pa. L. J. 195; *Hull v. S.*, 93 Ind. 128.

⁶³ *Martin v. S.*, 62 Ala. 119; *Olson v. Peterson*, 33 Neb. 358, 50 N. W. 155.

⁶⁴ *S. v. Worthingham*, 23 Minn. 528. The evidence in the following cases was held sufficient to sustain con-

victions: *Rinehart v. S.*, 23 Ind. App. 419, 55 N. E. 504; *Altschuler v. Algaza*, 16 Neb. 631, 21 N. W. 401; *Conklin v. Niles*, 62 Vt. 104, 18 Atl. 1043; *Dukehart v. Coughman*, 36 Neb. 412, 54 N. W. 680; *West v. S.*, 84 Ga. 527, 10 S. E. 731; *Denham v. Watson*, 24 Neb. 779, 40 N. W. 308; *P. v. Tripicersky*, 38 N. Y. Supp. 696, 4 App. Div. 613; *Planck v. Bishop*, 26 Neb. 589, 42 N. W. 723; *Davis v. P.*, 50 Ill. 200; *S. v. Seever*, 108 Iowa 738, 78 N. W. 705. But not sufficient in the following: *McCoy v. P.*, 65 Ill. 440; *Baker v. S.*, 47 Wis. 111, 2 N. W. 110; *Mascal v. P.*, 55 Ill. App. 482; *Koon v. Mallett*, 68 Iowa 205, 26 N. W. 74; *Burke v. Burpo*, 75 Hun 568, 27 N. Y. Supp. 684; *Whitman v. S.*, 34 Ind. 360; *Spurgeon v. Clemmons*, 6 Neb. 307; *Jones v. P.*, 53 Ill. 366.

⁶⁵ *Beals v. Furbish*, 39 Me. 469; *Com. v. Cole*, 5 Mass. 518; *Bailey*

§ 2055. **Testimony of mother uncorroborated.**—The uncorroborated testimony of the mother of the child may be sufficient to sustain a conviction where contradicted by the defendant only.⁶⁶ But where the evidence shows that complainant had sexual intercourse with other men about the time of the alleged intercourse with the defendant, her testimony is not entitled to any credit.⁶⁷

§ 2056. **Witnesses—Husband and wife incompetent.**—"Neither husband nor wife can testify to the fact of non-access during coverture to rebut the presumption of legitimacy in an action brought by a married woman against one whom she claims is the father of her bastard child."⁶⁸

§ 2057. **Preliminary—No bar.**—A proceeding for bastardy before a justice of the peace resulting in a discharge or acquittal, is not a bar to a subsequent prosecution on the same charge, such a proceeding not being a trial over which the justice has jurisdiction.⁶⁹

§ 2058. **Trial without a plea.**—The fact that the defendant did not enter a plea before trial, is not error where it appears he was deprived of no rights which he would have been entitled to had he entered a formal plea.⁷⁰

v. Chesley, 64 Mass. 284. See Bradford v. Paul, 18 Me. 30. Travail commences when pains begin resulting in the birth of the child: Rodmon v. Reding, 18 N. H. 431; Long v. Dow, 17 N. H. 470. The putative father is a competent witness in his own behalf: Freeman v. P., 54 Ill. 162; P. v. Starr, 50 Ill. 52.

⁶⁶ McElhaney v. P., 1 Ill. App. 550; S. v. Nichols, 29 Minn. 357, 13 N. W. 153; Miller v. S., 110 Ala. 69, 20 So. 392; Kremling v. Lallman, 16 Neb. 280, 20 N. W. 383; S. v. Williams, 109 N. C. 846, 13 S. E. 880; S. v. Ingram, 6 Tenn. 221; Underhill Cr. Ev., § 529; Com. v. Betz, 2 Woodw. Dec. 210; Noonan v. Brogan, 85 Mass. 481; Riggins v. P., 46 Ill. App. 196; S. v. McGlothlen, 56 Iowa 544, 9 N. W. 893.

⁶⁷ Com. v. McCarty, 2 Clark (Pa.) 351, 4 Pa. L. J. 136.

⁶⁸ Underhill Cr. Ev., § 527, citing

Easley v. Com. (Pa.), 11 Atl. 220; Mink v. S., 60 Wis. 583, 19 N. W. 445; Chamberlain v. P., 23 N. Y. 85; Cope v. Cope, 1 M. & R. 269.

⁶⁹ S. v. Linton, 42 Minn. 32, 43 N. W. 571; Waterloo v. P., 170 Ill. 488, 48 N. E. 1054; Barnes v. Ryan, 174 Mass. 117, 54 N. E. 492; Hyden v. S., 40 Ga. 476; Munro v. Callahan, 41 Neb. 849, 60 N. W. 97; Nicholson v. S., 72 Ala. 176; Marston v. Jenness, 11 N. H. 156; In re Parker, 44 Kan. 279, 24 Pac. 338; Davis v. S., 6 Blackf. (Ind.) 494; Lynn v. S., 84 Md. 67, 35 Atl. 21. *Contra*, S. v. Braun, 31 Wis. 600; S. v. Long, 9 Ired. (N. C.) 488. See Britton v. S., 54 Ind. 535. Where the second proceeding was commenced by collusion, see Ice v. S., 123 Ind. 590, 24 N. E. 682.

⁷⁰ S. v. Bunker, 7 S. D. 639, 65 N. W. 33. See De Priest v. S., 68 Ind. 569.

§ 2059. **Imprisonment for debt.**—A judgment rendered in a bastardy proceeding against the defendant is not a debt within the meaning of a constitutional provision prohibiting imprisonment for debt.⁷¹

§ 2060. **Bond in event of conviction.**—In a bastardy proceeding, the statute requires a bond to be given in the event of conviction, which means a sealed instrument, and if not under seal, it is not binding.⁷² If the conditions of the bond be valid in part and void in part, the valid portion will be enforced if the same can be separated from the invalid part.⁷³

§ 2061. **Giving bond confers jurisdiction.**—When the bond entered into by the accused before a justice of the peace, for his appearance at the next term of the circuit court, recites that complaint was made and a warrant issued, such recitals are sufficient to give the court jurisdiction of the case.⁷⁴ And such bond will confer jurisdiction, though defective.⁷⁵

ARTICLE V. APPEAL.

§ 2062. **Appeal, when allowed.**—Under the statute of Illinois an appeal lies from the county court to the circuit court in a bastardy cause and a trial may be had in the circuit court *de novo*.⁷⁶ A bastardy proceeding can not be appealed from the appellate court to the supreme court, without a proper certificate permitting such appeal.⁷⁷

§ 2063. **Appeal—When not allowed.**—A bastardy proceeding is a case in which the finding of the facts by the appellate court affirming the judgment is conclusive upon the parties in the supreme court.⁷⁸ But otherwise the judgment of the appellate court in a bastardy proceeding is not final in that court; an appeal may be taken to the supreme court.⁷⁹

⁷¹ *Ex parte Cottrell*, 13 Neb. 193, 13 N. W. 174; *S. v. Brewer*, 38 S. C. 263, 16 S. E. 1001; *Bookhout v. S.*, 66 Wis. 415, 28 N. W. 179.

⁷² *Chilton v. P.*, 66 Ill. 503, citing *Holman v. Borough*, 2 Salk. 658; *Cooke v. Graham*, 3 Cranch 229.

⁷³ *Erlinger v. P.*, 36 Ill. 461. Action on a forfeited bond,—see *P. v. Green*, 58 Ill. 236; *Clark v. S.*, 125 Ind. 1, 24 N. E. 744.

⁷⁴ *Cook v. P.*, 51 Ill. 145.

⁷⁵ *Walker v. S.*, 108 Ala. 56, 19 So. 353.

⁷⁶ *Holcomb v. P.*, 79 Ill. 411; *Rawlings v. P.*, 102 Ill. 477; *Stanley v. P.*, 84 Ill. 212; *Hauskins v. P.*, 82 Ill. 195. See *Peak v. P.*, 76 Ill. 292 (old law).

⁷⁷ *Scharf v. P.*, 134 Ill. 246, 24 N. E. 761.

⁷⁸ *Moore v. P.*, 108 Ill. 484.

⁷⁹ *Rawlings v. P.*, 102 Ill. 478; *Moore v. P.*, 108 Ill. 484.

CHAPTER L.

INCEST.

ART.	I. Definition and Elements,	§§ 2064-2069
	II. Matters of Defense,	§§ 2070-2074
	III. Indictment,	§§ 2075-2084
	IV. Evidence; Variance,	§§ 2085-2097

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2064. **Incest defined.**—"Incest is defined as the carnal copulation of a man and woman related to each other in any of the degrees within which marriage is prohibited by law."¹

§ 2065. **Single act sufficient.**—A single act of incestuous adultery or fornication is sufficient to constitute the offense between persons nearer of kin than cousins.²

§ 2066. **Consent material.**—The crime of incest, as well as adultery, seduction and fornication, can only be committed with a female over the age of fourteen years, and with the consent of the parties to the act.³

§ 2067. **Consent, when immaterial.**—Under a statute providing that persons within certain degrees of relationship mentioned, who "shall intermarry with each other, or who shall commit fornication or

¹ 2 McClain Cr. L., § 1120; S. v. Herges, 55 Minn. 464, 57 N. W. 205; Com. v. Lane, 113 Mass. 458; S. v. Brown, 47 Ohio St. 102, 23 N. E. 747; Porath v. S., 90 Wis. 527, 63 N. W. 1061; Underhill Cr. Ev., § 395.
² S. v. Brown, 47 Ohio St. 102, 23 N. E. 747; Mathis v. Com., 11 Ky. L. 882, 13 S. W. 360; Underhill Cr. Ev., § 396.
³ S. v. Wentler, 76 Wis. 95, 44 N. W. 841, 45 N. W. 816; S. v. Eding, 141 Mo. 281, 42 S. W. 935; De Groat v. P., 39 Mich. 124; P. v. Skutt, 96 Mich. 449, 56 N. W. 11; S. v. Jarvis, 20 Or. 437, 26 Pac. 302; P. v. Harri- den, 1 Park. Cr. (N. Y.) 344; P. v. Burwell, 106 Mich. 27, 63 N. W. 986; Yeoman v. S., 21 Neb. 171, 31 N. W. 669; P. v. Patterson, 102 Cal. 239, 36 Pac. 436.

⁴ S. v. Wentler, 76 Wis. 95, 44 N.

adultery with each other, or who shall carnally know each other," shall be guilty of incest, the offense may be committed without the consent of both parties to the act.⁴

§ 2068. **Half blood, and illegitimate.**—One who commits fornication with the daughter of his half brother, is guilty of incest under the statute prohibiting marriage between uncle and niece.⁵ The blood relation of half-niece is included in the statute relating to incest of "brother or sister, whether of the whole or half blood, and also, between the uncle and niece, the aunt and the nephew."⁶ Incest may be committed where the relationship is illegitimate as well as legitimate, as, by a father cohabiting with his illegitimate daughter.⁷

§ 2069. **Daughter defined.**—The word "daughter" within the meaning of the law relating to incest imports an immediate female descendant and does not include daughter-in-law, step-daughter, or adopted daughter.⁸

ARTICLE II. MATTERS OF DEFENSE.

§ 2070. **Female consenting.**—On a charge of incest, it is no defense that the female involved gave her consent to sexual intercourse with the defendant.⁹

§ 2071. **Chastity immaterial.**—The bad reputation of the female for virtue and chastity is not material, and is therefore incompetent on a charge of incest; and it is not competent as tending to impeach the character of the female for truth and veracity.¹⁰

§ 2072. **Defendant's reputation.**—The defendant on a charge of incest is entitled to prove his reputation for gentlemanly deportment and moral character to be good, and is not confined to his reputation for virtue and chastity.¹¹

⁴ S. v. Nugent, 20 Wash. 522, 56 Pac. 25; S. v. Chambers, 87 Iowa 1, 53 N. W. 1090.

⁵ S. v. Reedy, 44 Kan. 190, 24 Pac. 66.

⁶ S. v. Guiton, 51 La. 155, 24 So. 784; Ter. v. Corbett, 3 Mont. 50; Shelly v. S., 95 Tenn. 152, 31 S. W. 492; P. v. Jenness, 5 Mich. 305.

⁷ Clark v. S., 39 Tex. Cr. 179, 45 S. W. 576; Baker v. S., 30 Ala. 521;

P. v. Lake, 110 N. Y. 61, 17 N. E. 146; Brown v. S. (Fla.), 27 So. 869.

⁸ P. v. Kaiser, 119 Cal. 456, 51 Pac. 702.

⁹ Schoenfeldt v. S., 30 Tex. App. 696, 18 S. W. 640.

¹⁰ Kidwell v. S., 63 Ind. 384, 3 Am. C. R. 237.

¹¹ Poyner v. S. (Tex. Cr.), 48 S. W. 516.

§ 2073. **Not common law offense.**—The offense of incest is not indictable at common law, and as there is no statute in North Carolina declaring it to be a criminal offense, an indictment can not there be maintained.¹²

§ 2074. **Merely soliciting.**—Mere solicitations do not prove the attempt to commit the crime of incest; but there must be some physical act done before the crime is complete.¹³

ARTICLE III. INDICTMENT.

§ 2075. **Stating kinship.**—An indictment charging that the defendant committed the crime of incest upon a person named, such person then and there being the daughter of him, the defendant, being in the language of the statute, sufficiently states the offense.¹⁴

§ 2076. **Indictment stating kinship.**—An indictment charging by proper averments that the defendant was the father of a person named, and that he had carnal knowledge of such person, is sufficient, without further alleging that such person was a female or that she was the daughter of the defendant.¹⁵ Alleging the kinship of the parties to the incestuous act to be that of uncle and niece, is sufficient under a statute prohibiting sexual intercourse between persons "nearer of kin than cousins."¹⁶

§ 2077. **Knowledge immaterial.**—Where knowledge as to relationship of the parties is not made an element of the crime of incest by statutory definition, it need not be alleged in the indictment.¹⁷

§ 2078. **Alleging "carnal knowledge."**—An indictment which charges by proper averment that the defendant had carnal knowledge of his daughter, sufficiently states the offense, though the statutory

¹² S. v. Keesler, 78 N. C. 469, 2 Am. C. R. 331; Underhill Cr. Ev., § 395.

¹³ Cox v. P., 82 Ill. 191, 193; S. v. Butler, 8 Wash. 194, 35 Pac. 1093, 9 Am. C. R. 662; Smith v. Com., 54 Pa. St. 209, 93 Am. D. 690; 1 McClain Cr. L., § 220. See "Indictments."

¹⁴ Bergen v. P., 17 Ill. 426; Bolen v. P., 184 Ill. 339, 56 N. E. 408.

¹⁵ Waggoner v. S., 35 Tex. Cr. 199, 32 S. W. 896. See Hicks v. P., 10 Mich. 395; Hintz v. S., 58 Wis. 493, 17 N. W. 639.

¹⁶ S. v. Brown, 47 Ohio St. 102, 23 N. E. 747.

¹⁷ Simon v. S., 31 Tex. Cr. 186, 20 S. W. 399, 716; S. v. Bullinger, 54 Mo. 142, 2 Green C. R. 601; Baker v. S., 30 Ala. 521; Bergen v. P., 17 Ill. 426; Hicks v. P., 10 Mich. 395.

words, "carnal knowledge of each other," are not set out in the indictment.¹⁸

§ 2079. "Feloniously" is essential.—By statutory definition incest is made a felony; an indictment, therefore, must charge that the parties committed the incestuous act feloniously, otherwise it is bad.¹⁹

§ 2080. Name immaterial.—On a charge of incest committed by the father with his daughter, it makes no difference by what name the daughter was or is called if she was in fact his daughter.²⁰ An indictment charging the defendant with committing incest with the daughter of his brother, is not defective in not stating the name of such brother.²¹

§ 2081. Attempt, intent implied.—The indictment need not allege in direct terms an intent of the parties to commit incest, in charging an attempt to commit the offense, the intent being implied in an attempt to commit the offense.²²

§ 2082. Counts in rape joined.—Counts for rape and for incest may be joined in the same indictment if founded on the same transaction.²³

§ 2083. One indictable alone.—Conceding that the consent of both parties to the sexual intercourse is necessary to constitute the crime of incest, still one of them may be indicted alone and tried.²⁴

§ 2084. Joint indictment required.—A part of the statute of Indiana relating to incest is as follows: "If any step-mother and her step-son shall have sexual intercourse together having knowledge of their relationship, they shall be deemed guilty of incest." An indictment under this statute which charges that the defendant "did unlawfully have sexual intercourse with his step-mother, Augusta

¹⁸ S. v. Hurd, 101 Iowa 391, 70 N. W. 613. See Hicks v. P., 10 Mich. 395.

¹⁹ Newman v. S., 69 Miss. 393, 10 So. 580.

²⁰ Mathis v. Com., 11 Ky. L. 882, 13 S. W. 360.

²¹ S. v. Pennington, 41 W. Va. 599, 23 S. E. 918.

²² S. v. McGilvery, 20 Wash. 240, 55 Pac. 115.

²³ Porath v. S., 90 Wis. 534, 63 N. W. 1061; S. v. Leicham, 41 Wis. 574.

²⁴ P. v. Patterson, 102 Cal. 241, 36 Pac. 436; Lowther v. S., 4 Ohio C. C. 522; Powers v. S., 44 Ga. 209; Yeoman v. S., 21 Neb. 171, 31 N. W. 669.

Baumer, then and there being his step-mother," is defective; where the crime is joint both must be guilty or neither.²⁵

ARTICLE IV. EVIDENCE; VARIANCE.

§ 2085. **Proving relationship by reputation and admissions.**—The better doctrine now is that on an indictment for incest, the relationship and pedigree of the parties may be proved by reputation.²⁶ On a charge of incest (the father with his daughter), the relationship of the parties to the offense may be proved by the admissions of the defendant, though, considering the nature of the case, such evidence should be acted upon with great caution.²⁷

§ 2086. **Proving consent.**—That the female gave her consent to the act of sexual intercourse may be shown by circumstances although she may deny the act.²⁸

§ 2087. **Other acts of parties.**—It is well settled that in cases where incest or adultery is charged, prior acts of sexual intercourse between the parties may be proved.²⁹ Acts of illicit intercourse which are barred by the statute of limitations are competent, not to prove the act charged in the indictment, but as tending to prove a continuation of the conduct of the parties within the statute of limitations.³⁰

§ 2088. **Illicit relations with others.**—It is no defense to a charge of incest that the female had illicit relations with other men prior to the time she became pregnant.³¹

²⁵ Baumer v. S., 49 Ind. 544, 1 Am. C. R. 356, 19 Am. R. 691; Delany v. P., 10 Mich. 241; Noble v. S., 22 Ohio St. 541; S. v. Byron, 20 Mo. 210; Bish. Stat. Cr., §§ 702, 721, 731.

²⁶ S. v. Bullinger, 54 Mo. 142, 2 Green C. R. 601; Bergen v. P., 17 Ill. 426; Ewell v. S., 6 Yerg. (Tenn.) 364; Bish. Stat. Cr., § 735; Underhill Cr. Ev., § 397.

²⁷ Morgan v. S., 11 Ala. 289; P. v. Harriden, 1 Park. Cr. (N. Y.) 344.

²⁸ S. v. McGilvery, 20 Wash. 240, 55 Pac. 115.

²⁹ P. v. Patterson, 102 Cal. 244, 36

Pac. 436; Thayer v. Thayer, 101 Mass. 111; Lefforge v. S., 129 Ind. 551, 29 N. E. 34; P. v. Jenness, 5 Mich. 305; S. v. Pippin, 88 N. C. 646; S. v. Markins, 95 Ind. 464, 48 Am. R. 733; S. v. Bridgman, 49 Vt. 202; Com. v. Bell, 166 Pa. St. 405, 31 Atl. 123; P. v. Cease, 80 Mich. 576, 45 N. W. 585; P. v. Skutt, 96 Mich. 449, 56 N. W. 11; Underhill Cr. Ev., § 396.

³⁰ Taylor v. S., 110 Ga. 150, 35 S. E. 161.

³¹ Kilpatrick v. S., 39 Tex. Cr. 10, 44 S. W. 830; S. v. Winningham, 124 Mo. 423, 27 S. W. 1107.

§ 2089. **Defendant's cruelty.**—Evidence that the defendant, the father of the female, treated her cruelly to compel her to submit to sexual intercourse with him, is competent.³²

§ 2090. **Daughter of defendant a prostitute.**—Evidence that the daughter of the defendant, some time before the acts of incest charged in the indictment, was living as a prostitute with her mother in a house of ill-fame and giving her earnings to her father, is incompetent and prejudicial against the defendant on a charge of incest with his daughter.³³

§ 2091. **Family quarrels incompetent.**—Evidence that some years before the charge of incest, the defendant had quarreled with his sons and caused them to leave home, is incompetent.³⁴

§ 2092. **Hearsay—Third persons.**—On a charge of incest by a brother with his half sister, evidence that their father became angry and told them they must stop staying out late, was incompetent and hearsay.³⁵

§ 2093. **Female declarations.**—Any thing the female may have said about having had sexual intercourse with the defendant very soon after the act charged, is incompetent on a charge of incest.³⁶

§ 2094. **Female corroborated.**—Evidence that the female was pregnant and that her brother, the defendant, was the only person having opportunity to have sexual intercourse with her, is sufficient corroboration of her testimony, when corroboration is required.³⁷

§ 2095. **Variance—Rape or incest.**—Though the evidence may show that the act of sexual intercourse was accomplished by the de-

³² *Clements v. S.*, 34 Tex. Cr. 616, 31 S. W. 642.

³³ *P. v. Benoit*, 97 Cal. 249, 31 Pac. 1128.

³⁴ *S. v. Moore*, 81 Iowa 578, 47 N. W. 772.

³⁵ *S. v. Pruett*, 144 Mo. 92, 45 S. W. 1114.

³⁶ *Clark v. S.*, 39 Tex. Cr. 179, 45 S. W. 576.

³⁷ *Jackson v. S.*, 37 Tex. Cr. 612,

40 S. W. 498; *Bales v. S.* (Tex. Cr.), 44 S. W. 517; *Coburn v. S.*, 36 Tex. Cr. 257, 36 S. W. 442; *S. v. Miller*, 65 Iowa 60, 21 N. W. 181; *S. v. Dana*, 59 Vt. 614, 10 Atl. 727; *S. v. Jarvis*, 18 Or. 360, 23 Pac. 251. See *Underhill Cr. Ev.*, § 397. Evidence sufficient: *S. v. Eding*, 141 Mo. 281, 42 S. W. 935; *S. v. Kimes*, 149 Mo. 459, 51 S. W. 104; *S. v. Kouhns*, 103 Iowa 720, 73 N. W. 353.

fendant forcibly and without the consent of the female, it is no defense to a charge of incest, under the statute.³⁸

§ 2096. **Adultery or fornication.**—Under a statute against incestuous adultery or fornication, a married man may be convicted, though the indictment charges him with incestuous fornication and not adultery.³⁹

§ 2097. **Wife competent witness.**—On a charge of incest against a married man, his wife is a competent witness against him, his incestuous act being an offense against her.⁴⁰

³⁸ *Smith v. S.*, 108 Ala. 1, 19 So. 306; *P. v. Gleason*, 99 Cal. 359, 33 Pac. 1111; *P. v. Kaiser*, 119 Cal. 456, 51 Pac. 702; *S. v. Hurd*, 101 Iowa 391, 70 N. W. 613; *Porath v. S.*, 90 Wis. 527, 63 N. W. 1061. *Contra*, *S. v. Jarvis*, 20 Or. 437, 26 Pac. 302; *S. v. Eding*, 141 Mo. 281, 42 S. W. 935.
³⁹ *P. v. Cease*, 80 Mich. 576, 45 N. W. 585. *Contra*, *Martin v. S.*, 58 Ark. 3, 22 S. W. 840.
⁴⁰ *S. v. Chambers*, 87 Iowa 1, 53 N. W. 1090.

CHAPTER LI.

HOUSE OF ILL FAME.

ART.	I. Definition and Elements,	§§ 2098-2103
	II. Matters of Defense,	§§ 2104-2106
	III. Indictment,	§§ 2107-2110
	IV. Evidence,	§§ 2111-2118

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2098. **House of ill fame defined.**—A house of ill fame is a house which is kept for the convenience of persons desiring unlawful sexual intercourse and in which such intercourse is practiced.¹ At common law and in common parlance, the words “house of ill fame” mean a house resorted to for the purpose of prostitution. The words “ill fame” are used in the statute to give name and character to the house and do not refer to its reputation. The gist of the offense is the keeping of the house irrespective of its fame. The statute aims at the fact and not the fame, to the substance and not the shadow.²

§ 2099. **Owner of house liable.**—If the owner of a house leases it to another for the purpose of keeping a bawdy house or for any other unlawful purpose, or if he leases it with knowledge that it is to be kept or occupied for such purpose, he is guilty under the common law and under the statutes in some states.³

¹ P. v. Hampton, 4 Utah 258, 9 Pac. 508.

² S. v. Plant, 67 Vt. 454, 32 Atl. 237, 10 Am. C. R. 274.

³ Com. v. Harrington, 3 Pick. (Mass.) 26; McAlister v. Clark, 33 Conn. 91; Troutman v. S., 49 N. J. L. 33, 6 Atl. 618; S. v. Smith, 15

R. I. 24, 22 Atl. 1119; Crofton v. S., 25 Ohio St. 249; Stevens v. P., 67 Ill. 587; S. v. Williams, 30 N. J. L. 104; P. v. Saunders, 29 Mich. 269; Cahn v. S., 110 Ala. 56, 20 So. 380; Campbell v. S., 55 Ala. 89; Albertson v. S., 5 Tex. App. 89; Smith v. S., 6 Gill (Md.) 425; S. v. Lewis, 5

§ 2100. **Letting rooms to lodgers.**—One who lets rooms to prostitutes for the purpose of prostitution, or knowingly permits them to be used for that purpose, is guilty of keeping a house of ill fame, and it is no defense that the occupants of such rooms are merely lodgers.⁴

§ 2101. **Boat or tent is "house."**—The statute punishing the keeping of houses of ill fame will include a flat-boat with a cabin on it where persons live and sleep.⁵

§ 2102. **Reputation of house immaterial.**—The statute makes it a criminal offense to keep a house for the purpose of prostitution or lewdness. That the house had the reputation of being a house of ill fame, is not essential.⁶ The gist of the offense consists in keeping the house for the lewd and unchaste purposes, and not in the reputation of the house; nor is it necessary that the indecency or disorderly conduct of the frequenters of the house be perceptible from the exterior of the house.^{6a} Nor is it essential that the neighborhood should be disturbed by the noise about the house so kept.⁷

§ 2103. **House is nuisance.**—A bawdy house or house of ill fame, being a place where prostitutes are harbored and where persons meet for the purpose of prostitution, is a common nuisance, having a tendency to corrupt the morals of the community, as well as to cause breaches of the peace.⁸

Mo. App. 465; S. v. Potter, 30 Iowa 587. See also S. v. Schaffer, 74 Iowa 704, 39 N. W. 89; Drake v. S., 14 Neb. 536, 17 N. W. 117; Padgett v. S., 68 Ind. 46; DeForest v. U. S., 11 App. D. C. 458. When liable: Ter. v. Stone, 2 Dak. 155, 4 N. W. 697. But see S. v. Wheatley, 4 Lea (Tenn.) 230.

⁴ S. v. Smith, 15 R. I. 24, 22 Atl. 1119.

⁵ S. v. Mullen, 35 Iowa 207.

⁶ S. v. Plant, 67 Vt. 454, 32 Atl. 237, 10 Am. C. R. 274; S. v. Maxwell, 33 Conn. 259; S. v. Lee, 80 Iowa 75, 45 N. W. 545; Henson v. S., 62 Md. 231; S. v. Boardman, 64 Me. 523.

^{6a} Herzinger v. S., 70 Md. 278, 17 Atl. 81.

⁷ King v. P., 83 N. Y. 587. See

Com. v. Lavonsair, 132 Mass. 1; P. v. Pinkerton, 79 Mich. 110, 44 N. W. 180.

⁸ Toney v. S., 60 Ala. 97; Sparks v. S., 59 Ala. 83; P. v. Sadler, 97 N. Y. 146; Barnesciotta v. P., 10 Hun (N. Y.) 137, 69 N. Y. 612; Com. v. Goodall, 165 Mass. 588, 43 N. E. 520; Henson v. S., 62 Md. 231, 50 Am. R. 204; S. v. Porter, 38 Ark. 637; S. v. Boardman, 64 Me. 523; Handy v. S., 63 Miss. 207, 56 Am. R. 803; S. v. Brunell, 29 Wis. 435; Betts v. S., 93 Ind. 375; S. v. Evans, 5 Ired. (N. C.) 603; Harlow v. Com., 11 Bush (Ky.) 610; Givens v. Van Studdiford, 86 Mo. 149, 72 Mo. 129; Herzinger v. S., 70 Md. 278, 17 Atl. 81; S. v. Clark, 78 Iowa 492, 43 N. W. 273; S. v. Plant, 67 Vt. 454, 32 Atl. 237, 48 Am. R. 821.

ARTICLE II. MATTERS OF DEFENSE.

§ 2104. **One woman receiving men.**—The residence of an unchaste woman, a single prostitute, does not become a bawdy house because she may habitually admit one or many men to an illicit cohabitation with her. The house must be a common resort for the purposes of prostitution.⁹

§ 2105. **Single act not sufficient.**—Permitting a single act of illicit intercourse privately in one's house is not sufficient to sustain a charge of "keeping a house of ill fame."¹⁰

§ 2106. **"Profit" immaterial.**—The prosecution is not required to allege or prove on a charge of keeping a house of ill fame, that the defendant kept it for profit unless "profit" be an element of the offense as defined by statute.¹¹

ARTICLE III. INDICTMENT.

§ 2107. **Statutory words sufficient.**—Under a statute which provides that "whoever keeps a house of ill fame, resorted to for the purpose of prostitution and lewdness, shall be fined," an indictment setting out the offense in the language of the statute, is sufficient, without any further description as to what is a house of ill fame.¹²

§ 2108. **Intent immaterial.**—Criminal intent is not an essential element of the offense of keeping a house of ill fame as defined by the statute of Massachusetts, and therefore need not be alleged in the indictment.¹³

* P. v. Buchanan, 1 Idaho 689; S. v. Calley, 104 N. C. 858, 17 Am. St. 704, 10 S. E. 455; Singleton v. Ellison, L. R. (1895) 1 Q. B. 607; S. v. Evans, 5 Ired. (N. C.) 607; S. v. Lee, 80 Iowa 75, 20 Am. St. 401, 45 N. W. 545. *Contra*, P. v. Slater, 119 Cal. 620, 51 Pac. 957; S. v. Young, 96 Iowa 262, 65 N. W. 160. See Ramey v. S., 39 Tex. Cr. 200, 45 S. W. 489.

¹⁰ P. v. Gastro, 75 Mich. 127, 42 N. W. 937; S. v. Garing, 74 Me. 152; S. v. Lee, 80 Iowa 75, 20 Am. R. 401, 45 N. W. 545; S. v. Clark, 78

Iowa 492, 43 N. W. 273; Com. v. Lambert, 12 Allen (Mass.) 177.

¹¹ Com. v. Wood, 97 Mass. 225; S. v. Clark, 78 Iowa 492, 43 N. W. 273; S. v. Bailey, 21 N. H. 343; Sparks v. S., 59 Ala. 82; S. v. Homer, 40 Me. 438; S. v. Nixon, 18 Vt. 70, 46 Am. D. 135; Scarborough v. S., 46 Ga. 26; P. v. Hampton, 4 Utah 258, 9 Pac. 508; Com. v. Ashley, 2 Gray (Mass.) 356.

¹² Betts v. S., 93 Ind. 375; S. v. Osgood, 85 Me. 288, 27 Atl. 154; Com. v. Edds, 14 Gray (Mass.) 406.

¹³ Com. v. Shea, 150 Mass. 314, 23 N. E. 47.

§ 2109. **Stating time and place.**—A complaint which charges that the defendant on a day stated, “and on divers other days and times between that day and the day of the making the complaint, at Boston, and within the judicial district of said court, did keep a certain house of ill fame there situate,” sufficiently states the time and place of the commission of the offense charged.¹⁴

§ 2110. **Charging continuing offense.**—Charging in the indictment that the defendant on a certain day stated, “and on divers other days” between that day and a previous day stated, kept a house of ill fame, is proper pleading.¹⁵

ARTICLE IV. EVIDENCE.

§ 2111. **Keeper of house.**—In order to render a person guilty of keeping a house of ill fame, it must appear that he has some interest in it as such, or that he participates or is authorized to participate in some way in its management. Proof that he is the owner or lessor of the house and that he is frequently there and stays there some time during nights is not sufficient to sustain a conviction for “keeping a house of ill fame.”¹⁶

§ 2112. **Reputation of keeper and women.**—The defendant can not be made liable as the keeper of a house of ill fame by evidence of common reputation as to his character.¹⁷ The character of the women frequenting the house and their conversations are competent evidence against the keeper of a house for keeping a house of ill fame.¹⁸ On a charge of keeping a house of ill fame, the general reputation of the inmates and frequenters of the house for chastity, including the keeper, is competent against the defendant.^{19a} It is proper to show

¹⁴ *Com. v. Shea*, 150 Mass. 314, 23 N. E. 47.

¹⁵ *P. v. Russell*, 110 Mich. 46, 67 N. W. 1099.

¹⁶ *S. v. Pearsall*, 43 Iowa 630, 2 Am. C. R. 380; 2 *McClain Cr. L.*, § 1140. See *S. v. Wells*, 46 Iowa 662.

¹⁷ *S. v. Hand*, 7 Iowa 411; *Burton v. S.*, 16 Tex. App. 156.

¹⁸ *S. v. McGregor*, 41 N. H. 407; *Beard v. S.*, 71 Md. 275, 17 Atl. 1044; *S. v. Schaffer*, 74 Iowa 704, 39 N. W. 89; *Com. v. Kimball*, 7 Gray

(Mass.) 328; *S. v. Boardman*, 64 Me. 523; *P. v. Hulett*, 15 N. Y. Supp. 630; *S. v. Bresland*, 59 Minn. 281, 61 N. W. 450; *Golden v. S.*, 34 Tex. Cr. 143, 29 S. W. 779; *S. v. Plant*, 67 Vt. 454, 32 Atl. 237; *P. v. Russell*, 110 Mich. 46, 67 N. W. 1099; *S. v. Toombs*, 79 Iowa 741, 45 N. W. 300.

^{19a} *P. v. Russell*, 110 Mich. 46, 67 N. W. 1099; *McCain v. S.*, 57 Ga. 390; *Golden v. S.*, 34 Tex. Cr. 143, 29 S. W. 779; *Handy v. S.*, 63 Miss. 207; *Com. v. Clark*, 145 Mass. 251,

in evidence that the inmates of the house alleged to be a house of ill fame have the reputation of being common prostitutes.^{18b}

§ 2113. Proving woman a prostitute.—That a woman is a prostitute may be shown by her conduct and manner of living: that she does no work, has no means, idles during the day time and dresses up in the evening and spends her time on the streets, and by fair speech solicits men to go to her room with her, may be shown in evidence to prove her to be a prostitute, though acts of sexual intercourse are not shown.¹⁹

§ 2114. Lewd conduct and conversation.—On the trial of a person charged with keeping a house of ill fame, evidence of the lewd conduct and conversations of the defendant in the presence of the inmates is competent.²⁰

§ 2115. Law as to other offenses.—Evidence of the unchaste character of the defendant and that she had been charged with the unlawful sale of intoxicating liquors, having been admitted, on her trial for keeping a house of ill fame, it is her right to have the jury instructed that it is for them to determine whether or not she is guilty of the offense charged, however guilty she may be of other offenses.²¹

§ 2116. Reputation of house immaterial.—The gist of the offense is the keeping of the house, irrespective of its fame. All of the cases hold that the character of the house can not be shown by proof of its reputation.²² The prosecution is not required to show, on the trial, that the house had the reputation of being a bawdy house.²³

13 N. E. 888; *Toney v. S.*, 60 Ala. 97; *Gamel v. S.*, 21 Tex. App. 357, 17 S. W. 158; *S. v. Hull*, 18 R. I. 207, 26 Atl. 191; *Betts v. S.*, 93 Ind. 375; *S. v. Hendricks*, 15 Mont. 194, 48 Am. St. 666, 39 Pac. 93; *S. v. West*, 46 La. 1009, 15 So. 418; *Shaffer v. S.*, 87 Md. 124, 39 Atl. 313; *Whitlock v. S.*, 4 Ind. App. 432, 30 N. E. 934.

^{18b} *P. v. Russell*, 110 Mich. 46, 67 N. W. 1099.

¹⁹ *Peabody v. S.*, 72 Miss. 104, 17 So. 213.

²⁰ *Sullivan v. S.*, 75 Wis. 650, 44 N. W. 647; *S. v. Smith*, 29 Minn.

193, 12 N. W. 524; *Com. v. Dam*, 107 Mass. 210.

²¹ *P. v. Wells*, 112 Mich. 648, 71 N. W. 176. Compare *Rhodes v. Com.*, 21 Ky. L. 1076, 54 S. W. 184.

²² *S. v. Plant*, 67 Vt. 454, 32 Atl. 237, 10 Am. C. R. 274, citing *Henson v. S.*, 62 Md. 231, 50 Am. R. 204; *S. v. Lee*, 80 Iowa 75, 45 N. W. 545.

²³ *S. v. Smith*, 29 Minn. 193, 12 N. W. 524; *S. v. Lee*, 80 Iowa 75, 20 Am. R. 401, 45 N. W. 545; *Herzinger v. S.*, 70 Md. 278, 17 Atl. 81; *S. v. Boardman*, 64 Me. 523; *S. v. Plant*, 67 Vt. 454, 48 Am. R. 821, 32 Atl. 237. *Contra*, *Drake v. S.*, 14 Neb.

§ 2117. **Reputation of house—As to nuisance.**—That the ill fame or bad reputation of a house may be shown in evidence on a charge of keeping and maintaining a nuisance by keeping a house of ill fame, as well as the bad reputation of the inmates and of persons who frequent the place, there seems to be no doubt.²⁴

§ 2118. **Terms of lease competent.**—On the trial of an indictment charging the defendant with leasing a house to be used for the purpose of prostitution, it is competent to prove the terms of the lease.²⁵

535, 17 N. W. 117; *P. v. Pinkerton*, 79 Mich. 110, 44 N. W. 180.

²⁴ *S. v. Hull*, 18 R. I. 207, 26 Atl. 191, 10 Am. C. R. 429; *S. v. Lee*, 80 Iowa 75, 45 N. W. 545; *Com. v. Kimball*, 7 Gray (Mass.) 328; *Ter. v. Bowen*, 2 Idaho 607, 23 Pac. 82; *Beard v. S.*, 71 Md. 275, 17 Atl. 1044; *S. v. Mack*, 41 La. 1079, 6 So. 808;

Com. v. Clark, 145 Mass. 251, 13 N. E. 888; *Hogan v. S.*, 76 Ga. 82; *S. v. Lyon*, 39 Iowa 379; *S. v. Boardman*, 64 Me. 523; *S. v. Bresland*, 59 Minn. 281, 61 N. W. 450; *Ter. v. Chartrand*, 1 Dak. 379, 46 N. W. 583; *Gillett Indirect & Col. Ev.*, § 296.

²⁵ *P. v. Saunders*, 29 Mich. 269.

CHAPTER LII.

SEDUCTION.

ART.	I. Definition and Elements,	§§ 2120-2128
	II. Matters of Defense,	§§ 2129-2133
	III. Indictment	§§ 2134-2139
	IV. Evidence; Variance,	§§ 2140-2166

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2120. **What constitutes offense.**—Illicit connection, accomplished by means of a promise to marry, constitutes the offense of seduction, under the statute of Virginia.¹ It is of the essence of the offense of seduction that the defendant should make a false or feigned promise of marriage to the woman seduced.² It is not necessary that the promise of marriage should be a valid and binding one between the parties. The offense consists in seducing and having illicit connection with an unmarried female under promise of marriage.³

§ 2121. **Previous promise to marry.**—If before the time of the sexual intercourse the defendant had promised to marry the female, such promise need not be repeated at the time of the intercourse.⁴

¹Barker v. Com., 90 Va. 820, 20 S. E. 776, 9 Am. C. R. 615; S. v. Heatherton, 60 Iowa 175, 14 N. W. 230; Boyce v. P., 55 N. Y. 644; P. v. Gibbs, 70 Mich. 425, 38 N. W. 257; Jones v. S., 90 Ga. 616, 16 S. E. 380; P. v. De Fore, 64 Mich. 693, 31 N. W. 585.

²Norton v. S., 72 Miss. 128, 16 So. 264, 18 So. 916, 9 Am. C. R. 607; S. v. Fitzgerald, 63 Iowa 268, 19 N. W. 202; S. v. Patterson, 88 Mo. 88, 57 Am. R. 374; P. v. Clark, 33 Mich.

112, 1 Am. C. R. 660; Bowers v. S., 29 Ohio St. 542; O'Neill v. S., 85 Ga. 383, 11 S. E. 856; P. v. De Fore, 64 Mich. 693, 31 N. W. 585; Grant v. P., 4 Park. Cr. (N. Y.) 528.

³Callahan v. S., 63 Ind. 198, 3 Am. C. R. 403, 30 Am. R. 211; Boyce v. P., 55 N. Y. 644; Kenyon v. P., 26 N. Y. 203. See Barnes v. S., 37 Tex. Cr. 320, 39 S. W. 684.

⁴Bailey v. S., 36 Tex. Cr. 540, 38 S. W. 185.

§ 2122. **Committed by deception.**—The offense of seduction may be committed by means of temptation, deception, arts and acts of flattery as well as by promise of marriage.⁵

§ 2123. **Unmarried female essential.**—It is essential that the person seduced be an unmarried female of previous chaste character and that she consented to sexual intercourse with the defendant upon the sole consideration of his promise to marry her.⁶

§ 2124. **Character of female essential.**—In every prosecution for seduction the character of the female is involved in the issue, although the words "of previous chaste character" may not be embodied in the statutory definition of the offense.⁷ "The statute is for the protection of the pure in mind, for the innocent in heart. It is not every act of impropriety nor even of indecency that should affix the stain of unchastity upon a female and deprive her of the protection of the law." The chastity or unchastity is a question of fact for the jury to determine.⁸

§ 2125. **"Illicit connection" means sexual intercourse.**—"Illicit connection" and "sexual intercourse" are equivalent in meaning within the meaning of the law relating to seduction.⁹

§ 2126. **Woman seduced after reforming.**—If the woman had abandoned her former life and reformed after having been guilty of illicit intercourse with other men, the law will protect her and punish her seducer.¹⁰

⁵ Anderson v. S., 104 Ala. 83, 16 So. 108; Smith v. S., 107 Ala. 139, 18 So. 306; Bracken v. S., 111 Ala. 68, 20 So. 636. See S. v. Cochran, 10 Wash. 562, 39 Pac. 155.

⁶ P. v. Krusick, 93 Cal. 74, 28 Pac. 794; S. v. Carr, 60 Iowa 453, 15 N. W. 271; S. v. Wheeler, 108 Mo. 658, 18 S. W. 924; S. v. Knutson, 91 Iowa 549, 60 N. W. 129; S. v. Sharp, 132 Mo. 165, 33 S. W. 795; S. v. Crowell, 116 N. C. 1052, 21 S. E. 502.

⁷ Norton v. S., 72 Miss. 128, 16 So. 264, 18 So. 916, 9 Am. C. R. 609; Brock v. S., 95 Ga. 474, 20 S. E. 211; P. v. Roderigas, 49 Cal. 9; Polk v. S., 40 Ark. 482, 48 Am. R. 17; P. v. Clark, 33 Mich. 112, 1 Am. C. R. 664; Mrous v. S., 31 Tex. Cr. 597, 21

S. W. 764; S. v. Jones, 16 Kan. 608; Wilson v. S., 73 Ala. 533; 2 McClain Cr. L., § 1113. See Mills v. Com., 93 Va. 815, 22 S. E. 863.

⁸ Andre v. S., 5 Iowa 389, 68 Am. D. 708; S. v. Carron, 18 Iowa 372, 87 Am. D. 401. See Wilson v. S., 73 Ala. 527; O'Neill v. S., 85 Ga. 383, 11 S. E. 856.

⁹ S. v. King, 9 S. D. 628, 70 N. W. 1046.

¹⁰ S. v. Timmens, 4 Minn. 333; S. v. Gunagy, 84 Iowa 177, 50 N. W. 882; Patterson v. Hayden, 17 Or. 238, 21 Pac. 129, 11 Am. R. 822; S. v. Primm, 98 Mo. 368, 11 S. W. 732; S. v. Knutson, 91 Iowa 549, 60 N. W. 129; S. v. Sharp, 132 Mo. 165, 33 S. W. 795; Kelly v. S., 33 Tex.

§ 2127. **Virtuous woman.**—An innocent and virtuous woman is one who has never had illicit intercourse with any man, and who is chaste and pure.¹¹

§ 2128. **Female confided to one's care.**—Where a girl under eighteen years made arrangements with the defendant's wife to become a member of the family of the defendant, agreeing to work for her support, she was "confided to his care and protection" under the statute, and he may be prosecuted for defiling her.¹²

ARTICLE II. MATTERS OF DEFENSE.

§ 2129. **Intercourse after seduction.**—The fact that the female may have had sexual intercourse with other men after her seduction by the defendant, is no defense.¹³

§ 2130. **Being a minor is no defense.**—The fact that the defendant was a minor is no defense to a charge of seduction.¹⁴

§ 2131. **Offer to marry.**—Although by statute the marriage of the defendant to the female seduced is a bar to a prosecution for seduction, yet the offer to marry her is no defense. No matter what offers the defendant may have made after the act was committed, such offers can be no defense.¹⁵

§ 2132. **Unchaste character of female.**—When the evidence shows that the prosecuting witness was of bad repute for chastity at the time

App. 31, 24 S. W. 295. See *Foley v. S.*, 59 N. J. L. 1, 35 Atl. 105.

¹¹ *S. v. Crowell*, 116 N. C. 1052, 21 S. E. 502; *O'Neill v. S.*, 85 Ga. 383, 11 S. E. 856. See *Wood v. S.*, 48 Ga. 192, 15 Am. R. 664; *Keller v. S.*, 102 Ga. 506, 31 S. E. 92; *P. v. Nelson*, 153 N. Y. 90, 46 N. E. 1040; *Mills v. Com.*, 93 Va. 815, 22 S. E. 863; *Underhill Cr. Ev.*, § 392.

¹² *S. v. Hill*, 134 Mo. 663, 36 S. W. 223; *S. v. Napper*, 141 Mo. 401, 42 S. W. 957; *S. v. Sibley*, 131 Mo. 519, 33 S. W. 167; *S. v. Rogers*, 108 Mo. 202, 18 S. W. 976; *Underhill Cr. Ev.*, § 394.

¹³ *Anderson v. S.*, 39 Tex. Cr. 83,

45 S. W. 15; *Bracken v. S.*, 111 Ala. 68, 20 So. 636. See *S. v. Abegglen*, 103 Iowa 50, 72 N. W. 305; *P. v. Wade*, 118 Cal. 672, 50 Pac. 841.

¹⁴ *Kenyon v. P.*, 26 N. Y. 203; *Polk v. S.*, 40 Ark. 482, 48 Am. R. 17; *P. v. Kehoe*, 123 Cal. 224, 55 Pac. 911; *Harvey v. S. (Tex. Cr.)*, 53 S. W. 102; *S. v. McClain*, 137 Mo. 307, 38 S. W. 906.

¹⁵ *S. v. Brandenburg*, 118 Mo. 185, 23 S. W. 1080; *S. v. Mackey*, 82 Iowa 393, 48 N. W. 918; *P. v. Hough*, 120 Cal. 538, 52 Pac. 846. *Contra, Com. v. Wright*, 16 Ky. L. 257, 27 S. W. 815; *S. v. Otis*, 135 Ind. 267, 34 N. E. 954; *Underhill Cr. Ev.*, § 391.

of the alleged seduction, the defendant may rely on this fact as a defense, although he knew of her unchaste reputation at the time he promised to marry her.¹⁶

§ 2133. Female voluntarily submitting.—A female able to understand the nature of the offense, who voluntarily submits to sexual intercourse before the time of the alleged seduction, is not within the statute relating to seduction, although she was under the age of consent.¹⁷

ARTICLE III. INDICTMENT.

§ 2134. Statutory words sufficient.—An indictment charging seduction will be sufficient if it states the offense substantially in the language of the statute defining it.¹⁸ The indictment charges that the defendant unlawfully and feloniously “did seduce, carnally know and debauch one Laura E. Herring.” Being in the words of the statute, the indictment is sufficient.¹⁹ In order to constitute the offense the intercourse must be “under promise of marriage.” An indictment charging that the intercourse was had “by means of a promise of marriage” is sufficient.²⁰

§ 2135. “Unmarried” not essential.—An indictment for seduction need not allege that the defendant, or the woman seduced, was unmarried, unless “unmarried” be made material by statutory definition.²¹

§ 2136. Averment of chaste character.—Charging in the indictment that the woman involved “was then and there an unmarried female of previous chaste character” sufficiently alleges that she was then and previous to that time of chaste character.²²

¹⁶ *Mrous v. S.*, 31 Tex. Cr. 597, 21 S. W. 764.

¹⁷ *P. v. Nelson*, 153 N. Y. 90, 46 N. E. 1040.

¹⁸ *S. v. Conkright*, 58 Iowa 338, 12 N. W. 283; *Wilson v. S.*, 73 Ala. 527; *Callahan v. S.*, 63 Ind. 198, 30 Am. R. 211, 3 Am. C. R. 400. See *Wright v. S.*, 62 Ark. 145, 34 S. W. 545.

¹⁹ *S. v. Curran*, 51 Iowa 112, 49 N. W. 1006, 3 Am. C. R. 406; *S. v. Abrisch*, 41 Minn. 41, 42 N. W. 543; *Wilson v. S.*, 73 Ala. 527; *S. v. Whalen*, 98 Iowa 662, 68 N. W. 554.

²⁰ *Callahan v. S.*, 63 Ind. 198, 30

Am. R. 211, 3 Am. C. R. 400; *Stinehouse v. S.*, 47 Ind. 17; *P. v. Higuera*, 122 Cal. 466, 55 Pac. 252. But see *S. v. Hamann*, 109 Iowa 646, 80 N. W. 1064.

²¹ *Davis v. Com.*, 98 Ky. 708, 17 Ky. L. 1265, 34 S. W. 699; *Luckie v. S.*, 33 Tex. Cr. 562, 28 S. W. 533; *Norton v. S.*, 72 Miss. 128, 16 So. 264, 18 So. 916.

²² *S. v. Wenz*, 41 Minn. 196, 42 N. W. 933; *West v. S.*, 1 Wis. 209. But see *Norton v. S.*, 72 Miss. 129, 16 So. 264, 18 So. 916.

§ 2137. **Exact time immaterial.**—It is not necessary that the indictment should allege the exact date or time of the seduction. Time is not of the essence of the offense.²³

§ 2138. **Indictment sufficient.**—The indictment alleged that the defendant “did then and there, under and by promise of marriage made, unlawfully and feloniously seduce and debauch her, being then and there an unmarried female of good repute and under eighteen years of age.” Held sufficient.²⁴

§ 2139. **Indictment based on sufficient evidence.**—An indictment found on the uncorroborated testimony of the prosecuting witness will, on proper showing, be quashed under a statute providing that no indictment shall be found on the uncorroborated testimony of the woman alleged to have been seduced.²⁵

ARTICLE IV. EVIDENCE; VARIANCE.

§ 2140. **Future promise of marriage.**—If the girl submitted to the embraces of the defendant, relying on his promise to marry her when they got old enough, this is sufficient to sustain the charge of seduction.²⁶ The defendant, who was several years older than the girl of seventeen years, promised that if she would submit to his embraces, and if she became pregnant as a result, he would marry her: Held sufficient to warrant a conviction.²⁷

§ 2141. **Promise implied from language.**—The promise of marriage, which induced the female to submit to sexual intercourse, may be implied from language used or inferred from circumstances, but can not be proved by evidence of mere attentions, or by a promise made after the seduction to marry her.²⁸

²³ S. v. Brassfield, 81 Mo. 151, 51 Am. R. 234; S. v. Moore, 78 Iowa 494, 43 N. W. 273; Price v. S., 61 N. J. L. 500, 39 Atl. 709; Carlisle v. S., 73 Miss. 387, 19 So. 207.

²⁴ S. v. O’Keefe, 141 Mo. 271, 42 S. W. 725. See S. v. Rogan, 18 Wash. 43, 50 Pac. 532; S. v. Olson, 108 Iowa 667, 77 N. W. 332 (“person”).

²⁶ Hart v. S., 117 Ala. 183, 23 So. 43.

²⁷ P. v. Kehoe, 123 Cal. 224, 55 Pac. 911. See Armstrong v. P., 70 N. Y.

38; Underhill Cr. Ev., § 386. *Contra*, O’Neill v. S., 85 Ga. 383, 11 S. E. 856.

²⁸ S. v. Hughes, 106 Iowa 125, 76 N. W. 520. See Callahan v. S., 63 Ind. 198, 30 Am. R. 211; P. v. Hustis, 32 Hun (N. Y.) 58, 2 N. Y. Cr. 448. *Contra*, Spenrath v. S. (Tex. Cr.), 48 S. W. 192; P. v. Van Alstyne, 144 N. Y. 361, 39 N. E. 343; P. v. Duryea, 30 N. Y. Supp. 877, 81 Hun 390; S. v. Adams, 25 Or. 172, 35 Pac. 36.

²⁸ P. v. Kane, 14 Abb. Pr. (N. Y.)

§ 2142. **Intercourse before promise.**—The defendant may show that he had sexual intercourse with the female before the promise to marry her as tending to show that she did not rely upon a promise to marry.²⁹

§ 2143. **Defendant's statements and correspondence.**—The declarations of the defendant as to his relations with the female involved, as that he has had or intends to have sexual intercourse with her, are competent against him.³⁰ Letters written by the defendant to the prosecutrix several years before the date of the alleged seduction and his visits with her during the period of time are competent as tending to prove a promise of marriage.³¹

§ 2144. **Female's statements to others.**—The fact that the prosecuting witness had previously told others that she was engaged to be married to the defendant is not competent on a charge of seduction.³²

§ 2145. **Specific acts of unchastity.**—Evidence of specific acts of criminal intercourse by the prosecutrix with other persons than the accused is not competent to disprove the "good repute" of the prosecutrix. The evidence in this regard must be confined to general reputation or character of the prosecutrix for unchastity, and the burden is on the state to prove her to be of "good repute."³³ In many of the states the statute instead of reading "of good repute" provides that the female shall be of "previous chaste character." Under such a statute the character of the prosecutrix may be impeached by proof of specific acts of lewdness, obscene talk, or immoral conduct previous to the seduction.³⁴

15; *Rice v. Com.*, 102 Pa. St. 408; *S. v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642; *P. v. Clark*, 33 Mich. 112. See *Armstrong v. P.*, 70 N. Y. 38; *S. v. Pierce*, 27 Conn. 319; *Underhill Cr. Ev.*, § 387.

²⁹ *S. v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *Bowers v. S.*, 29 Ohio St. 542; *Ferguson v. S.*, 71 Miss. 805, 15 So. 66; *Underhill Cr. Ev.*, § 388.

³⁰ *S. v. Hughes*, 106 Iowa 125, 76 N. W. 520.

³¹ *Webb v. S. (Miss.)*, 21 So. 133.

³² *Harvey v. S. (Tex. Cr.)*, 53 S. W. 102.

³³ *S. v. Bryan*, 34 Kan. 63, 8 Pac. 260, 7 Am. C. R. 610; *P. v. Wallace*,

109 Cal. 611, 42 Pac. 159; *Bowers v. S.*, 29 Ohio St. 542, 2 Am. C. R. 593; *S. v. Hill*, 91 Mo. 423, 4 S. W. 121; *S. v. Wheeler*, 94 Mo. 252, 7 S. W. 103; *S. v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *Zabriskie v. S.*, 43 N. J. L. 640, 39 Am. R. 610; *Oliver v. Com.*, 101 Pa. St. 215, 47 Am. R. 704; *S. v. Atterbury*, 59 Kan. 237, 52 Pac. 451.

³⁴ *S. v. Bryan*, 34 Kan. 63, 8 Pac. 260, 7 Am. C. R. 604; *P. v. Clark*, 33 Mich. 112, 1 Am. C. R. 660; *S. v. Clemons*, 78 Iowa 123, 42 N. W. 562; *Polk v. S.*, 40 Ark. 482, 48 Am. R. 17; *P. v. McArdle*, 5 Park. Cr. (N. Y.) 180. See *Keller v. S.*, 102 Ga.

§ 2146. **Reputation for chastity.**—Evidence of reputation for chastity of the female involved is incompetent: She must possess actual personal virtue.³⁵

§ 2147. **Chastity of female, when and when not presumed.**—On the trial of one charged with seduction the chastity of the female is presumed and the burden is on the accused to impeach it.³⁶ But in some jurisdictions it is held that the presumption in favor of the chastity of the female is overcome by the presumption of innocence of the defendant, and the burden rests upon the state to prove the averment.³⁷

§ 2148. **Chaste character—Slight.**—The evidence of previous chaste character of the female, though but slight and circumstantial, is sufficient where the burden is on the state to prove the same.³⁸ The prosecution is not bound to prove the chastity of the female to a moral certainty, under a statute providing that no conviction shall be had, "if on the trial it is proved that" the female was unchaste.³⁹

§ 2149. **Chaste character prior to seduction.**—That the woman may have had sexual intercourse after she was seduced by the defendant would not negative his guilt. Such evidence would not tend

506, 31 S. E. 92; Underhill Cr. Ev., § 392.

³⁵ S. v. Prizer, 49 Iowa 531, 31 Am. R. 155; Suther v. S., 118 Ala. 88, 24 So. 43; Hussey v. S., 86 Ala. 34, 5 So. 484; S. v. Summar, 143 Mo. 220, 45 S. W. 254; S. v. Painter, 50 Iowa 317; O'Neill v. S., 85 Ga. 383, 11 S. E. 856; Kenyon v. P., 26 N. Y. 203, 84 Am. D. 177; S. v. Reinheimer, 109 Iowa 624, 80 N. W. 669; P. v. Brewer, 27 Mich. 134; S. v. Clark, 9 Or. 466. See Smith v. Com., 17 Ky. L. 541, 32 S. W. 137; S. v. Lockerby, 50 Minn. 363, 52 N. W. 958, 9 Am. C. R. 621.

³⁶ S. v. Burns, 110 Iowa 745, 78 N. W. 681; Barker v. Com., 90 Va. 820, 20 S. E. 776, 9 Am. C. R. 616; Flick v. Com., 97 Va. 766, 34 S. E. 39; Mills v. Com., 93 Va. 815, 22 S. E. 863; S. v. Bauerkemper, 95 Iowa 562, 64 N. W. 609; P. v. Clark, 33 Mich. 112; Norton v. S., 72 Miss. 128, 16 So. 264, 18 So. 916; Crozier v. P., 1 Park. Cr. (N. Y.) 453; Polk v. S., 40 Ark. 482, 48 Am. R. 17; Smith v. S., 118

Ala. 117, 24 So. 55; S. v. McClintic, 73 Iowa 663, 35 N. W. 696; Slocum v. P., 90 Ill. 274, 281; Wilson v. S., 73 Ala. 527; McTyier v. S., 91 Ga. 254, 18 S. E. 140; P. v. Squires, 49 Mich. 487, 13 N. W. 828; Conkey v. P., 5 Park. Cr. (N. Y.) 31; Underhill Cr. Ev., §§ 19, 393.

³⁷ S. v. Lockerby, 50 Minn. 363, 52 N. W. 958, 9 Am. C. R. 618; S. v. Wenz, 41 Minn. 196, 42 N. W. 933; West v. S., 1 Wis. 209; Oliver v. Com., 101 Pa. St. 215, 218; Norton v. S., 72 Miss. 128, 16 So. 264, 18 So. 916; Com. v. Whittaker, 131 Mass. 224; S. v. Zabriskie, 43 N. J. L. 369; P. v. Roderigas, 49 Cal. 9; 1 Bish. Cr. Proc., § 1106; P. v. Wallace, 109 Cal. 611, 42 Pac. 159; P. v. Squires, 49 Mich. 487, 13 N. W. 828.

³⁸ S. v. Lockerby, 50 Minn. 363, 52 N. W. 958, 9 Am. C. R. 618, citing P. v. Kearney, 110 N. Y. 193, 17 N. E. 736.

³⁹ Suther v. S., 118 Ala. 88, 24 So. 43.

to prove her unchaste at or previous to the time of seduction. Evidence as to the chaste character must be strictly confined to the time prior to the seduction.⁴⁰

§ 2150. Mere improprieties not sufficient.—Mere improprieties of the female before the alleged seduction, or sexual intercourse thereafter, will not, without other evidence, prove unchaste character.⁴¹

§ 2151. Impeaching chastity—Lascivious conduct.—The conduct of the prosecuting witness, her lewd disposition or lascivious nature, and her relations with other men, such as kissing and embracing, may be shown in evidence as tending to impeach her chastity.⁴²

§ 2152. Impeaching chastity by reputation of house.—The accused can not impeach the chastity of the female by showing that the house where she resided was of ill repute. The character of the house can not be shown by general reputation, but only by proof of particular facts.⁴³

§ 2153. Impeaching prosecutrix.—A female child having become pregnant, admitted that she had made written statements that the defendant was innocent of her condition, but stated that she made such statements because the defendant had threatened her. It was then proper for the defendant to show that she committed acts of sexual intercourse with other men, as tending to impeach her truthfulness and as tending to show how she became pregnant.⁴⁴

§ 2154. Questions indefinite.—On cross-examination questions were asked the prosecuting witness as to her having had sexual intercourse

⁴⁰ *S. v. Gunagy*, 84 Iowa 183, 50 N. W. 882; *Mann v. S.*, 34 Ga. 1; *Lewis v. P.*, 37 Mich. 518; *S. v. Brassfield*, 81 Mo. 151, 51 Am. R. 234; *Boyce v. P.*, 55 N. Y. 644; *S. v. Deitrick*, 51 Iowa 467, 1 N. W. 732; *S. v. Gates*, 27 Minn. 52, 6 N. W. 404; *Smith v. S.*, 118 Ala. 117, 24 So. 55; *S. v. Abeggian*, 103 Iowa 50, 72 N. W. 305; *Underhill Cr. Ev.*, § 392; *P. v. Wade*, 118 Cal. 672, 50 Pac. 841; *Bracken v. S.*, 111 Ala. 68, 20 So. 636. *Contra*, *Keller v. S.*, 102 Ga. 506, 31 S. E. 92.

⁴¹ *P. v. Kehoe*, 123 Cal. 224, 55 Pac. 911. See *S. v. McIntire*, 89 Iowa 139, 56 N. W. 419.

⁴² *Creighton v. S.* (Tex. Cr.), 51 S. W. 910; *Keller v. S.*, 102 Ga. 506,

31 S. E. 92. See also *S. v. Shean*, 32 Iowa 88; *P. v. Squires*, 49 Mich. 487, 13 N. W. 828; *O'Neill v. S.*, 85 Ga. 383, 11 S. E. 856; *S. v. Clemons*, 78 Iowa 123, 42 N. W. 562; *S. v. Primm*, 98 Mo. 368, 11 S. W. 732; *S. v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

⁴³ *Barker v. Com.*, 90 Va. 820, 20 S. E. 776, 9 Am. C. R. 614; *Kenyon v. P.*, 26 N. Y. 203; *Polk v. S.*, 40 Ark. 482; *S. v. Bowman*, 45 Iowa 418; *McTyler v. S.*, 91 Ga. 254, 18 S. E. 140; 2 McClain Cr. L., § 1113.

⁴⁴ *P. v. Craig*, 116 Mich. 388, 74 N. W. 528. See *S. v. Summar*, 143 Mo. 220, 45 S. W. 254.

with other persons than the accused: Held improper because not confined to a time prior to the seduction charged. The questions asked were indefinite as to the time and required an answer of the witness after the alleged seduction as well as before.⁴⁵

§ 2155. Chastity, when attacked, may be sustained by reputation.—The defendant having attacked the chastity of the prosecutrix by the introduction of testimony, the prosecution in reply may sustain her character by evidence of her general reputation in the community where she lives for chastity.⁴⁶

§ 2156. Courtship or attention competent.—The authorities concur that seduction is generally shown by circumstances, such as courtship or continued attention for a length of time. Courtship affords not simply the opportunity but the very means of persuasion by which seduction is effected.⁴⁷

§ 2157. Previous familiarities.—Evidence of previous familiarities and propositions of affection and conversations about marriage, and correspondence, also, are competent on a charge of seduction.⁴⁸

§ 2158. Child as evidence.—A child born to the woman who was seduced may be introduced in evidence for the purpose of proving any likeness it bears to the defendant.⁴⁹

§ 2159. Other acts between the parties.—Evidence of other acts of sexual intercourse between the defendant and the female since the date of the seduction alleged is competent against him.⁵⁰

⁴⁵ *S. v. Deitrick*, 51 Iowa 467, 1 N. W. 732, 3 Am. C. R. 416; *S. v. Sutherland*, 30 Iowa 570; *Davis v. S.*, 36 Tex. Cr. 548, 38 S. W. 174. But see *Keller v. S.*, 102 Ga. 506, 31 S. E. 92; *Foley v. S.*, 59 N. J. L. 1, 35 Atl. 105.

⁴⁶ *S. v. Reinheimer*, 109 Iowa 624, 80 N. W. 669.

⁴⁷ *S. v. Curran*, 51 Iowa 112, 49 N. W. 1006, 3 Am. C. R. 410; *S. v. Wells*, 48 Iowa 671; *S. v. Wheeler*, 108 Mo. 659, 18 S. W. 924; *Munkers v. S.*, 87 Ala. 94, 6 So. 357; *Wright v. S.*, 31 Tex. App. 354, 20 S. W. 756; *S. v. McClintic*, 73 Iowa 663, 35 N. W. 696.

⁴⁸ *P. v. Hubbard*, 92 Mich. 326, 52

N. W. 729; *Ferguson v. S.*, 71 Miss. 805, 15 So. 66; *S. v. Mackey*, 82 Iowa 393, 48 N. W. 918; *Webb v. S.* (Miss.), 21 So. 133. See *S. v. King*, 9 S. D. 628, 70 N. W. 1046; *Munkers v. S.*, 87 Ala. 94, 6 So. 357; *S. v. Hill*, 91 Mo. 423, 4 S. W. 121; *Underhill Cr. Ev.*, § 388.

⁴⁹ *S. v. Horton*, 100 N. C. 443, 6 S. E. 238; *S. v. Smith*, 54 Iowa 104, 6 N. W. 153; *S. v. Burns*, 110 Iowa 745, 78 N. W. 681. *Contra*, *S. v. Carter*, 8 Wash. 272, 36 Pac. 29; *Barnes v. S.*, 37 Tex. Cr. 320, 39 S. W. 684. See *Robnett v. P.*, 16 Ill. App. 299.

⁵⁰ *S. v. Robertson*, 121 N. C. 551, 28 S. E. 59; *Keller v. S.*, 102 Ga. 506,

§ 2160. **Corroborating female by other evidence.**—Where a statute requires that the evidence of the woman shall be corroborated before a conviction can be had, the rule is that the corroboration need only extend to the promise to marry and to the sexual intercourse, and that the supporting evidence need be such only as the character of these matters admits of being furnished.⁵¹ The testimony of the woman alleged to have been seduced may be corroborated by circumstances, such as her association with the defendant, going to church or other places together, love letters passing between them, and the like.⁵² Under a statute requiring corroboration of the prosecutrix on a charge of seduction such corroboration must be shown by other and different evidence than that given by the prosecuting witness.⁵³

§ 2161. **Corroboration not sufficient.**—Where the evidence showed that the defendant had an opportunity to have sexual intercourse with the prosecuting witness at the time she said the offense was committed, and that about nine months afterward she gave birth to a child, and also showed that she had had intercourse with other persons, she was not corroborated as to the promise of marriage. Held not sufficient to warrant a conviction.⁵⁴

31 S. E. 92; *Foley v. S.*, 59 N. J. L. 1, 35 Atl. 105; *Barnes v. S.*, 37 Tex. Cr. 320, 39 S. W. 684; *S. v. King*, 9 S. D. 628, 70 N. W. 1046; *S. v. Whalen*, 98 Iowa 662, 68 N. W. 554; *Ferguson v. S.*, 71 Miss 805, 15 So. 66; *Underhill Cr. Ev.*, § 388.

⁵¹ *Barker v. Com.*, 90 Va. 820, 20 S. E. 776, 9 Am. C. R. 617; *P. v. Orr*, 36 N. Y. Supp. 398, 92 Hun 199; *Rice v. Com.*, 102 Pa. St. 408, 4 Am. C. R. 563; *Suther v. S.*, 118 Ala. 88, 24 So. 43; *S. v. Eisenhower*, 132 Mo. 140, 33 S. W. 785; *Ferguson v. S.*, 71 Miss. 805, 15 So. 66; *P. v. Gumaer*, 80 Hun 78, 30 N. Y. Supp. 17; *Underhill Cr. Ev.*, § 390. See *S. v. Lauderbeck*, 96 Iowa 258, 65 N. W. 158; *S. v. Knutson*, 91 Iowa 549, 60 N. W. 129; *S. v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *S. v. Davis*, 141 Mo. 522, 42 S. W. 1083; *S. v. Marshall*, 137 Mo. 463, 36 S. W. 619, 39 S. W. 63; *S. v. Hughes*, 106 Iowa 125, 76 N. W. 520; *La Rosae v. S.*, 132 Ind. 219, 31 N. E. 798. Corroboration not required: *S. v. King*, 9 S. D. 628, 70 N. W. 1046.

⁵² *S. v. Lauderbeck*, 96 Iowa 258,

65 N. W. 158; *S. v. Brassfield*, 81 Mo. 151; *Bailey v. S.*, 36 Tex. Cr. 540, 38 S. W. 185; *S. v. Hill*, 91 Mo. 423, 4 S. W. 121; *S. v. Reinheimer*, 109 Iowa 624, 80 N. W. 669; *S. v. Brown*, 64 N. J. L. 414, 45 Atl. 800.

⁵³ *S. v. McGinn*, 109 Iowa 641, 80 N. W. 1068; *S. v. Bess*, 109 Iowa 675, 81 N. W. 152.

⁵⁴ *Spenrath v. S.* (Tex. Cr.), 48 S. W. 192; *S. v. Burns*, 110 Iowa 745, 82 N. W. 325. See the following cases on corroboration of the female: *S. v. Ferguson*, 107 N. C. 841, 12 S. E. 574; *Cunningham v. S.*, 73 Ala. 51; *P. v. Kearny*, 110 N. Y. 188, 17 N. E. 736; *S. v. Hill*, 91 Mo. 423, 4 S. W. 121; *S. v. Reeves*, 97 Mo. 668, 10 S. W. 841; *Armstrong v. P.*, 70 N. Y. 38; *S. v. Smith*, 54 Iowa 743, 7 N. W. 402; *S. v. Heatherton*, 60 Iowa 175, 14 N. W. 230; *S. v. Bell*, 79 Iowa 117, 44 N. W. 244; *S. v. Clemons*, 78 Iowa 123, 42 N. W. 562; *Cooper v. S.*, 90 Ala. 641, 8 So. 821; *S. v. McCaskey*, 104 Mo. 644, 16 S. W. 511; *Munkers v. S.*, 87 Ala. 94, 6 So. 357; *S. v. Hayes*, 105 Iowa 82, 74 N. W. 757; *Zabriskie v. S.*, 43 N. J. L. 640, 39

§ 2162. **Promise of marriage relied on.**—It must appear from the evidence, beyond a reasonable doubt, that the prosecuting witness relied alone on the promise of marriage and that she was not actuated by some other consideration.⁵⁵

§ 2163. **Willingness to marry.**—Although the willingness of the defendant to marry the prosecutrix is no defense, yet this fact may be shown in evidence for the purpose of determining whether or not she really was seduced, and also in mitigation of punishment.⁵⁶

§ 2164. **Preparation to marry incompetent.**—Evidence that the prosecuting witness had procured a wedding dress and was making preparations to marry the defendant is not competent.⁵⁷

§ 2165. **Defendant's moral character.**—The court by refusing to allow evidence of good moral character, on the part of the defendant, in a case of seduction, but in allowing evidence of his character for virtue, committed no error.⁵⁸

§ 2166. **Variance—When rape.**—Where violence is used to compel the female to submit to sexual intercourse the crime is not seduction, but rape.⁵⁹

Am. R. 610; *Rice v. Com.*, 100 Pa. St. 28; *Anderson v. S.*, 39 Tex. Cr. 83, 45 S. W. 15; *P. v. Wade*, 118 Cal. 672, 50 Pac. 841.

⁵⁵ *Barnes v. S.*, 37 Tex. Cr. 320, 39 S. W. 684; *S. v. Sibley*, 132 Mo. 102, 33 S. W. 167, 53 Am. R. 477; *Mills v. Com.*, 93 Va. 815, 22 S. E. 863.

⁵⁶ *S. v. Whalen*, 98 Iowa 662, 68 N. W. 554; *S. v. Bauerkemper*, 95 Iowa 562, 64 N. W. 609; *Underhill Cr. Ev.*, § 391. *Contra*, *S. v. O'Keefe*, 141 Mo. 271, 42 S. W. 725; *Smith v. S.*, 107 Ala. 139, 18 So. 306.

⁵⁷ *S. v. Lenihan*, 88 Iowa 670, 56 N. W. 292; *S. v. Buxton*, 89 Iowa 573, 57 N. W. 417. See *Underhill Cr. Ev.*, § 388.

⁵⁸ *S. v. Curran*, 51 Iowa 112, 49 N. W. 1006, 3 Am. C. R. 408; 3 Greenl. Ev., § 25. See *S. v. King*, 9 S. D. 628, 70 N. W. 1046.

⁵⁹ *P. v. Royal*, 53 Cal. 62; *S. v. Horton*, 100 N. C. 443, 6 Am. R. 613,

6 S. E. 238; *Croghan v. S.*, 22 Wis. 444; *S. v. Lewis*, 48 Iowa 578, 30 Am. R. 407. See *Nicholson v. Com.*, 91 Pa. St. 390; *Wood v. S.*, 48 Ga. 192, 15 Am. R. 664; *Hopper v. S.*, 54 Ga. 389. The evidence in the following cases was held sufficient to sustain convictions: *Rippetoe v. P.*, 172 Ill. 173, 50 N. E. 166; *S. v. Ayers*, 8 S. D. 517, 67 N. W. 611; *S. v. Wallace*, 109 Cal. 611, 42 Pac. 159; *S. v. McIntire*, 89 Iowa 139, 56 N. W. 419 (alibi); *Bailey v. S.*, 36 Tex. Cr. 540, 38 S. W. 185 (intercourse); *Wright v. S.*, 31 Tex. Cr. 354, 20 S. W. 756; *S. v. Reed*, 153 Mo. 451, 55 S. W. 74 (unmarried); *Flick v. Com.*, 97 Va. 766, 34 S. E. 39; *S. v. Hughes*, 106 Iowa 125, 76 N. W. 520 (corroboration). But not sufficient in the following: *S. v. Thomas*, 103 Iowa 748, 73 N. W. 474; *Spenrath v. S.* (Tex. Cr.), 48 S. W. 192.

CHAPTER LIII.

OBSCENE LITERATURE; INDECENCY.

ART. I.	What Constitutes Offense,	§§ 2167-2174
II.	Matters of Defense,	§§ 2175-2180
III.	Indictment,	§§ 2181-2188
IV.	Evidence; Variance,	§§ 2189-2192

ARTICLE I. WHAT CONSTITUTES OFFENSE.

§ 2167. **Definition.**—The test of an obscene book is stated to be whether the tendency of the matter charged as obscenity is to deprave or corrupt those whose minds are open to such immoral influences and who might come in contact with it. It would also be a proper test of obscenity in a painting or statue, whether the motive of the painting or statue, so to speak, as indicated by it, is pure or impure.¹ A picture which is so indecent that it can be described only by the use of obscene language is certainly an obscene picture.²

§ 2168. **Publication of obscene painting.**—Although it is not stated in the indictment in express terms that the defendants published the painting, yet the averment is substantially the same, that is to say, that they exhibited it to sundry persons for money, for that in law is a publication.³

§ 2169. **Publication—Delivery to one.**—Taking the photograph of a nude woman and delivering it to her on receipt of the price is a violation of the statute prohibiting the sale of obscene photographs.*

¹ P. v. Muller, 96 N. Y. 408, 4 Am. (Pa.) 91, 101. See Reg. v. Carlile, C. R. 455. See Reg. v. Hicklin, L. R. 1 Cox C. C. 229; 2 McClain Cr. L., 3 Q. B. 369; U. S. v. Clarke, 38 Fed. § 1157.
² S. v. Pfenninger, 76 Mo. App. 313. W. 352.
³ S. v. Doty, 103 Iowa 699, 73 N.

* Com. v. Sharpless, 2 Serg. & R.

But merely sitting for a negative of a nude picture is not a violation.⁵

§ 2170. **Exhibiting nude pictures.**—Exhibiting a picture of a newly-married couple, showing the bride in the act of undressing, though without exposing much of her person, is, under the statute, an offense against public decency.⁶

§ 2171. **Indecent exhibition.**—Where the evidence showed that the two prisoners kept a booth at Epsom Downs for the purpose of giving an indecent exhibition; that they invited all persons who came within reach of their solicitations to come in and see it, and that persons paid and went in and saw what was grossly indecent, it was held sufficient to sustain a conviction.⁷

§ 2172. **Indecent exposure.**—If a person expose his person on a public highway in view of persons passing on such highway, including females, he is guilty of indecent exposure at common law.⁸

§ 2173. **Obscenity—A question of fact.**—Whether language charged to be obscene or insulting, or whether a publication, painting or picture is obscene or not, is a question of fact for the jury to determine.⁹

§ 2174. **Publishing scandals.**—A newspaper publishing scandals, immoral conduct and intrigues, comes within the statute, though less than half its columns were devoted to that purpose.¹⁰

ARTICLE II. MATTERS OF DEFENSE.

§ 2175. **Obscene language—No defense.**—On a charge of using obscene language in the presence or hearing of any female it is no defense that the defendant did not know or have any reason to believe that any female was present.¹¹

⁵ P. v. Ketchum, 103 Mich. 443, 61 N. W. 776.

⁶ P. v. Doris, 43 N. Y. Supp. 571, 12 N. Y. Cr. 100.

⁷ Queen v. Saunders, L. R. 1 Q. B. D. 15, 3 Am. C. R. 440.

⁸ S. v. Walter, 2 Marv. (Del.) 444, 43 Atl. 253.

⁹ McNair v. P., 89 Ill. 443; Carter v. S., 107 Ala. 146, 18 So. 232; P. v.

Muller, 32 Hun (N. Y.) 209; U. S. v. Davis, 38 Fed. 326; U. S. v. Clarke, 38 Fed. 500.

¹⁰ In re Banks, 56 Kan. 242, 42 Pac. 693. See Com. v. Dowling, 14 Pa. Co. Ct. R. 607; P. v. Danihy, 63 Hun 579, 18 N. Y. Supp. 467; U. S. v. Harman, 38 Fed. 827.

¹¹ Laney v. S., 105 Ala. 105, 17 So. 107.

§ 2176. **Language, when obscene.**—It is “vulgar and obscene” for a man to ask a woman to go to bed with him. But saying to a woman, “I want to stay here a while,” is not *per se* obscene.¹²

§ 2177. **Defendant's opinion immaterial.**—The inquiry under the statute is whether the paper charged to have been obscene, lewd and lascivious was in fact of that character; and if it was so, and was deposited in the mail by one who knew or had notice at the time of its contents, the offense is complete, although the defendant himself did not regard the paper as one which the statute forbade to be carried in the mails.¹³

§ 2178. **Sending through mail.**—It is no defense to a charge of sending obscene, lewd or lascivious books, pictures and the like through the mail that the same were sent in the interest of science, philosophy or morality.¹⁴

§ 2179. **Procuring obscene picture.**—On an information charging a woman with having procured a certain obscene picture of herself for the purpose of exhibition and circulation, evidence that she caused such picture to be taken will not sustain a conviction without evidence to show for what purpose she had the picture taken.¹⁵

§ 2180. **Indecent exposure seen by one.**—Under a statute forbidding a “notorious act of public indecency,” the committing of an act of indecent exposure in a field near a public road, seen by one person only, is not an offense.¹⁶

ARTICLE III. INDICTMENT.

§ 2181. **Setting out or describing obscenity.**—An indictment for publishing a paper containing an obscene picture is defective in not setting out such paper in *haec verba* or giving a description of it.¹⁷ In

¹² Dillard v. S., 41 Ga. 278; Stamps v. S., 95 Ga. 475, 20 S. E. 241.

¹³ Rosen v. U. S., 161 U. S. 29, 10 Am. C. R. 262, 16 S. Ct. 434; Dunlop v. U. S., 165 U. S. 486, 17 S. Ct. 375; Andrews v. U. S., 162 U. S. 420, 16 S. Ct. 798. See Swearingen v. U. S., 161 U. S. 446, 16 S. Ct. 562.

¹⁴ U. S. v. Slenker, 32 Fed. 691; U. S. v. Smith, 45 Fed. 476. See U. S. v. Harmon, 45 Fed. 414.

¹⁵ P. v. Ketchum, 103 Mich. 443, 61 N. W. 776.

¹⁶ Morris v. S., 109 Ga. 351, 34 S. E. 577.

¹⁷ Reyes v. S., 34 Fla. 181, 15 So. 875. See Stevenson v. S., 90 Ga. 456, 16 S. E. 95; S. v. Brown, 27 Vt. 619; Thomas v. S., 103 Ind. 419, 2 N. E. 808; McNair v. P., 89 Ill. 441; P. v. Hallenbeck, 52 How. Pr. (N. Y.) 502.

an indictment for publishing an obscene book it is not sufficient to describe the book by the title only; the words contained in it alleged to be obscene must be set out.¹⁸ An indictment alleging that the defendant "sold an obscene, lewd, lascivious, filthy and indecent newspaper, containing stories of an indecent and immoral character, having a tendency to degrade and corrupt the morals," is defective in not setting out the contents of the paper to show that it was of that character.¹⁹ Under a statute providing that every person who shall distribute any printed paper or thing which contains obscene language, manifestly tending to the corruption of the morals of youth, shall be imprisoned, an indictment alleging that the defendant "unlawfully, knowingly and wickedly did distribute a certain printed paper containing obscene language," is defective in not stating the manner of the distribution.²⁰

§ 2182. Obscenity—Need not be alleged.—It is necessary to set out the obscene publication in the indictment, unless it is in the hands of the defendant or out of the power of the prosecution, or the matter is too gross and obscene to be spread on the records of the court, either of which facts, if existing, should be averred in the indictment.²¹

§ 2183. Statutory words sufficient.—An indictment in charging in the language of the statute that the defendant unlawfully did sell, or have in his possession, a certain obscene and indecent picture, is sufficient.²²

§ 2184. Averring obscenity.—In charging the offense of using obscene or licentious language in the presence or hearing of a female, if the words used are not *per se* of that character the indictment must by proper averments show wherein the words are obscene.²³ While the indecent publication need not be set forth at length in the indictment, and that it is sufficient to allege as an excuse for not so doing, its scandalous and obscene character, it must be identified by some gen-

¹⁸ *Bradlaugh v. Queen*, L. R. 3 Q. B. D. 607, 3 Am. C. R. 479. *Contra*, *Com. v. McCance*, 164 Mass. 162, 41 N. E. 133.

¹⁹ *P. v. Danihy*, 63 Hun 579, 18 N. Y. Supp. 467. See *Abendroth v. S.*, 34 Tex. Cr. 325, 30 S. W. 787.

²⁰ *S. v. Smith*, 17 R. I. 371, 22 Atl. 282.

²¹ *McNair v. P.*, 89 Ill. 443; *S. v. Smith*, 17 R. I. 415, 22 Atl. 1020;

P. v. Girardin, 1 Mich. 90; *Com. v. Holmes*, 17 Mass. 336; *Rosen v. U. S.*, 161 U. S. 29, 16 S. Ct. 434, 10 Am. C. R. 256, 260.

²² Act of 1889, Ill. Stat.; *Strohm v. P.*, 160 Ill. 584, 43 N. E. 622; *Fuller v. P.*, 92 Ill. 182; *S. v. McKee*, 73 Conn. 18, 46 Atl. 409, 49 L. R. A. 542.

²³ *S. v. Cone*, 16 Ind. App. 350, 45 N. E. 345.

eral description which will show what the paper is which the defendant is charged with publishing.²⁴

§ 2185. Indictment for depositing in mail.—An indictment charging that the defendant “did unlawfully and knowingly deposit in the mail of the United States, then and there for mailing and delivery, a certain obscene, lewd and lascivious book (naming it), which said book is so lewd, obscene and lascivious that the same would be offensive to the court and improper to be placed upon the records thereof, wherefore the jurors aforesaid do not set forth the same in the indictment,” sufficiently states an offense.²⁵

§ 2186. Indictment as to knowledge.—An information charging that the defendant did “knowingly compose, edit, print and sell” a certain obscene newspaper, is sufficient, without alleging that he knew the paper to be obscene.²⁶

§ 2187. Duplicity—Various ways.—Under a statute punishing any person who shall “import, print, publish, sell, rent, give away, distribute or show any obscene book, newspaper or photograph,” an indictment alleging that the defendant “did compose, edit, print, sell and distribute a certain obscene newspaper,” charges but a single offense.²⁷

§ 2188. Filing copy of obscene document.—Where the indictment alleges that the publication is too obscene and indecent to be set out in the record, then the court will exercise its discretion as to whether or not the prosecution shall be required to file a copy of the matter on which the prosecution is based.²⁸

ARTICLE IV. EVIDENCE; VARIANCE.

§ 2189. Other acts incompetent.—On a charge of sending an indecent and offensive letter to a female, evidence of sending an inde-

²⁴ *Com. v. Wright*, 139 Mass. 382, 1 N. E. 411, 5 Am. C. R. 572. *Pac.* 652. See *Rosen v. U. S.*, 161 U. S. 29, 16 S. Ct. 434. *Contra*, *U. S. v. Reid*, 73 Fed. 289.

²⁵ *Rosen v. U. S.*, 161 U. S. 29, 16 S. Ct. 434, 10 Am. C. R. 260; *S. v. Smith*, 17 R. I. 371, 22 Atl. 282. *Contra*, *U. S. v. Fuller*, 72 Fed. 771.

²⁶ *S. v. Holedger*, 15 Wash. 443, 46 Pac. 652. ²⁷ *S. v. Holedger*, 15 Wash. 443, 46 Pac. 652. ²⁸ *Dunlop v. U. S.*, 165 U. S. 486, 17 S. Ct. 375.

cent letter to another female¹ is not competent unless there be some connection between the two transactions.²⁹

§ 2190. **Document containing obscene matter.**—The newspaper or printed document containing the alleged obscene matter may be admitted in evidence. And it may also be shown that other copies of the same newspaper were mailed, though not shown to have been received.³⁰

§ 2191. **Variance—Vulgar words.**—A statute making it a misdemeanor to use “obscene and vulgar” language in the presence of a female is not violated by using the following words: “You are a God damn, low down, son of a bitch,” in the presence of a female.³¹

§ 2192. **Variance—Nude pictures.**—An indictment averred that the defendant unlawfully and scandalously did print and publish certain obscene pictures, figures and descriptions, to wit, pictures of two naked girls. The evidence was that the defendant took photograph pictures of girls naked down to the waist. Held to be a variance.³²

²⁹ *Larison v. S.*, 49 N. J. L. 256, 265, 9 Atl. 700; *Montross v. S.*, 72 Ga. 261. Evidence obtained by means of sending decoy letters is competent against the accused on a charge of violating the mail law. *U. S. v. Slenker*, 32 Fed. 691; *Goode v. U. S.*,

159 U. S. 663, 16 S. Ct. 136; *Price v. U. S.*, 165 U. S. 311, 17 S. Ct. 366.

³⁰ *Dunlop v. U. S.*, 165 U. S. 486, 17 S. Ct. 375.

³¹ *Shields v. S.*, 89 Ga. 549, 16 S. E. 66.

³² *Com. v. Dejardin*, 126 Mass. 46, 3 Am. C. R. 291.

CHAPTER LIV.

GAMING.

ART.	I. Definition and Elements,	§§ 2193-2219
	II. Matters of Defense,	§§ 2220-2223
	III. Indictment,	§§ 2224-2240
	IV. Evidence; Variance,	§§ 2241-2254

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2193. **Gaming defined.**—Gaming is an unlawful agreement between two or more persons to risk money or property on a contest or chance of any kind, where one must be gainer and the other loser.¹ The controlling element in unlawful gaming is chance or hazard.²

§ 2194. **Gaming house.**—A gaming house, within the meaning of the statute, will include a house where persons are permitted to habitually resort for the purpose of betting money on horse races and other games.³ The keeping of “a common gaming house in any building” includes athletics or other games of muscular strength as well as games of hazard and skill played with instruments; also betting on horse races, bookmaking and pool-selling, contingent upon the result of horse races.⁴

¹ Eubanks v. S., 3 Heisk. (Tenn.) 488, 1 Green C. R. 323; Portis v. S., 27 Ark. 360. See Montfort v. Com., 13 Ky. L. 136.

² In re Lee Tong, 18 Fed. 253, 9 Sawy. 333, 5 Cr. L. Mag. 67; Wortham v. S., 59 Miss. 179; Harris v. White, 81 N. Y. 539; S. v. Smith, Meigs (Tenn.) 99, 33 Am. D. 132.

³ Bollinger v. Com., 98 Ky. 574, 17 Ky. L. 1122, 35 S. W. 553. See Com. v. Blankinship, 165 Mass. 40, 42 N. E. 115.

⁴ Swigart v. P., 154 Ill. 291, 40 N. E. 432; Shaffner v. Pinchback, 133 Ill. 412, 24 N. E. 867; Cheek v. Com., 100 Ky. 1, 18 Ky. L. 515, 37 S. W. 152; Talman v. Strader, 23 Ill. 440; Garrison v. McGregor, 51 Ill. 474; S. v. Falk, 66 Conn. 250, 33 Atl. 913; McBride v. S., 39 Fla. 442, 22 So. 711; Wilkinson v. Tousley, 16 Minn. 299; McLain v. Huffman, 30 Ark. 428. See also P. v. Weithoff, 51 Mich. 203, 47 Am. R. 557, 16 N. W. 442; Robb v. S., 52 Ind. 216; Benson

§ 2195. **Keeping gaming house—Continuing offense.**—The “keeping of a gaming house” is a continuing offense, and though such “keeping” continues for a long space of time, it is but a single offense for that entire period of time.⁵

§ 2196. **Only one act.**—Where a person keeps a gaming device and permits and entices persons to play on or with it, it is but one offense if done at the same time.⁶

§ 2197. **Several bets.**—Each of several distinct bets on a gaming device is a separate offense though done at one and the same sitting. Betting on such device is not a continuing offense.⁷

§ 2198. **Bookmaking and pool-selling.**—Under a statute relating to bookmaking and pool-selling containing a proviso that the provisions of the statute shall not apply to the actual enclosure of fair or race-track associations during the actual time of the meetings of such associations, such proviso does not suspend the operation of the general statute against gaming within the enclosure of such associations during the actual time of such meetings and affords no protection to such associations on charges of gaming for money.⁸

§ 2199. **Betting outside inclosure.**—Betting on a horse race outside of the inclosure where the race is run is a violation under a statute permitting such betting within the inclosure.⁹

§ 2200. **Selling prize boxes.**—The defendant was clerk for another, who was selling prize candy publicly, on the square, by auction. The candy was put up in small boxes about two inches wide and three inches long, made with a sliding drawer. Each box contained French candies worth ten cents and each box was sold for fifty cents. Some of the boxes, besides candy, had rings, some silver half dollars and watches and jewelry. It was guaranteed that each box contained

v. Dyer, 69 Ga. 190; Redman v. S., 33 Ala. 428; Underhill Cr. Ev., § 471.

⁵ S. v. Lindley, 14 Ind. 430. See S. v. Crogan, 8 Iowa 523; Com. v. Smith, 166 Mass. 370, 44 N. E. 503; Underhill Cr. Ev., § 475.

⁶ S. v. Oswald, 59 Kan. 508, 53 Pac. 525.

⁷ Torney v. S., 13 Mo. 455; Swallow

v. S., 20 Ala. 30; Buck v. S., 1 Ohio St. 51.

⁸ Swigart v. P., 154 Ill. 295, 40 N. E. 432; S. v. Dycer, 85 Md. 246, 36 Atl. 763. See Aicardi v. S., 19 Wall. (U. S.) 635, 2 Green C. R. 142.

⁹ Debardelaben v. S., 99 Tenn. 649, 42 S. W. 684; Williams v. S., 92 Tenn. 275, 21 S. W. 662.

candy and something of value not known to either seller or purchaser. It was required that each box should be opened at the time and place of sale. Each box contained some article besides candy worth from ten cents to five dollars: Held to be promoting or encouraging gaming.¹⁰

§ 2201. Gaming table includes "craps."—A game of craps, where the exhibitor plays against all others interested in the game, receiving bets and paying losses out of money which he keeps on a table, is included in a statute against "keeping a gaming table."¹² But craps is not a "banking game" within the meaning of the statute.¹³

§ 2202. Keno is a game.—The game of keno comes within the statute providing that "any person who keeps, exhibits or is interested in any table for gaming of whatever name, kind or description, without a license, shall be fined."¹⁴

§ 2203. Gaming with dice—Raffling.—Where persons throw dice for money, the one throwing the highest number taking the money, it is gaming with dice; it is not a raffle, though the mode of procedure is the same as in raffling.¹⁵ Where each of several persons puts up money for the price of a turkey and throws dice to determine which shall have the turkey, it is gaming.¹⁶

§ 2204. For checks and things of value.—Gaming for checks, notes or instruments, understood by the parties to represent value, and by virtue of which the winner can obtain value, is as much an offense as gaming for money.¹⁷

¹⁰ Eubanks v. S., 3 Heisk. (Tenn.) 488, 1 Green C. R. 323.

¹² Copeland v. S., 36 Tex. Cr. 576, 38 S. W. 189; Bell v. S., 32 Tex. Cr. 187, 22 S. W. 687; Harman v. S. (Tex. Cr.), 22 S. W. 1038.

¹³ Bell v. S., 32 Tex. Cr. 187, 22 S. W. 687; Bell v. S. (Tex. Cr.), 21 S. W. 366.

¹⁴ Miller v. S., 48 Ala. 122; P. v. Carroll, 80 Cal. 153, 22 Pac. 129; Smith v. S., 17 Tex. 191; Underhill Cr. Ev., § 471; Portis v. S., 27 Ark. 360, 1 Green C. R. 325; Brown v. S., 40 Ga. 689.

¹⁵ Jones v. S., 26 Ala. 155; S. v. De Boy, 117 N. C. 702, 23 S. E. 167. See 2 McClain Cr. L., § 1285.

¹⁶ S. v. De Boy, 117 N. C. 702, 23 S. E. 167.

¹⁷ Gibbons v. P., 33 Ill. 446; Porter v. S., 51 Ga. 300, 1 Am. C. R. 232; Ransom v. S., 26 Fla. 364, 7 So. 860; 2 McClain Cr. L., § 1286; Walton v. S., 14 Tex. 381; S. v. Wilson, 9 Wash. 16, 36 Pac. 967. As to witness's knowledge of the value of chips or checks, see Wilson v. S., 113 Ala. 104, 21 So. 487.

§ 2205. **Speculating on markets.**—To make contracts for the sale or purchase of grain or other products in the way of speculating on the rise and fall of the prices of such products, where such grain or products are not actually delivered nor intended to be delivered, is gambling.¹⁸

§ 2206. **Bystanders betting.**—Persons betting money on a game others are playing are liable to criminal prosecution for gaming within the meaning of the statute against gaming.¹⁹

§ 2207. **Betting on election.**—Betting on the result of an election is not gaming; an election is not a game under a statute against betting on any "game."²⁰ Betting on the result of an election after the polls have closed, but before the result is declared, is a violation of a statute which declares that "if any person bet or wager money or other thing of value on any election held in this state" he shall suffer a penalty.²¹

§ 2208. **Keeping slot machine.**—Under the statute of Illinois the keeping of a slot machine, whether it be kept for the purpose of gambling or not, is a violation.²²

§ 2209. **Gaming in public places.**—Closing an office or public place temporarily during business hours for the purpose of gaming with cards therein will not cause it to become a private office; it will not by such act cease to be a public place for the transaction of business.²³

¹⁸ *Soby v. P.*, 134 Ill. 68, 25 N. E. 109. See *Booth v. P.*, 186 Ill. 43, 57 N. E. 798; *P. v. Wade*, 13 N. Y. Cr. 425, 59 N. Y. Supp. 846.

¹⁹ *Parmer v. S.*, 91 Ga. 152, 16 S. E. 937; *S. v. McDaniel*, 20 Or. 523, 26 Pac. 837. See also *Bone v. S.*, 63 Ala. 185; *Smoot v. S.*, 18 Ind. 18; *Quarles v. S.*, 5 Humph. (Tenn.) 561; *Flynn v. S.*, 34 Ark. 441; *S. v. Blair*, 41 Tex. 30.

²⁰ *S. v. Henderson*, 47 Ind. 127, 1 Am. C. R. 233; *McHatton v. Bates*, 4 Blackf. (Ind.) 63; *Hickerson v. Benson*, 8 Mo. 8, 40 Am. D. 115; *Woodcock v. McQueen*, 11 Ind. 14. But see *Com. v. Wells*, 110 Pa. St. 463, 467, 1 Atl. 310; *Com. v. Kennedy*, 15 B. Mon. (Ky.) 531; *Com. v. Helm*, 9 Ky. L. 532.

²¹ *S. v. Griggs*, 34 W. Va. 78, 11 S. E. 740; *S. v. Snider*, 34 W. Va. 83, 11 S. E. 742. See *Covington v. S.*, 28 Tex. App. 225, 14 S. W. 126; *Com. v. Wells*, 110 Pa. St. 463, 1 Atl. 310.

²² *Bobel v. P.*, 173 Ill. 19, 50 N. E. 322; *Christopher v. S.* (Tex. Cr.), 53 S. W. 852. See *Kolshorn v. S.*, 97 Ga. 343, 23 S. E. 829.

²³ *Gomprecht v. S.*, 36 Tex. Cr. 434, 37 S. W. 734. See *White v. S.*, 39 Tex. Cr. 269, 45 S. W. 702, 46 S. W. 825; *Williams v. S.* (Tex. Cr.), 34 S. W. 271; *Reeves v. S.*, 34 Tex. Cr. 147, 29 S. W. 786. But see *Turbeville v. S.*, 37 Tex. Cr. 145, 38 S. W. 1010.

Unlawful gaming in a bedroom of a tavern or inn is "gaming in a public place" within the meaning of a statute against gaming in a "public place."²⁴ And rooms in the rear of public places are part of the place.²⁵ If the unlawful game be played in view of a public place it comes within the statute prohibiting such games at any public place.²⁶

§ 2210. Ferry boat, a "public place."—The statute against gaming with cards in a "public place" will reach gaming with cards in a ferry boat which carried passengers across a public licensed ferry, although the boat was not on that day engaged in carrying passengers.²⁷

§ 2211. School-house—A public place.—Unlawful gaming in a vacant school-house is gaming in a public house within the meaning of the statute.²⁸

§ 2212. Faro is game—Public place.—On a charge of unlawful gaming with cards at a public place, proof that the defendant bet on a game called faro exhibited at the place named is sufficient to constitute an offense.²⁹

§ 2213. Gaming at out-house.—Under a statute against gaming "at an out-house where people resort" will be included an unoccupied store house or any house not occupied for dwelling or for business.³⁰

§ 2214. Manager is keeper of house.—A person having general charge and supervision of a place, though but as an employe of the gaming house and the gaming there carried on, is regarded as the

²⁴ *McCalman v. S.*, 96 Ala. 98, 11 So. 408; *Goldstein v. S.* (Tex. Cr.), 35 S. W. 289; *Cole v. S.*, 9 Tex. 42. See *Skinner v. S.*, 87 Ala. 105, 6 So. 399.

²⁵ *Bentley v. S.*, 32 Ala. 596; *Redditt v. S.*, 17 Tex. 610; *Downey v. S.*, 110 Ala. 99, 20 So. 439. See *Nichols v. S.*, 111 Ala. 58, 20 So. 564; *Underhill Cr. Ev.*, § 473.

²⁶ *White v. S.*, 39 Tex. Cr. 269, 45 S. W. 702, 46 S. W. 825. See *Mills v. S.*, 20 Ala. 86; *Ford v. S.*, 123 Ala. 81, 26 So. 503. Whether or not the place where the unlawful game was played was a "public place" within the meaning of the statute, is a

question of fact: *Grant v. S.*, 33 Tex. Cr. 527, 27 S. W. 127.

²⁷ *Dickey v. S.*, 68 Ala. 508, 4 Am. C. R. 250; *Coleman v. S.*, 13 Ala. 602; *Underhill Cr. Ev.*, § 473; *S. v. Metcalf*, 65 Mo. App. 681.

²⁸ *Cole v. S.*, 28 Tex. App. 536, 13 S. W. 859. See *Sisk v. S.*, 28 Tex. App. 432, 13 S. W. 647 (outhouse); *Huffman v. S.*, 29 Ala. 40 (barn).

²⁹ *Gibboney v. Com.*, 14 Gratt. (Va.) 588.

³⁰ *Downey v. S.*, 115 Ala. 108, 22 So. 479; *Downey v. S.*, 90 Ala. 644, 8 So. 869; *Swallow v. S.*, 20 Ala. 30. See *Downey v. S.*, 110 Ala. 99, 20 So. 439.

keeper of the house within the meaning of the law.³¹ It will not avail the defendant that he was acting merely as the agent of another in carrying on the business of gambling in stocks, grain or other gaming device.³² But a clerk who records bets which his employer makes on races, but makes no bets himself, is not guilty of book-making or occupying a place on the ground for the purpose of recording bets.³³

§ 2215. Dealer in game.—On a charge of “exhibiting a gaming bank and table,” one who merely deals the cards and cashes the “chips” and makes change and takes a percentage of the bets as his compensation is not guilty under a statute against exhibiting a gaming bank and table.³⁴

§ 2216. Aiding, abetting.—A person who furnishes another with a machine used for gaming, knowing that it is to be set up and used for gaming, is guilty of aiding and abetting in setting up such machine.³⁵

§ 2217. Interest in gaming house.—Where a person has an interest in a gambling establishment he will be liable whether he is present or not, for any violations committed.³⁶

§ 2218. Intent immaterial.—It is unnecessary to show the intention of the keeper of the place to bring the act of the defendant within the statute against bucket shops.³⁷

§ 2219. Every device included—“Slot machine.”—A statute prohibiting various kinds of games, including “every species of gaming

³¹ *Stevens v. P.*, 67 Ill. 591; *P. v. Erwin*, 4 Denio (N. Y.) 129; *Stoltz v. P.*, 4 Scam. (Ill.) 169; *S. v. Miller*, 5 Blackf. (Ind.) 502; *Jacobi v. S.*, 59 Ala. 71, 3 Am. C. R. 157; *S. v. Marchant*, 15 R. I. 539, 9 Atl. 902. See *Jeffries v. S.*, 61 Ark. 308, 32 S. W. 1080; *Alexander v. Com.*, 12 Ky. L. 470; *Bibb v. S.*, 84 Ala. 13, 4 So. 275; 2 McClain Cr. L., § 1308; *Robbins v. P.*, 95 Ill. 175; *Lettz v. S.* (Tex. Cr.), 21 S. W. 371; *Underhill Cr. Ev.*, § 475.

³² *Soby v. P.*, 134 Ill. 75, 25 N. E. 109; *Com. v. Clancy*, 154 Mass. 128, 27 N. E. 1001; *Atkins v. S.*, 95 Tenn. 474, 32 S. W. 391, 10 Am. C. R. 420;

Shaw v. S., 35 Tex. Cr. 394, 33 S. W. 1078.

³³ *P. v. Fallon*, 152 N. Y. 1, 46 N. E. 302.

³⁴ *Hairston v. S.*, 34 Tex. Cr. 346, 30 S. W. 811. But see *Lettz v. S.* (Tex. Cr.), 21 S. W. 371.

³⁵ *Com. v. Lansdale*, 98 Ky. 664, 17 Ky. L. 1245, 34 S. W. 17; *Com. v. Ritter*, 98 Ky. 664, 17 Ky. L. 1245, 34 S. W. 17; *Earp v. S.* (Tex.), 13 S. W. 888.

³⁶ *Buchanan v. S.* (Tex. Cr.), 33 S. W. 339.

³⁷ *Caldwell v. P.*, 67 Ill. App. 369; *Soby v. P.*, 134 Ill. 66, 25 N. E. 109; *Cameron Cr. L.* 156.

device known by the name of table or bank of every kind whatever," includes any machine used for gaming which may have been invented after the enactment of the statute, such as a slot machine.³⁸

ARTICLE II. MATTERS OF DEFENSE.

§ 2220. **Billiards not gaming.**—Keeping a public billiard hall, where persons frequently play, and requiring the loser to pay twenty-five cents for the use of the table, for each game played, is not gaming, but mere amusement.³⁹

§ 2221. **Playing for drinks not gaming.**—Where persons play at a game of cards under an agreement that the winner shall use the money put up by each on the game, in setting up drinks, it is not betting for money or other valuable thing;⁴⁰ but there are many cases to the contrary.^{40a} The evidence must show that something having intrinsic value was bet or wagered on the game.⁴¹

§ 2222. **Servant, when innocent.**—An employe or servant who is charged with participating in keeping a gaming house has a right to show that his employer made representations to him which led him to believe that the business was lawful.⁴²

§ 2223. **Prize or premium.**—The giving of a prize or premium to persons competing in the doing of something, in which the person or association offering the prize takes no part and has no chance of gaining the prize offered, does not constitute unlawful gaming.⁴³

³⁸ Christopher v. S. (Tex. Cr.), 53 S. W. 852.

³⁹ Harbaugh v. P., 40 Ill. 295; Wakefield v. Com., 7 Ky. L. 295, 7 Cr. L. Mag. 385; Blewitt v. S., 34 Miss. 606; P. v. Sargeant, 8 Cow. (N. Y.) 139; S. v. Hall, 32 N. J. L. 158; P. v. Forbes, 52 Hun 30, 4 N. Y. Supp. 757. See Sike v. S., 67 Ala. 77. *Contra*, S. v. Book, 41 Iowa 550, 1 Am. C. R. 234; Ward v. S., 17 Ohio St. 32; S. v. Leighton, 3 Foster (N. H.) 167; Murphy v. Rogers, 151 Mass. 118, 24 N. E. 35; Alexander v. S., 99 Ind. 450, 6 Cr. L. Mag. 506; Owens v. S., 52 Ala. 213; Crawford v. S., 33 Ind. 304; S. v. Leighton, 23 N. H. 167.

⁴⁰ Simmons v. S., 106 Ga. 355, 32 S. E. 339.

^{40a} Humphreys v. S., 34 Tex. Cr. 434, 30 S. W. 1066; Dunbar v. S., 34 Tex. Cr. 596, 31 S. W. 401; S. v. Wade, 43 Ark. 77, 51 Am. R. 560; S. v. Leicht, 17 Iowa 28; Walker v. S., 2 Swan (Tenn.) 287; Com. v. Gourdier, 80 Mass. 390; S. v. Albertson, 2 Blackf. (Ind.) 251; Brown v. S., 49 N. J. L. 61, 7 Atl. 340; P. v. Cutler, 28 Hun (N. Y.) 465.

⁴¹ Jackson v. S. (Tex.), 25 S. W. 773; Underhill Cr. Ev., § 473; Ford v. S., 123 Ala. 81, 26 So. 503. See Mid-daugh v. S., 103 Ind. 78, 2 N. E. 292.

⁴² S. v. Ackerman, 62 N. J. L. 456, 41 Atl. 697.

⁴³ Harris v. White, 81 N. Y. 539; Deller v. Plymouth Agri. Soc., 57 Iowa 481, 10 N. W. 872; Misner v. Knapp, 13 Or. 135, 9 Pac. 65; Porter

ARTICLE III. INDICTMENT.

§ 2224. **Statutory words sufficient.**—It is generally sufficient in drawing an indictment to follow the words of the statute without being required to name the persons who participated in the game.⁴⁴ And it is not necessary to state the particular kind of game under a statute prohibiting generally the keeping of a gaming house. But if the particular kind of game be alleged, it must be proved as charged in the indictment, being matter of description.⁴⁵

§ 2225. **Stating names of players.**—In an indictment for gaming “with cards for money,” it is not necessary to state in the indictment with whom the accused played; but in some jurisdictions the contrary rule prevails.⁴⁶ An indictment based on a penal statute making it a penal offense to permit any minor to play at a game of billiards, bagatelle, and other games specified, must name the person with whom the minor played billiards, or allege an excuse for not naming him; otherwise it will be defective.⁴⁷

§ 2226. **Stating name of owner.**—An indictment alleging that the defendant “bet at a game played with cards in a certain highway or public place” is sufficient without stating the name of the owner of the house or place or a particular description of the premises.⁴⁸

§ 2227. **Thing bet immaterial.**—An indictment alleging that the defendant “did unlawfully bet and wager at a certain game with dice”

v. Day, 71 Wis. 296, 37 N. W. 259; Alvord v. Smith, 63 Ind. 58. *Contra*, Comly v. Hillegass, 94 Pa. St. 132; P. v. Fallon, 152 N. Y. 1, 46 N. E. 302.

⁴⁴ S. v. Light, 17 Or. 359, 21 Pac. 132; Roberts v. S., 32 Ohio St. 171; Hinton v. S., 68 Ga. 322; Sharp v. S., 28 Fla. 357, 9 So. 651; McBride v. S., 39 Fla. 442, 22 So. 711; P. v. Saviers, 14 Cal. 29; S. v. Hester, 48 Ark. 40, 2 S. W. 339; Middaugh v. S., 103 Ind. 78, 2 N. E. 292; S. v. Shutee, 41 Tex. 548; S. v. Stogsdale, 67 Mo. 630.

⁴⁵ Dudley v. S., 22 Ark. 251; S. v. Prescott, 33 N. H. 212; S. v. Gitt Lee, 6 Or. 427; S. v. Maxwell, 5 Blackf. (Ind.) 230; Sweitzer v. Ter., 5 Okl. 297, 47 Pac. 1094.

⁴⁶ Green v. P., 21 Ill. 126; S. v. Light, 17 Or. 358, 21 Pac. 132, 8 Am. C. R. 326; Roberts v. S., 32 Ohio St. 171; Sweitzer v. Ter., 5 Okl. 297, 47 Pac. 1094; Com. v. Swain, 160 Mass. 354, 35 N. E. 862; S. v. Wilson, 9 Wash. 16, 36 Pac. 967; S. v. Pancake, 74 Ind. 15; Hinton v. S., 68 Ga. 322. *Contra*, Sharp v. S., 28 Fla. 357, 9 So. 651; S. v. Jeffrey, 33 Ark. 136; S. v. Little, 6 Blackf. (Ind.) 267. See Archer v. S., 69 Ga. 767.

⁴⁷ Zook v. S., 47 Ind. 463, 1 Am. C. R. 240, citing Quinn v. S., 35 Ind. 485, 9 Am. R. 754.

⁴⁸ Ray v. S., 50 Ala. 172; P. v. Saviers, 14 Cal. 29; Napier v. S., 50 Ala. 168; Elsberry v. S., 41 Tex. 158.

is sufficient, it not being necessary to state what particular thing was bet or the value thereof.⁴⁹

§ 2228. Scheme with machine.—An indictment charging that the defendant “did unlawfully keep, maintain, employ and carry on a certain scheme, and device, for the hazarding of money or other valuable thing, said scheme and device being called and known as a nickel-in-the-slot machine,” sufficiently states the offense without specifying the manner of operating the machine.⁵⁰

§ 2229. Slot machine—Gaming with it.—The indictment alleged “that Adam Bobel, late of the county of Cook, on the first day of December, in the year of our Lord one thousand eight hundred and ninety-seven, in said county of Cook, in the state of Illinois aforesaid, unlawfully and willfully did, in a certain room then and there situated upon a certain location, then and there, commonly known as No. 4500 State street, in the city of Chicago, in the state of Illinois, keep a certain slot machine, the same then and there being a device upon the result of the action of which money or other valuable thing is staked,” etc.; held sufficient under the statute which reads as follows: “That whoever, in any room, saloon, inn, tavern, shed, booth or building or other enclosure, or in any part thereof, operates, keeps, owns, rents or uses any clock, joker, tape or slot machine, or any other device upon which money is staked or hazarded, or into which money is paid or played upon chance, or upon the result of the action of which money or other valuable thing is staked, bet, hazarded, won or lost, shall, upon conviction, be fined,” etc.⁵¹

§ 2230. Gaming table.—An indictment alleging, with other proper averments, that the defendant “then and there did unlawfully keep and exhibit for the purpose of gaming a gaming table and bank” is sufficient.⁵²

⁴⁹ Long v. S., 22 Tex. App. 194, 2 S. W. 541, 58 Am. R. 633; Medlock v. S., 18 Ark. 363; Collins v. S., 70 Ala. 19.

⁵⁰ Kolshorn v. S., 97 Ga. 343, 23 S. E. 829; Foster v. Ter., 1 Wash. St. 411, 25 Pac. 459; Christopher v. S. (Tex. Cr.), 53 S. W. 852.

⁵¹ Bobel v. P., 173 Ill. 23, 50 N. E. 322.

⁵² Rabby v. S. (Tex. Cr.), 37 S. W. 741; Turbeville v. S., 37 Tex. Cr. 145, 38 S. W. 1010; Ranirez v. S. (Tex. Cr.), 40 S. W. 278. See S. v. Norton, 9 Houst. (Del.) 586, 33 Atl. 438; Perkins v. S. (Tex. Cr.), 33 S. W. 341; Adams v. S. (Tex. Cr.), 29 S. W. 384; S. v. Taylor, 111 N. C. 680, 16 S. E. 168; Jefferson v. S. (Tex. Cr.), 22 S. W. 148.

§ 2231. **Dealing faro.**—An indictment charging that the defendant, on the 15th day of August, 1875, at Providence, in a county named, did deal “faro,” a certain banking game where money and other property were then and there dependent on the result; whereby, and by force of the statute in such case made and provided, etc., is sufficient.⁵³

§ 2232. **Pools and book-making.**—Under a statute forbidding “pool-selling and book-making,” an indictment simply charging that the defendant engaged in selling auction pools and book-making without setting out the acts constituting the pool-selling and book-making is defective.⁵⁴

§ 2233. **Duplicity—“Deal, play and carry on.”**—A statute provides that “every person who deals, plays or carries on, or conducts any game of faro,” shall be punished. Under this statute an indictment charging that the defendant “did deal, play, carry on and conduct” the game of faro is not bad for duplicity.⁵⁵

§ 2234. **Duplicity—Keeps, permits, rents.**—Under a statute which provides that whoever keeps a building to be occupied and used for gaming, or knowingly permits the same to be used or occupied, or whoever, being the owner of any building, rents the same to be used or occupied for gaming, shall be fined, an indictment charging the several offenses mentioned in the same count is not bad for duplicity.⁵⁶

§ 2235. **For hire or gain.**—Under a statute providing that any person who shall, “for his gain or reward,” keep any gaming room or table, or who shall knowingly suffer a gaming room or table to be kept on his premises, shall be guilty of a misdemeanor, an information charging a violation must allege that it was done “for hire, gain or reward.”⁵⁷

§ 2236. **In public place.**—An indictment which charges that the defendant unlawfully played at cards in a cedar brake, in a pasture near a town named, does not state the offense of gaming with cards “in a

⁵³ S. v. Melville, 11 R. I. 417, 3 Am. C. R. 158.

⁵⁴ S. v. Burke, 151 Mo. 136, 52 S. W. 226. See also S. v. Spear, 63 N. J. L. 179, 42 Atl. 840.

⁵⁵ P. v. Gosset, 93 Cal. 641, 29 Pac.

246. But see Stearns v. S., 81 Md. 341, 32 Atl. 282.

⁵⁶ Davis v. S., 100 Ind. 154; S. v. Cooster, 10 Iowa 453. See Harvell v. S. (Tex. Cr.), 53 S. W. 622.

⁵⁷ P. v. Weithoff, 100 Mich. 393, 58 N. W. 1115.

public place" within the meaning of a statute on gaming in a public place.⁵⁸

§ 2237. **Betting on election.**—An indictment charging the accused with betting on an election is fatally defective in not alleging when the election was to be held.⁵⁹

§ 2238. **Intent, when material.**—An indictment alleging that the defendant sent money out of the state to bet on horse races is defective in failing to allege that the defendant knew the unlawful purpose for which the money was sent.⁶⁰

§ 2239. **Joining counts, gaming and keeping.**—Counts for unlawful gaming and keeping a common gaming house, causing a nuisance, may be joined in the same indictment, though differing from each other and varying in the punishment.⁶¹

§ 2240. **Joining defendants.**—On a charge of keeping a gaming house several persons present may be joined in the same count, the offense being analogous to maintaining a public nuisance.⁶² Where an indictment charges several persons jointly with unlawful gaming, it must aver that the defendants played together in the same game.⁶³

ARTICLE IV. EVIDENCE; VARIANCE.

§ 2241. **Particular device immaterial.**—Where the evidence shows that the house alleged to be a gaming house is a place where persons resort to bet and risk their money on any contest or game at chance, it is sufficient without proving that a particular scheme or device is a gaming device.⁶⁴

§ 2242. **Instruments used in gaming are competent.**—Implements, articles or things used in carrying on unlawful gaming or keeping a

⁵⁸ *McCarley v. S.* (Tex. Cr.), 51 S. W. 373; *Nail v. S.* (Tex. Cr.), 50 S. W. 704.

⁵⁹ *Lewellen v. S.*, 18 Tex. 538.
⁶⁰ *S. v. Falk*, 66 Conn. 250, 33 Atl. 913.

⁶¹ *Wheeler v. S.*, 4 Md. 563; *Whitfield v. S.*, 4 Ark. 171; *P. v. Gosset*, 93 Cal. 641, 29 Pac. 246.

⁶² *Com. v. Smith*, 166 Mass. 370, 44 N. E. 503.

⁶³ *Elliott v. S.*, 26 Ala. 78; *S. v. Homan*, 41 Tex. 155; *Lindsey v. S.*, 48 Ala. 169.

⁶⁴ *S. v. Grimes*, 74 Minn. 257, 77 N. W. 4.

gaming house are competent evidence, though seized by public officers under a statute authorizing such seizure.⁶⁵

§ 2243. **Circumstantial evidence.**—It is not necessary to show that the witnesses actually saw money or any valuable thing bet on the games. That fact may be inferred from the circumstances.⁶⁶

§ 2244. **Evidence showing public place.**—In order to determine whether or not the premises in question are a “public place,” evidence that liquors and refreshments were sold there to the public is competent.⁶⁷

§ 2245. **Description of game.**—Where one witness described the game which he saw the defendant conducting, it is competent to prove by another witness that the game so described was “tan.”⁶⁸

§ 2246. **Reputation of frequenters.**—On a charge of keeping a gaming house, the general reputation of the persons who frequent the house, including the defendant himself, as being gamblers, is competent.⁶⁹ Evidence of visiting a gaming house on but one occasion will not sustain a charge of “frequenting gaming houses.”⁷⁰

§ 2247. **Common gambler—Several acts.**—Evidence of several distinct acts of gaming on different days is competent on a charge of being a common gambler, although the offense is charged to have been committed on a certain day, and not as a continuing offense.⁷¹

§ 2248. **Witness—Professional players.**—The manner of conducting or playing an unlawful game may be explained by professional players, or by others who may have had but little experience at playing the game under investigation.⁷²

⁶⁵ *P. v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *S. v. Pomeroy*, 130 Mo. 489, 32 S. W. 1002; *S. v. Robbins*, 124 Ind. 308, 24 N. E. 978.

⁶⁶ *Robbins v. P.*, 95 Ill. 178. See 2 McClain Cr. L., § 1306. See also *S. v. Boyer*, 79 Iowa 330, 44 N. W. 558; *Thompson v. S.*, 99 Ala. 173, 13 So. 753; *S. v. McAndrews*, 43 Mo. 470.

⁶⁷ *White v. S.*, 39 Tex. Cr. 269, 45 S. W. 702, 46 S. W. 825. See *Moore v. S.*, 35 Tex. Cr. 74, 31 S. W. 649.

⁶⁸ *P. v. Sam Lung*, 70 Cal. 515, 11 Pac. 673.

⁶⁹ *S. v. Mosby*, 53 Mo. App. 571. *Contra*, as to the house: *Underhill Cr. Ev.*, § 475.

⁷⁰ *Green v. S.*, 109 Ind. 175, 9 N. E. 781.

⁷¹ *S. v. Groves*, 21 R. I. 252, 43 Atl. 181.

⁷² *Nuckolls v. Com.*, 32 Gratt. (Va.) 884; *Com. v. Adams*, 160 Mass. 310, 35 N. E. 851. See *P. v. Sam*

§ 2249. **Variance as to game—"Monte" and "cards."**—Where a statute, in describing the offense of gaming, mentions different kinds or classes of games, an indictment for one kind or class will not support a conviction of another kind or class; as, if the defendant be indicted for betting at "faro," he can not be convicted of "tiger."⁷³ The game of "monte" and "playing with cards" for money are different offenses under the statute, and evidence of one will not support an indictment for the other.⁷⁴

§ 2250. **Variance as to place.**—An indictment which charges the defendant with keeping a gaming house in a certain "building situated at the town of Cicero, and known as Harlem Jockey Club," is supported by evidence of keeping such house on a "certain race-track known as Harlem Jockey Club in the town of Cicero."⁷⁵

§ 2251. **Policy shop, not included.**—A lottery or "policy shop" does not come within the meaning of an ordinance against "rooley-pooley,

Lung, 70 Cal. 515, 11 Pac. 673. The evidence in the following cases was held sufficient to sustain convictions: *Aguar v. S.* (Tex. Cr.), 47 S. W. 464; *Stockton v. S.* (Tex. Cr.), 44 S. W. 509; *Crutcher v. S.*, 39 Tex. Cr. 233, 45 S. W. 594; *Jackson v. S.*, 117 Ala. 155, 23 So. 47; *Robinson v. S.* (Tex. Cr.), 39 S. W. 662; *Smith v. S.* (Tex. Cr.), 33 S. W. 871; *Wartelsky v. S.* (Tex. Cr.), 33 S. W. 1079; *Cox v. S.*, 95 Ga. 502, 20 S. E. 269; *Armstrong v. S.*, 34 Tex. Cr. 645, 31 S. W. 664; *S. v. Townsend*, 50 Mo. App. 690; *Thompson v. S.*, 99 Ala. 173, 13 So. 753; *Com. v. Healey*, 157 Mass. 455, 32 N. E. 656; *S. v. Raymond*, 12 Mont. 226, 29 Pac. 732; *P. v. Fisher*, 17 N. Y. Supp. 162; *P. v. Wynn*, 12 N. Y. Supp. 379, 58 Hun 609 (keeping books); *Grant v. S.*, 89 Ga. 393, 15 S. E. 488 (of accomplice); *Harper v. Com.*, 93 Ky. 290, 14 Ky. L. 163, 19 S. W. 737 (conducting game); *P. v. Hess*, 85 Mich. 128, 48 N. W. 181 (*corpus delicti*); *Ransom v. S.*, 26 Fla. 364, 7 So. 860 (keeping house); *Com. v. Ciancy*, 154 Mass. 128, 27 N. E. 1001 (selling pools); *Robinson v. S.*, 77 Ga. 101;

S. v. Boyer, 79 Iowa 330, 44 N. W. 558; *Voght v. S.*, 124 Ind. 358, 24 N. E. 680; *Ward v. P.*, 23 Ill. App. 510. See *S. v. Fountain*, 1 Marv. (Del.) 532, 41 Atl. 195. But the evidence was held not sufficient to sustain convictions in the following cases: *Ford v. S.*, 123 Ala. 81, 26 So. 503; *Cochran v. S.*, 102 Ga. 631, 29 S. E. 438; *S. v. Gritznier*, 134 Mo. 512, 36 S. W. 39; *Downey v. S.*, 110 Ala. 99, 20 So. 439; *Com. v. Warren*, 161 Mass. 281, 37 N. E. 172 (gaming house); *S. v. Eaton*, 85 Me. 237, 27 Atl. 126; *Bell v. S.*, 92 Ga. 49, 18 S. E. 186; *Tatum v. S.*, 33 Fla. 311, 14 So. 586; *P. v. Mitchell*, 66 Hun (N. Y.) 629, 21 N. Y. Supp. 166; *Richardson v. S.*, 41 Fla. 303, 25 So. 880; *P. v. Wynn*, 12 N. Y. Supp. 379, 58 Hun 609 (selling pools); *Polly v. S.*, 33 Tex. Cr. 410, 26 S. W. 727.

⁷³ *Patterson v. S.*, 12 Tex. App. 222; *S. v. Grider*, 18 Ark. 297; *Chambers v. S.*, 77 Ala. 80; *S. v. Martin*, 22 Ark. 420.

⁷⁴ *Averheart v. S.*, 30 Tex. App. 651, 18 S. W. 416.

⁷⁵ *O'Leary v. P.*, 188 Ill. 226, 58 N. E. 939.

keno or faro table, faro bank, roulette or other instrument, device or thing for the purpose of gaming."⁷⁶

§ 2252. **Statute for destruction valid.**—A statute which provides for the seizure and destruction of tables, implements and devices used at gambling, in the event of a conviction of the person from whom taken, is valid.⁷⁷

§ 2253. **Venue—Where bet.**—Any scheme or device resorted to at one place for the purpose of receiving the money of persons deposited as a bet on horse races at another place is betting at the place where the money is received.⁷⁸

§ 2254. **Witness's privilege.**—A witness in a gaming case is not bound to answer questions, the answers to which would criminate or tend to criminate him, or which may furnish a link in the chain of evidence of his connection with the offense.⁷⁹ If a witness had engaged in a game of cards for money, he can not be compelled to disclose the names of the persons with whom he was so gaming.⁸⁰

⁷⁶ *Marquis v. City of Chicago*, 27 Ill. App. 251. See *Com. v. Kammerer*, 11 Ky. L. 777, 13 S. W. 108; *S. v. Carpenter*, 60 Conn. 97, 22 Atl. 497.

⁷⁷ *Glennon v. Britton*, 155 Ill. 237, 40 N. E. 594; *Bobel v. P.*, 173 Ill. 25, 50 N. E. 322; *Com. v. Certain Gaming Impl.*, 141 Mass. 114, 5 N. E. 475; *Lowery v. Rainwater*, 70 Mo. 152, 35 Am. R. 420. See *S. v. Robins*, 124 Ind. 308, 24 N. E. 978.

⁷⁸ *Ransome v. S.*, 91 Tenn. 716, 20 S. W. 310; *P. v. Weithoff*, 93 Mich.

631, 53 N. W. 784; *Williams v. S.*, 92 Tenn. 275, 21 S. W. 662. *Contra*, *Lescallett v. Com.*, 89 Va. 878, 17 S. E. 546.

⁷⁹ *Minters v. P.*, 139 Ill. 365, 29 N. E. 45; 1 *Thomp. Trials*, § 290, p. 266.

⁸⁰ *Minters v. P.*, 139 Ill. 365, 29 N. E. 45; *Moore v. S.*, 97 Ga. 759, 25 S. E. 362. *Contra*, *Ex parte Buskett*, 106 Mo. 602, 17 S. W. 753, 9 Am. C. R. 755; *Underhill Cr. Ev.*, § 474.

CHAPTER LV.

LOTTERY.

ART. I.	Definition and Elements,	§§ 2255-2262
II.	Matters of Defense,	§§ 2263-2264
III.	Indictment,	§§ 2265-2267
IV.	Evidence; Variance,	§§ 2268-2271

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2255. **Lottery defined.**—A lottery is a scheme for the distribution of prizes; a game in which a price is paid for a prize.¹

§ 2256. **Scheme held lottery.**—A merchant advertised that to each purchaser of goods at his store to the amount of fifty cents or more he would give a key, and that the purchaser holding the key that would unlock a certain box containing a sum of money, which was in his store, should have the money in the box. Held to be a lottery.² The owner of a slot machine permitted several persons to use it at playing a game of chance for cigars by dropping nickels into the slot of the machine. By agreement, the person who won the game took all the cigars. The owner of the machine furnished the cigars, giving one for each nickel put into the machine by the persons engaged in the game. Held to be a lottery scheme.³ Where the scheme or plan of an enterprise was to sell two hundred thousand copies of steel engravings by tickets of five dollars each, entitling the purchaser of a ticket to a course of lectures, and at the close of the lectures presents

¹ 2 Bouv. Law Dict. 86; Com. v. Sullivan, 146 Mass. 142, 15 N. E. 491; 2 McClain Cr. L., § 1315; Ex parte Kameta, 36 Or. 251, 60 Pac. 394.

² Davenport v. City of Ottawa, 54 Kan. 711, 39 Pac. 708.

³ Loiseau v. S., 114 Ala. 34, 22 So. 138; Prendergast v. S. (Tex. Cr.), 57 S. W. 850.

were to be distributed to the purchasers of engravings amounting to two hundred thousand dollars, the number of such presents being three thousand and twelve, twenty-eight hundred of this number ranging in value from two to twelve dollars each and the remaining two hundred and twelve from thirty-five thousand dollars to fifty thousand dollars each, such scheme was held to be a lottery.⁴

§ 2257. **Candy box scheme.**—Where the defendants conducted an enterprise by selling small boxes of candy and gave to the purchaser a chance to point out a picture from a number of pictures of the same size, some of which had sums of money behind them, and if the purchaser of such box pointed out a picture with money behind it he was entitled to such money, their enterprise was held to be a lottery scheme.⁵

§ 2258. **A territory not included.**—The federal statute of 1895, prohibiting lottery tickets to be carried or transferred from one state to another, does not include a territory; therefore, to carry such tickets from a state to a territory is no offense under the statute.⁷

§ 2259. **Paper showing result not included.**—The federal statute of 1895, which makes it a criminal offense to carry from one state to another any paper purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, has no application to a paper or document containing only figures representing the result of a lottery drawing.⁸

⁴ Thomas v. P., 59 Ill. 162, 2 Green C. R. 551. See Elder v. Chapman, 176 Ill. 142, 52 N. E. 10; Dunn v. P., 40 Ill. 467; Barry v. S., 39 Tex. Cr. 240, 45 S. W. 571.

⁵ S. v. Lumsden, 89 N. C. 572; Thomas v. P., 59 Ill. 163, 2 Green C. R. 551; Davenport v. City of Ottawa, 54 Kan. 711, 39 Pac. 708; S. v. Willis, 78 Me. 70, 2 Atl. 848, 6 Am. C. R. 285; S. v. Overton, 16 Nev. 136; Com. v. Sullivan, 146 Mass. 142, 15 N. E. 491; P. v. Noelke, 94 N. Y. 137. In the following cases the schemes and devices were held to be lotteries: Barry v. S., 39 Tex. Cr. 240, 45 S. W. 571 (spindle); Branham v. Stallings, 21 Colo. 211, 40 Pac. 396; Reeves v. S., 105 Ala. 120, 17 So. 104 (arrow); MacDonald v. U. S., 63 Fed. 426 (bonds); McLanahan v. Mott, 25 N. Y. Supp. 892,

73 Hun 131 (bonds); Barclay v. Pearson, 3 Rep. 388, 2 Ch. 154; S. v. Moren, 48 Minn. 555, 51 N. W. 618 (tailor); Long v. S., 73 Md. 527, 21 Atl. 683; S. v. Mercantile Assn., 45 Kan. 351, 25 Pac. 984; S. v. Boneil, 42 La. 1207, 8 So. 300; P. v. Hess, 85 Mich. 128, 48 N. W. 181; Chavannah v. S., 49 Ala. 396. But *contra* in the following: Com. v. Emerson, 165 Mass. 146, 42 N. E. 559; Cross v. P., 18 Colo. 321, 32 Pac. 821 (merchants); Yellow Stone Kit v. S., 88 Ala. 196, 7 So. 338; Ex parte Shobert, 70 Cal. 632, 11 Pac. 786; Buckalew v. S., 62 Ala. 334; S. v. Dalton (R. I.), 46 Atl. 234, 48 L. R. A. 775.

⁷ U. S. v. Ames, 95 Fed. 453.

⁸ France v. U. S., 164 U. S. 676, 17 S. Ct. 219.

§ 2260. **Aiding, abetting.**—All persons, whether agents or servants, or others, who in any manner assist in the promotion or management of a lottery, are liable to criminal prosecution under a statute which makes it unlawful “for any person or persons, either by themselves, agents, servants, employes or others, to keep, maintain, employ or carry on any lottery.”⁹

§ 2261. **Knowledge an element.**—Where a statute makes it an offense to knowingly have in one's possession any paper or document relating to the business of lottery policy, knowledge is an essential element of the offense.¹⁰

§ 2262. **Using the mail.**—Congress having power to establish post-offices and post-roads, embraces the regulation of the entire system of the country, and may designate what may be carried in the mail and what excluded; and may prohibit the distribution of matter to lotteries as injurious to public morals.¹³

ARTICLE II. MATTERS OF DEFENSE.

§ 2263. **Where conducted.**—Under a statute prohibiting lottery business, it is not necessary for the prosecution to show that the lottery drawings were to take place in the state where the business is established.¹¹

§ 2264. **Horse races—Not lottery.**—Persons associated together in conducting horse races, by charging an entrance fee against the owner of each horse competing for a purse of money, to be given to the owner of the horse winning the race, are not guilty of conducting a lottery.¹²

ARTICLE III. INDICTMENT.

§ 2265. **Words of statute sufficient.**—An indictment charging the offense substantially in the language of the statute defining the offense, is sufficient.¹⁴

⁹ Henderson v. S., 95 Ga. 326, 22 S. E. 537.

¹⁰ S. v. Collins, 63 N. J. L. 316, 43 Atl. 896.

¹¹ S. v. Pomeroy, 130 Mo. 489, 32 S. W. 1002; P. v. Noelke, 94 N. Y. 137, 46 Am. R. 128.

¹² P. v. Fallon, 39 N. Y. Supp. 865,

4 App. Div. 82; In re Dwyer, 35 N. Y. Supp. 884, 14 Misc. 204. See Reilly v. Gray, 28 N. Y. Supp. 811, 77 Hun 402.

¹³ In re Rapier, 143 U. S. 133, 12 S. Ct. 374. See also Horner v. U. S., 143 U. S. 207, 12 S. Ct. 407.

¹⁴ France v. S., 6 Baxt. (Tenn.)

§ 2266. **Description of lottery ticket.**—Where the indictment sets forth a lottery ticket by copy, that is sufficient without further description, such ticket purporting to entitle the holder to whatever prize shall be drawn by its corresponding number in a scheme called a prize concert.¹⁵ Describing the lottery ticket in the language of the statute, is sufficient.¹⁶

§ 2267. **Duplicity—Several modes of committing offense.**—Where a statute specifies several different modes of committing the offense of lottery, any one of which is of itself an offense, such as setting up, conducting and promoting a lottery, conducting lottery drawings for prizes, or selling lottery tickets for money, an indictment alleging all these different modes in one count against the same person at the same time is not bad for duplicity.¹⁷

ARTICLE IV. EVIDENCE; VARIANCE.

§ 2268. **Evidence as to other documents.**—To open other envelopes besides the one sold (containing a card) and read their contents to the jury is competent, being among those found in the box from which the one was sold as stated.¹⁸

§ 2269. **Knowledge—Shown by circumstances.**—That the defendant knew the character of the slips of paper or documents found in his possession, which are alleged to relate to a lottery policy, may be shown by circumstantial evidence.¹⁹

§ 2270. **Aiding is setting up lottery.**—Under the statutes of Kentucky relating to drawing an indictment in charging the offense of promoting a lottery, evidence that the accused aided or abetted in setting up a lottery is competent on a charge of setting up, operating and promoting a lottery.²⁰

478; *Watson v. S.*, 111 Ind. 599, 12 N. E. 1008; *Freleigh v. S.*, 8 Mo. 606; *S. v. Martin*, 68 N. H. 463, 44 Atl. 605; *Com. v. Wright*, 127 Mass. 250; *S. v. Dennison (Neb.)*, 82 N. W. 383 ("owner or otherwise").

¹⁵ *Com. v. Thacher*, 97 Mass. 583; *S. v. Willis*, 78 Me. 70, 2 Atl. 848; *S. v. Kaub*, 90 Mo. 196, 2 S. W. 276.

¹⁶ *Dunn v. P.*, 40 Ill. 469.

¹⁷ *Smith v. S.*, 40 Fla. 203, 23 So.

854. See *Bueno v. S.*, 40 Fla. 160, 23 So. 862.

¹⁸ *Dunn v. P.*, 40 Ill. 469.

¹⁹ *S. v. Collins*, 63 N. J. L. 316, 43 Atl. 896.

²⁰ *Com. v. Rose*, 21 Ky. L. 1278, 54 S. W. 862. Evidence sufficient to sustain convictions: *Anderson v. S. (Tex. Cr.)*, 39 S. W. 109; *S. v. Williams*, 44 Mo. App. 302; *Ballock v. S.*, 73 Md. 1, 20 Atl. 184.

§ 2271. **Variance, as to name of lottery.**—A charge of the sale of a ticket in the lottery known as the "Louisiana Lottery of the State of Louisiana" is supported by evidence of the sale of a ticket in the "Louisiana Lottery," though the ticket is not introduced in evidence.²¹

²¹ *Anderson v. S.* (Tex. Cr.), 39 S. W. 109.

CHAPTER LVI.

SEPULTURE VIOLATIONS.

ART.	I. Definition and Elements,	§§ 2272-2276
	II. Matters of Defense,	§ 2277
	III. Indictment,	§ 2278
	IV. Evidence,	§§ 2279-2281

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2272. **Illinois statute, defining offense.**—Whoever willfully and without authority digs up, disinters, removes or conveys away from the place of sepulture or interment thereof, any human body, or the remains thereof, or knowingly aids in such disinterment, removal or conveying, shall be imprisoned in the penitentiary not less than one nor more than ten years.¹ By statutory provisions of the various states (as well as by common law in some respects), it is criminal to wantonly injure, deface, destroy or remove any vault, tomb, monument, grave-stone or other memorial of the dead, or any fence or inclosure of any cemetery or place of burial, or to cut, break, injure, remove or destroy any tree, shrub or plant on or within the inclosure of any place of burial.

§ 2273. **Neglect to bury decently.**—Any person whose duty it is to give proper burial to the dead, and who, being able, shall refuse or neglect to do so, may be indicted and punished at common law.²

§ 2274. **Control and regulation of burials.**—"The matter of burials is one that may properly be placed under the control of a board of

¹ Div. 1, ch. 38, Crim. Code. Similar statutes exist in the various states. 5 Cox C. C. 379; Kanavan's Case, 1 Me. 226; 2 Bish. New Cr. Proc., § 1009.

² Reg. v. Vann, 2 Den. C. C. 325,

health, and it may be a proper regulation by such board that no one but a licensed undertaker shall be allowed to remove bodies from the place of death for burial.”³

§ 2275. Removal of body is criminal.—It is also a criminal offense at common law to exhume and remove the dead, after burial; and it makes no difference what motive may prompt such removal, whether religious or otherwise.⁴

§ 2276. Selling dead body.—It is an indictable offense at common law for any one to sell or dispose of a dead body for dissection.⁵

ARTICLE II. MATTERS OF DEFENSE.

§ 2277. Possession merely.—The facts that a medical student was found in possession of a body which he had disinterred and removed, and that he stated that his professor would give fifty dollars for such a subject, are not sufficient to warrant a conviction under the statute of Missouri, making it a criminal offense to disinter and remove a body for the purpose of dissection, surgical and anatomical experiment.⁶

ARTICLE III. INDICTMENT.

§ 2278. Statutory words sufficient.—The indictment charging any offense simply states the facts of the particular offense in the language of the statute, applying the same rules as in other criminal offenses.⁷

ARTICLE IV. EVIDENCE.

§ 2279. Possession of dead body.—Under the statute of Kansas the unexplained possession of a dead body, which had been removed from

³ 2 McClain Cr. L., § 1165, citing *Com. v. Goodrich*, 13 Allen (Mass.) 546.

⁴ *Reg. v. Sharpe*, Dears. & B. 160; *Com. v. Cooley*, 10 Pick. (Mass.) 37. Statutory regulations,—see *Tate v. S.*, 6 Blackf. (Ind.) 110; *P. v. Fitzgerald*, 105 N. Y. 146, 11 N. E. 378; *McNamee v. P.*, 31 Mich. 473; *Com. v. Slack*, 19 Pick. (Mass.) 304; *Com. v. Loring*, 8 Pick. (Mass.) 370.

⁵ *Rex v. Cundick*, 1 Dow. & Ry. 356; *Rex v. Gilles*, Russ. & Ry. 367n.

⁶ *S. v. Fox*, 148 Mo. 517, 50 S. W. 98; *S. v. Baker*, 144 Mo. 323, 46 S. W. 194 (evidence insufficient). See *Schneider v. S.*, 40 Ohio St. 336; *S. v. Johnson*, 6 Kan. App. 119, 50 Pac. 907.

⁷ See 2 Bish. New Cr. Proc., §§ 1010, 1011.

the grave unlawfully, is *prima facie* evidence of guilty intention, and sufficient to warrant a conviction.⁸

§ 2280. **Removal, to sell essential.**—On a charge for the unlawful removal of a dead body from the grave, the evidence must show that it was removed for the purpose of selling it for dissection; but the intention may be inferred from the facts and circumstances.⁹

§ 2281. **“Without authority” is matter of defense.**—Under a statute which makes it a criminal offense for any person “without lawful authority to dig up, disinter, remove or carry away any human body,” the prosecution is not bound to show on the trial that the accused acted “without lawful authority.” That is a matter of defense.¹⁰

⁸ S. v. Johnson, 6 Kan. App. 119, 794; S. v. Pugsley, 75 Iowa 742, 38 50 Pac. 907. N. W. 498.

⁹ S. v. Fox, 136 Mo. 139, 37 S. W. ¹⁰ S. v. Schaffer, 95 Iowa 379, 64 N. W. 276.

CHAPTER LVII.

BLASPHEMY.

- ART. I. Definition and Elements, §§ 2282-2283
II. Indictment, §§ 2284-2285

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2282. **Blasphemy defined.**—"The offense more immediately against God and religion is that of blasphemy against the Almighty, by denying His being or providence, or by contumelious reproaches of our Savior Jesus Christ. Whither also may be referred all profane scoffing at the holy scripture, exposing it to contempt and ridicule. These are offenses punishable at common law by fine and imprisonment, or other infamous corporal punishment; for Christianity is a part of the laws of England. Somewhat allied to this, though in an inferior degree, is the offense of profane and common swearing and cursing."¹

§ 2283. **"Damned," not essential.**—It is not necessary to use the word "damned" in connection with the name of the Deity to bring it within the definition of profanity.²

ARTICLE II. INDICTMENT.

§ 2284. **Statutory words sufficient.**—An information charging that the defendant did unlawfully and profanely curse, swear and imprecate by and in the name of God by unlawfully saying, "God damn," sufficiently states the offense, being in the words of the statute.³

¹ 4 Bl. Com. 59; Ex parte Delaney, 43 Cal. 478; P. v. Ruggles, 8 Johns. (N. Y.) 290. See also S. v. Chrisp, 85 N. C. 528; Com. v. Linn, 158 Pa. St. 22, 27 Atl. 843.
² S. v. Wiley, 76 Miss. 282, 24 So. 194. See Gaines v. S., 7 Lea (Tenn.) 410, 4 Am. R. 64.
³ Taney v. S., 9 Ind. App. 46, 36 N. E. 295. See Ex parte Foley, 62

§ 2285. "In presence," essential.—An indictment charging the use of profane language to be a nuisance, must contain an averment that the profane swearing was in the presence and hearing of citizens and to the annoyance of the citizens or people.⁴

Cal. 508; Walton v. S., 64 Miss. 207, *Com. v. Linn, 158 Pa. St. 22, 27
8 So. 171; S. v. Freeman, 63 Vt. Atl. 843; Young v. S., 10 Lea (Tenn.)
496, 22 Atl. 621; Bodenhamer v. S., 165.
60 Ark. 10, 28 S. W. 507.

CHAPTER LVIII.

SODOMY—CRIME AGAINST NATURE.

ART.	I. Definition and Elements,	§§ 2286-2293
	II. Matters of Defense	§ 2294
	III. Indictment,	§§ 2295-2296
	IV. Evidence,	§ 2297

ARTICLE I. DEFINITION AND ELEMENTS.

§ 2286. **Sodomy defined.**—Sodomy is the carnal copulation of one human being with another in a manner “against nature,” or, to be more definite, in any manner than that provided by nature. Bestiality is the carnal copulation of a man or woman with a beast.¹ Blackstone says: The infamous crime against nature, committed either with man or with beast, is an offense of so dark a nature, so easily charged and the negative so difficult to be proved, that the accusation should be clearly made out.²

§ 2287. **Offense with beast not included.**—Under a statute making it a criminal act if any person shall assault another with intent to commit sodomy or buggery, or if any person shall endeavor or persuade another to permit such person to commit such offense with him, is not included any such offense with any beast or animal.³

§ 2288. **Emission essential, by common law.**—Under the common law, emission is essential and must be shown, though this may be inferred from the fact of penetration.⁴

¹ Underhill Cr. Ev., § 360; 2 McClain Cr. L., § 1153.

³ Com. v. J., 21 Pa. Co. Ct. 625.

⁴ P. v. Hodgkin, 94 Mich. 27, 53

² 4 Bl. Com. 215; Honselman v. P., N. W. 794; Williams v. S., 14 Ohio 168 Ill. 172, 48 N. E. 304. See S. v. 222; Collins v. S., 73 Ga. 76; Cross v. S., 17 Tex. App. 476.

§ 2289. **Child of tender years consenting.**—If a child twelve years of age consents to an act of sodomy, without resistance, the offense is complete by reason of the age of the child.⁵

§ 2290. **Committing by using mouth.**—While the crime against nature and sodomy have often been used as synonymous terms, yet under a statute which provides that “every person convicted of the crime of sodomy, or other crime against nature, shall be deemed infamous,” the crime may be committed by use of the mouth within the meaning of the law.⁶

§ 2291. **Attempt under statute.**—An attempt to commit the crime of sodomy is a criminal offense under a statutory definition of an attempt to commit a crime.⁷ Under an indictment charging the crime of sodomy, a conviction may be had for an attempt to commit the crime.⁸

§ 2292. **“Assault” eliminated by consent.**—Where a person is charged with assaulting another with intent to commit sodomy, if it appears that consent was given by the person alleged to have been assaulted, then the element of simple assault is out of the case.⁹

ARTICLE II. MATTERS OF DEFENSE.

§ 2293. **Defendant too young.**—On a charge of buggery, it appearing from the evidence of the prosecuting witness that the defendant was about ten or twelve years old, a conviction can not be sustained.¹⁰

ARTICLE III. INDICTMENT.

§ 2294. **Statutory words sufficient.**—Charging in the indictment in the language of the statute that the defendant, at a certain time and place stated, committed “the infamous crime against nature upon and

⁵ *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714.

⁶ *Honselman v. P.*, 168 Ill. 175, 48 N. E. 304. See *S. v. Williams*, 34 La. 87. *Contra*, *P. v. Boyle*, 116 Cal. 658, 48 Pac. 800. See *Prindle v. S.*, 31 Tex. Cr. 551, 21 S. W. 360.

⁷ *S. v. Frank*, 103 Mo. 120, 15 S. W. 330. See *In re King*, 9 N. D. 149, 82 N. W. 423.

⁸ *S. v. Frank*, 103 Mo. 120, 15 S. W. 330.

⁹ *P. v. Hickey*, 109 Cal. 275, 41 Pac. 1027; *Reg. v. Wollaston*, 12 Cox C. C. 180. See *Mascolo v. Montesanto*, 61 Conn. 50, 23 Atl. 714.

¹⁰ *Williams v. Com. (Va.)*, 22 S. E. 859. See *Hodges v. S.*, 94 Ga. 593, 19 S. E. 758.

with one (a person named), a man then and there being, is sufficient under a statute making it a felony to commit "the infamous crime against nature, either with man or beast."¹¹

§ 2295. "Human being" not essential.—In charging the offense of the crime against nature, the indictment need not allege that the person upon whom it was committed was a human being. It is sufficient to state that the crime was committed upon the person of another, naming him.¹²

§ 2296. Attempt—Indictment sufficient.—An indictment charging an attempt to commit sodomy, averring that the defendant "did forcibly compel" a person "to unbutton the trousers and expose the body of him," the said person, and "then and there did fail in the perpetration of said offense," sufficiently charges an attempt to commit the crime.¹³

ARTICLE IV. EVIDENCE.

§ 2297. Convictions sustained.—The evidence in the following cases was held sufficient to sustain convictions.¹⁴

¹¹ Honselman v. P., 168 Ill. 174, 48 N. E. 304; Com. v. Dill, 160 Mass. 536, 36 N. E. 472; S. v. Romans, 21 Wash. 284, 57 Pac. 819. See Frazier v. S., 39 Tex. 390; Fennell v. S., 32 Tex. 378; S. v. Chandonette, 10 Mont. 280, 25 Pac. 438; P. v. Williams, 59 Cal. 397. See also Bradford v. S., 104 Ala. 68, 16 So. 107; Cross v. S., 17 Tex. App. 476; S. v.

Williams, 34 La. 87; S. v. Campbell, 29 Tex. 44.

¹² P. v. Moore, 103 Cal. 508, 37 Pac. 510.

¹³ S. v. Smith, 137 Mo. 25, 38 S. W. 717.

¹⁴ Honselman v. P., 168 Ill. 172, 48 N. E. 304; P. v. Wilson, 119 Cal. 384, 51 Pac. 639.

PART SEVEN

OFFENSES AGAINST GOVERNMENT

CHAPTER LIX.

ELECTION LAWS.

ART.	I. What Constitutes Offenses,	§§ 2298-2316
	II. Matters of Defense,	§§ 2317-2326
	III. Indictment,	§§ 2327-2351
	IV. Evidence; Variance,	§§ 2352-2360

ARTICLE I. WHAT CONSTITUTES OFFENSES.

§ 2298. **Voting defined.**—When a voter presents himself before the judges, hands his ballot to the officers holding the election, and his name is announced and registered by the clerks, with the sanction of the judges, he has completed the act of voting.¹

§ 2299. **Election day defined.**—Election day, within the meaning of the law forbidding the keeping open of dram-shops or the selling or giving of intoxicating liquors, does not mean merely the time during which the polls are open, but the entire day, from midnight to the following midnight.²

§ 2300. **"Election" includes municipal elections.**—Voting illegally at a municipal election is included in the statutory provision for

¹ Steinwehr v. S., 5 Sneed (Tenn.) 492, 34 S. W. 617; Com. v. Murphy, 586. But see Blackwell v. Thompson, 95 Ky. 38, 15 Ky. L. 411, 23 S. E. 655; Schuck v. S., 50 Ohio St. 493, 34 N. E. 663.
² Steinberger v. S., 35 Tex. Cr. 34 N. E. 663.

knowingly and illegally voting "at an election held according to law."³

§ 2301. Primary elections not included.—A criminal statute embodied in the election laws has no application to primary elections created by political parties.*

§ 2302. Election on liquor question.—A statute which provides that "whoever at any national, state or municipal election, knowingly gives more than one ballot at one time of balloting at such election," shall be punished, does not apply to such unlawful balloting at a city election upon the question of granting or refusing license for the sale of intoxicating liquors in the city.⁵

§ 2303. Private persons included.—Under a statute providing that "every person who willfully causes, procures or allows false registration" shall be liable to a penalty, are included private persons as well as officers of registration.⁶

§ 2304. Alderman included.—Within the meaning of a primary election law for nominating candidates for state, city and county offices, an alderman is included.⁷

§ 2305. A non-resident voting.—Voting in a township in which a person does not reside is an offense under a statute requiring a person to be a resident of the state six months before he is entitled to vote.⁸

§ 2306. Alien not citizen.—A person of foreign birth is not a "citizen" of the state until he is naturalized, and can not vote at an election until he shall have resided in the state six months before the election.⁹

* *Ex parte Senior*, 37 Fla. 1, 19 So. 652; *Com. v. Duff*, 87 Ky. 586, 10 Ky. L. 617, 9 S. W. 816. *Contra*, *S. v. Liston*, 9 Humph. (Tenn.) 603; *S. v. Chichester*, 31 Neb. 325, 47 N. W. 934.

⁴ *P. v. Cavanaugh*, 112 Cal. 674, 44 Pac. 1057; *Graham v. P.*, 135 Ill. 442, 25 N. E. 749. *Contra*, *Com. v. Pol-luck*, 6 Pa. Dist. R. 559; *Leonard v. Com.*, 112 Pa. St. 607, 4 Atl. 220.

⁵ *Com. v. Howe*, 144 Mass. 144, 10

N. E. 755. *Contra*, *Gandy v. S.*, 82 Ala. 61, 2 So. 465.

⁶ *P. v. Sternberg*, 111 Cal. 3, 43 Pac. 198; *P. v. McKane*, 143 N. Y. 455, 38 N. E. 950.

⁷ *Com. v. Snyder*, 17 Pa. Co. Ct. R. 321, 5 Pa. Dist. R. 121.

⁸ *S. v. Minnick*, 15 Iowa 123.

⁹ *S. v. Cloksey*, 5 Sneed (Tenn.) 482; *U. S. v. Burley*, 14 Blatchf. (U. S.) 91.

§ 2307. **Bribing voter, or attempting to bribe.**—It is a criminal offense at common law to willfully influence or attempt to influence a voter to cast his ballot at an election by offering or paying him money for his vote, or to vote more than once.¹⁰ Attempting to bribe or influence an elector in casting his ballot, although not accomplished, is an offense.¹¹ And it is also an indictable offense to attempt to cast an illegal vote by handing a fraudulent ballot to a judge of an election.¹²

§ 2308. **Candidate influencing voters.**—A candidate, by giving money to persons who are actively opposing his election, though of his own political party, as a consideration “for services to the ticket,” not in good faith as campaign expenses, will be liable on a charge of bribery.¹³ If a candidate for an office, for the purpose of influencing persons to vote for him, offer to accept a less sum as his salary than that fixed by law or the public authorities, or, in other words, donate a part of the salary to the county, any votes so obtained will be rejected as illegal.¹⁴

§ 2309. **Influencing voter unlawfully.**—If a person pay money to an elector to obtain his influence for any candidate for office, it is bribery under the statute forbidding such “influence.”¹⁵ Giving a voter money to pay the registration fee, although prompted by no corrupt motives, is influencing the voter unlawfully and is a criminal offense.¹⁶

§ 2310. **Attempt to influence voter.**—Hiring a voter to go away from the election polls and refrain from voting is an offense under the

¹⁰ S. v. Jackson, 73 Me. 91, 40 Am. R. 342; S. v. Philbrick, 84 Me. 562, 24 Atl. 955. See S. v. Perkins, 42 Vt. 399; Com. v. Silsbee, 9 Mass. 417; Com. v. McHale, 97 Pa. St. 397, 39 Am. R. 808; Mason v. S., 55 Ark. 529, 18 S. W. 827 (destroying ballots).

¹¹ S. v. Jackson, 73 Me. 91; S. v. Ames, 64 Me. 386. Treating voters for the purpose of influencing them in casting their ballots at an election is a criminal offense—it is bribery: S. v. Shaw, 8 Humph.

(Tenn.) 32; S. v. Pearis, 35 W. Va. 320, 13 S. E. 1006.

¹² Com. v. Gale, 10 Bush (Ky.) 488.

¹³ Epps v. Smith, 121 N. C. 157, 28 S. E. 359. See Underhill Cr. Ev., § 455.

¹⁴ S. v. Purdy, 36 Wis. 213; S. v. Dustin, 5 Or. 375.

¹⁵ Com. v. Rudy, 5 Pa. Dist. R. 270; S. v. Towns, 153 Mo. 91, 54 S. W. 552.

¹⁶ S. v. Collins, 1 Pen. (Del.) 420, 42 Atl. 619.

statute, although such person afterwards returns and votes at the election.¹⁷

§ 2311. Voter not influenced.—It is not essential to a conviction for giving or offering to give “any money, property or other thing of value to any elector to influence his vote,” that the gift actually influenced the elector’s vote.¹⁸

§ 2312. Gift for changing county seat.—Offering to give public buildings and grounds to induce the voters to vote at an election to change the county seat from one place to another is not an attempt to obtain votes by bribery.¹⁹

§ 2313. Officer willfully refusing.—That the judge of an election did not consider the naturalization papers of a voter sufficiently regular to entitle him to vote is no excuse on a charge of willfully refusing to accept the ballot of the voter, where such papers appear to be regular.²⁰

§ 2314. Officer refusing duty.—Where a public officer whose duty it is to appoint election officers from approved lists prepared and filed by any political party, as provided by law, refuses to make appointments from such lists, and appoints others not members of the party filing such lists, he is liable to prosecution for a failure to perform his duty.²¹

§ 2315. Officer permitting alteration.—An election inspector, who is entrusted with the custody of election documents, by carelessly permitting such documents to be altered by another, is guilty under a statute making it a criminal offense for an election inspector to permit any alteration of election documents in his custody.²²

§ 2316. Stuffing ballot box.—Officers of an election by putting ballots into a ballot-box not cast by persons entitled to vote, and count-

¹⁷ *Thompson v. S.*, 16 Ind. App. 84, 44 N. E. 763. See *S. v. Downs*, 148 Ind. 324, 47 N. E. 670.

¹⁸ *S. v. Downs*, 148 Ind. 324, 47 N. E. 670.

¹⁹ *Hall v. Marshall*, 80 Ky. 552. See *S. v. Dustin*, 5 Or. 375.

²⁰ *S. v. Colton*, 9 Houst. (Del.) 530, 33 Atl. 259.

²¹ *P. v. Gleason*, 42 N. Y. Supp. 1084, 12 N. Y. Cr. 192.

²² *S. v. Brand*, 2 Marv. (Del.) 459, 43 Atl. 263.

ing such spurious votes with intent to corruptly influence the result of the election, may be punished under a statute which provides: "If any two or more persons shall conspire to commit any act for the perversion or obstruction of justice or the due administration of the laws they shall be guilty of conspiracy."²³

ARTICLE II. MATTERS OF DEFENSE.

§ 2317. Officer's slight departure from duty.—A slight departure by officers conducting an election, from unimportant details which do not and can not defeat the object of the law, was not intended by the legislature to call for punishment.²⁴ But if an officer of an election willfully refuse or neglect to discharge his plain duty as such officer, as the refusal to tender to a challenged voter an oath as required by statute, he will be held liable.²⁵

§ 2318. Officer's mistake, no offense.—Officers acting in good faith in the discharge of their duty in conducting an election will not be held criminally liable for mistake of judgment: as, if they err in their judgment as to how a vote should be counted or in receiving an illegal ballot from one not having a right to vote.²⁶

§ 2319. Minor voting.—That a minor on a charge of illegal voting was informed by his father that he was twenty-one years old, and he honestly believed such information, is a good defense.²⁷

§ 2320. Advice no defense.—It is no defense to a charge of voting illegally that the defendant had been advised by friends or counsel that there was no record of his conviction of a felony disfranchising him, or that he had forgotten such conviction.²⁸ The statute makes it a criminal offense to "knowingly and fraudulently" register in two or more election districts. It is no defense to a charge of fraudu-

²³ Moschell v. S., 53 N. J. L. 498, 22 Atl. 50.

²⁴ S. v. Bush, 47 Kan. 202, 27 Pac. 834.

²⁵ S. v. Clark, 102 Iowa 685, 72 N. W. 296; S. v. Tuibell, 26 Ind. 264; U. S. v. Eagan, 30 Fed. 495; S. v. Bush, 45 Kan. 138, 25 Pac. 614.

²⁶ P. v. Sutherland, 41 N. Y. Supp. 181, 9 App. Div. 313; Byrne v. S.,

12 Wis. 519; Matter of Hilt, 9 Abb. N. C. (N. S.) (N. Y.) 484; U. S. v. Dwyer, 56 Fed. 464.

²⁷ Gordon v. S., 52 Ala. 308; Carter v. S., 55 Ala. 181.

²⁸ Gandy v. S., 82 Ala. 61, 2 So. 465; Gandy v. S., 86 Ala. 20, 5 So. 420; S. v. Sheeley, 15 Iowa 404; Thompson v. S., 26 Tex. App. 94, 9 S. W. 486.

lently registering in two districts that the defendant was informed he had a right to register in a certain district.²⁹

§ 2321. Conviction of felony disqualifies.—One is not disqualified as a legal voter merely because he has been convicted of a felony; he is not “convicted” unless there is a judgment on the verdict. If judgment be suspended there is no “conviction.”³⁰

§ 2322. Knowledge of law presumed.—On a charge of illegal voting by a person not entitled to vote because of his conviction of a felony, it is no defense that he did not know such conviction barred him from voting; it must be conclusively presumed that he knew the legal consequences of such conviction. And the prosecution, therefore, is not required to prove he had such knowledge.³¹

§ 2323. Intent—Drunkenness.—Under a statute providing that if “any person shall vote more than once at any election he shall be deemed guilty of a felony,” the defendant may show he was so intoxicated at the time of committing the act that he was unable to form a criminal intent.³²

§ 2324. Legal election essential.—On a charge of bribery or other violation of the election laws it is not enough to show that an election *de facto* was held, and that the defendant bribed a voter as an elector on that occasion; it must further appear that the election was legal and valid.³³ But mere irregularities in calling or conducting an election which do not invalidate the election afford no protection for illegal voting or other offense in violation of the election laws.³⁴ And it has been held that if an election is conducted under color of law the defendant can not, as a defense, insist that the election is invalid.³⁵

²⁹ *S. v. Caldwell*, 1 Marv. (Del.) 555, 41 Atl. 198.

³⁰ *S. v. Houston*, 103 N. C. 383, 9 S. E. 699. See *U. S. v. Barnabo*, 14 Blatchf. (U. S.) 74.

³¹ *Thompson v. S.*, 26 Tex. App. 94, 9 S. W. 486. See *McGuire v. S.*, 7 Humph. (Tenn.) 54; *U. S. v. Anthony*, 11 Blatchf. (U. S.) 200.

³² *P. v. Harris*, 29 Cal. 679.

³³ *S. v. Williams*, 25 Me. 561; *Ex*

parte Rodriguez, 39 Tex. 752; *Morril v. Haines*, 2 N. H. 246; *U. S. v. Badinelli*, 37 Fed. 138. See *Com. v. Howe*, 144 Mass. 144, 10 N. E. 755.

³⁴ *S. v. Cohoon*, 12 Ired. (N. C.) 178, 55 Am. D. 407.

³⁵ *Cooper v. S.*, 25 Tex. App. 530, 8 S. W. 654; *Cooper v. S.*, 26 Tex. App. 575, 10 S. W. 216.

§ 2325. **Decision of judges, a defense.**—The decision of the judges of an election in favor of the right of a person to vote, in the absence of fraud or collusion, must have the effect of securing the voter immunity from criminal liability if it should afterwards appear that he did not have the right to vote.³⁶

§ 2326. **Betting on election.**—A proposition to bet on the result of an election, as the putting up of a sum of money which shall be forfeited, on the failure to increase it to the sum of the proposed bet by a certain time, with another who put up the full amount of the proposed bet, is not betting on an election within the meaning of the law.³⁷

ARTICLE III. INDICTMENT.

§ 2327. **Election duly held.**—In an indictment for illegally voting at a town meeting, it is sufficient to allege that such meeting was duly holden, without stating how, or by what authority, the meeting was called.³⁸

§ 2328. **Purpose of election essential.**—An indictment for a violation of the election law to be sufficient should state that the election was held under authority of and in the manner required by law, and for what purpose held, or otherwise sufficiently identify the character of the election.³⁹

§ 2329. **Public notice essential.**—An indictment charging a violation of the election laws is defective if it fails to allege that public notice of the election had been given as required by statute.⁴⁰

§ 2330. **Statutory words not sufficient.**—An indictment charging that the defendant knowingly voted in the name of another "at an election for representative in congress," though in the language of the statute, is not sufficient, if the election was held for both state and federal officers.⁴¹

³⁶ S. v. Pearson, 97 N. C. 434, 1 S. E. 914.

³⁷ Rich v. S., 38 Tex. Cr. 199, 42 S. W. 291. See Wagoner v. S., 63 Ind. 250.

³⁸ S. v. Marshall, 45 N. H. 281.

³⁹ Gandy v. S., 82 Ala. 61, 2 So. 465.

⁴⁰ Com. v. Maddox, 17 Ky. L. 557, 32 S. W. 129.

⁴¹ Blitz v. U. S., 153 U. S. 308, 14 S. Ct. 924; U. S. v. Wardell, 49 Fed. 914; P. v. Neil, 91 Cal. 465, 27 Pac. 760.

§ 2331. **Intent immaterial.**—Where a criminal intent is not made an essential element of the offense defined by statute relating to the election laws, such intent need not be alleged in drawing an indictment.⁴² In charging a person with obstructing officers while in the discharge of their duty by ejecting them from the polls of the election, the intent with which the act was done is material and must be alleged in the indictment.⁴³

§ 2332. **Duplicity—Carrying away ballots, and aiding.**—Under a statute punishing the unlawful interference with the officers conducting an election, an indictment which charges that the defendant unlawfully carried away, aided and abetted in carrying away and counseled and procured the carrying away of the ballot-box containing the ballots of an election is not bad for duplicity.⁴⁴

§ 2333. **Allegation of candidates immaterial.**—An indictment (omitting the formal part) charging that the defendant, at a time and place stated, bribed a person named “to vote at the August election, 1859, with money and property of the value of five dollars, and for the said bribe he did vote” for certain persons for certain offices named, is sufficient without alleging that the persons voted for were candidates for the offices named.⁴⁵

§ 2334. **Qualifications of voter.**—On a charge of giving intoxicating liquor to a voter on the day of an election, the indictment is sufficient in stating generally that the person to whom intoxicating drink was given was a legally qualified voter at such election without stating the facts constituting such person a qualified voter.⁴⁶

§ 2335. **Personating another.**—An indictment charging one of the offense of attempting to vote at a certain election by falsely representing himself to be another person, and applying for a “ballot” in the name of such person, sufficiently states the offense under a statute using the words “paper ballot” instead of “ballot.”⁴⁷

⁴² *Com. v. Warner*, 17 Pa. Co. Ct. R. 556; *S. v. Caldwell*, 1 Marv. (Del.) 555, 41 Atl. 198; *S. v. Lally*, 2 Marv. (Del.) 424, 43 Atl. 258.

⁴³ *U. S. v. Taylor*, 57 Fed. 391.

⁴⁴ *Connors v. U. S.*, 158 U. S. 408, 15 S. Ct. 951. See also *U. S. v. Egan*, 30 Fed. 498.

⁴⁵ *Com. v. Stephenson*, 3 Metc. (Ky.) 226; *Com. v. Selby*, 87 Ky. 595, 10 Ky. L. 621, 9 S. W. 819.

⁴⁶ *S. v. Pearis*, 35 W. Va. 320, 13 S. E. 1006. See *S. v. Shaw*, 8 Humph. (Tenn.) 32.

⁴⁷ *S. v. Timothy*, 147 Mo. 532, 49 S. W. 499.

§ 2336. **Voting at primary.**—In drawing an indictment or information for a violation of a primary election law it is not sufficient to charge that the defendant voted at a primary election in a certain precinct named, not being a resident of such precinct; it must also state that the defendant would not, at the next election, be a qualified voter of such precinct.⁴⁸

§ 2337. **Making false return.**—An indictment charging an election officer with making a false return as to the number of votes received by the candidates, without setting out the facts wherein the falsity consists, is fatally defective.⁴⁹ Charging in an indictment that the defendant, an election officer, “willfully and unlawfully published a false certificate of the result of an election by making a false return to the board of canvass of the number of votes given at the election, and willfully, fraudulently and unlawfully made an alteration in said certificate by changing the number of votes at said election,” sufficiently states an offense under a statute making it a criminal offense for any officer to publish any false return of an election, or false certificate of the result, knowing it to be false, or to willfully destroy or deface any such certificate.⁵⁰

§ 2338. **Charging false registration.**—An indictment which charges that the defendant unlawfully and fraudulently registered in a certain election district, he then and there having no lawful right to register therein, is fatally defective in stating merely a conclusion of law.⁵¹

§ 2339. **Procuring another to register.**—An indictment for unlawfully procuring or advising another to register as a voter must set out the acts done by the defendant, charging that he did so with intent to cause fraudulent registration.⁵² But the particular words of advice need not be set out in the indictment.⁵³

§ 2340. **False registration.**—An indictment charging false registration by a voter falsely stating his place of residence must aver that he

⁴⁸ Calcoat v. S., 37 Tex. Cr. 245, 39 S. W. 364.

⁴⁹ S. v. Conway, 2 Marv. (Del.) 453, 43 Atl. 253; Com. v. Eckert, 14 Ky. L. 250, 20 S. W. 253. See S. v. Clark, 2 Marv. (Del.) 456, 43 Atl. 254.

⁵⁰ S. v. Clark, 2 Marv. (Del.) 456, 43 Atl. 254.

⁵¹ S. v. Vincent, 1 Marv. (Del.) 560, 41 Atl. 199; U. S. v. McCabe, 58 Fed. 557.

⁵² U. S. v. McCabe, 58 Fed. 557.

⁵³ U. S. v. Brown, 58 Fed. 558.

made such false statement to the registration officers at the time he registered; otherwise it will be defective.⁵⁴

§ 2341. Registering twice.—An indictment setting out the offense in the words of the statute, that the defendant unlawfully registered in two election districts, is good, although he had a right to register in one of the two districts mentioned.⁵⁵

§ 2342. Voting fraudulently.—An information, although in the words of the statute, charging a person with voting unlawfully and fraudulently, is fatally defective if it fails to allege the particular facts showing that the defendant was not entitled to vote, and in charging fraud generally without stating the facts constituting the fraud.⁵⁶

§ 2343. Voting more than once.—It is the voting more than once at the same election which the statute prohibits, and not the voting more than once for the same candidates for office. The indictment, therefore, need not state that the defendant's second vote was cast for certain officers or candidates named who were to be voted for; it is immaterial whether the same or different candidates are voted for on the two occasions.⁵⁷ "Under a statute providing that whoever votes more than once at the same election shall be imprisoned in the penitentiary," an indictment charging that the defendant, at a time and place named, "did unlawfully, willfully and knowingly vote more than once, to wit, twice, at a certain corporation election, then and there being duly holden and authorized to be holden by the laws of the state of Ohio," is fatally defective in not designating the election mentioned; its words may refer to an election of a private corporation.⁵⁸ An indictment which charges that the defendant, having once voted at an election, afterwards fraudulently procured and handed in another ballot with intent to have it counted, and did fraudulently pro-

⁵⁴ U. S. v. Jacques, 55 Fed. 53.

⁵⁵ S. v. Caldwell, 1 Marv. (Del.) 555, 41 Atl. 198. See S. v. Lally, 2 Marv. (Del.) 424, 43 Atl. 258.

⁵⁶ P. v. Neil, 91 Cal. 465, 27 Pac. 760; P. v. McKenna, 81 Cal. 159, 22 Pac. 488; S. v. Bruce, 5 Or. 68. See Banyon v. S., 108 Ga. 49, 33 S. E. 845; P. v. Standish, 6 Park. Cr. (N. Y.) 111; S. v. Moore, 27 N. J. L. 105; Gordon v. S., 52 Ala. 308; 1 Bish.

Cr. Proc., § 627; Quinn v. S., 35 Ind. 487, 9 Am. R. 754. *Contra*, S. v. Marshall, 45 N. H. 281; Com. v. Shaw, 7 Metc. (Mass.) 52; S. v. Douglass, 7 Iowa 414.

⁵⁷ S. v. Welch, 21 Minn. 22; S. v. Minnick, 15 Iowa 125; Steinwehr v. S., 5 Sneed (Tenn.) 586.

⁵⁸ Lane v. S., 39 Ohio St. 312; Tipton v. S., 27 Ind. 493.

cure such ballot to be deposited in the ballot-box as a lawful ballot, and counted, does not sufficiently state any offense under a statute declaring it to be a criminal offense "to vote more than once," or "knowingly cast more than one ballot" at the same election.⁵⁹

§ 2344. **Acting as officer essential.**—A statute which provides that "if any judge or clerk of an election, or any other person, shall willfully and knowingly receive and place in the ballot-box any ballot not legally voted by a qualified voter," he shall be punished, has no application to persons except judges or clerks of election or to persons acting in that capacity; and an indictment failing to charge that the defendant was so acting is fatally defective.⁶⁰

§ 2345. **Officer's appointment essential.**—An indictment against a judge of the election laws, charging that he was acting at an election "duly and regularly called and ordered" by the governing authority of the party holding the election, is defective in that it fails to allege that the defendant was appointed by the governing authority of the party holding the election.⁶¹

§ 2346. **Description of ballots.**—The indictment, in failing to describe the ballots alleged to have been unlawfully and fraudulently put into the ballot-box, or by whom such ballots purport to have been cast, is defective, unless it charges that these matters were unknown to the grand jury.⁶²

§ 2347. **Destruction of ballots.**—On a charge of violating the election laws by the destruction of ballots, an indictment charging generally that the defendant unlawfully did destroy certain ballots mentioned, is sufficient, and need not set out the particular manner of such destruction.⁶³

§ 2348. **Altering ballots.**—In drawing an indictment charging the defendant with changing a ballot with the intent to deprive a voter from voting for such person as he intended, it is not sufficient to

⁵⁹ S. v. Miller, 132 Mo. 297, 33 S. W. 1149.

⁶⁰ S. v. Krueger, 134 Mo. 262, 35 S. W. 604.

⁶¹ Com. v. Maddox, 17 Ky. L. 557, 32 S. W. 129.

⁶² S. v. Krueger, 134 Mo. 262, 35 S. W. 604.

⁶³ S. v. Mundy, 2 Marv. (Del.) 429, 43 Atl. 260.

charge the offense, in the language of the statute, that the defendant changed the ballot; it must specifically set out what changes were made to the ballot.⁶⁴

§ 2349. Officer willfully violating.—Where the law requires that two of the election judges should assist a voter to prepare his ballot to vote, if he requests assistance, an indictment charging a judge of an election with an offense by himself alone assisting a voter to prepare his ballot states no offense unless it charges that he did the act willfully or negligently.⁶⁵ But it has been held that an officer of registration is liable to a criminal prosecution for wrongfully publishing the names of qualified voters in the list of names required to be stricken from the registry list, although not charged to have been fraudulently or corruptly done.⁶⁶

§ 2350. Bribing voter.—In drawing an indictment for giving or offering to give “money, property or other valuable thing to a voter to influence his vote,” it is not necessary to allege that such influence was intended to secure such vote for some particular candidate named.⁶⁷ Under a statute making it a criminal offense for any person “to buy or sell or be concerned in buying or selling” any vote at any state or county election, an indictment alleging that the defendant, at a time and place stated, did then and there unlawfully and with force and arms buy the vote of a person named, by then and there paying to said person, naming him, fifty cents in money, on condition that the said person should vote at a certain county election, is sufficient.⁶⁸

§ 2351. Breach of the peace.—An information charging a breach of the peace at a voting place, at a general public election, must set out where the voting place was and by what means the election was disturbed.⁶⁹

ARTICLE IV. EVIDENCE; VARIANCE.

§ 2352. Ballots competent.—The ballots cast at an election are competent evidence, where preserved, on the trial of a cause for a violation of the election laws.⁷⁰

⁶⁴ Hunter v. P., 52 Ill. App. 367.

⁶⁵ U. S. v. Dwyer, 56 Fed. 464.

⁶⁶ Mincher v. S., 66 Md. 227, 7 Atl. 451.

⁶⁷ S. v. Downs, 148 Ind. 324, 47 N. E. 670.

⁶⁸ Cohen v. S., 104 Ga. 734, 30 S. E. 932; Brown v. S., 104 Ga. 736, 30 S. E. 951.

⁶⁹ Wright v. S. (Tex. Cr.), 55 S. W. 48.

⁷⁰ Com. v. Ryan, 157 Mass. 403, 32 N. E. 349.

§ 2353. **Poll-book—Certificate.**—On a charge of making a false certificate to the poll-books of an election, the certificate on the poll-books is *prima facie* evidence that it was signed by the precinct election officers.⁷¹

§ 2354. **Concealing election documents.**—Where one is charged with a violation of the election laws by concealing from the public the registration lists, it is competent to show in evidence all the circumstances attending any unsuccessful attempts to obtain access to such lists.⁷²

§ 2355. **How voters voted.**—It is not competent to show by the voters whom they voted for, on a charge against a clerk of an election for making a false return as such clerk.⁷³

§ 2356. **Willfulness essential.**—In the absence of proof that an inspector at an election, knowingly, willfully or corruptly refused or neglected to receive the ballot of a person qualified to vote, there can be no conviction.⁷⁴ But whether an act, such, for instance, as the procuring of another to falsely register, was done willfully, intentionally or knowingly, or not, is a question for the jury to determine.^{74a}

§ 2357. **Altering ballot willfully.**—On a charge of willfully and fraudulently altering a ballot with intent to cheat and defraud, by drawing lines across the name of a candidate on the ballot, it is sufficient if the proof shows the erasure of the surname of such candidate.⁷⁵

§ 2358. **Evidence circumstantial.**—On a charge of the unlawful destruction of ballots, the evidence being entirely circumstantial, it must appear that there was no other reasonable way to account for such destruction than that charged against the accused.⁷⁶

§ 2359. **Inducing another to vote.**—On a charge of voting unlawfully by falsely personating and voting in the name of another at an

⁷¹ Com. v. O'Hara, 17 Ky. L. 1030, 33 S. W. 412.

⁷² P. v. McKane, 143 N. Y. 455, 38 N. E. 950.

⁷³ Com. v. Barry, 98 Ky. 394, 17 Ky. L. 1018, 33 S. W. 400.

⁷⁴ S. v. Tuibell, 26 Ind. 264.

^{74a} McBarron v. S., 63 N. J. L. 43, 42 Atl. 777.

⁷⁵ Com. v. McGurty, 145 Mass. 257, 14 N. E. 98.

⁷⁶ S. v. Mundy, 2 Marv. (Del.) 429, 43 Atl. 260.

election, proof that the defendant controlled, aided and directed another to so vote is sufficient under a statute which provides that persons who aid and abet in the commission of an offense shall be deemed principals.⁷⁷

§ 2360. **Jurisdiction—Federal court.**—Any criminal offense committed in violation of the election laws, at an election when a congressman is to be voted for and elected, is an offense against the United States, and the federal courts have jurisdiction to punish the offender, although the offense thus committed may have been intended to affect the result of local or state officers, and not the election of the congressman.⁷⁸

⁷⁷ *Lionetti v. P.*, 183 Ill. 253, 55 N. E. 668.

⁷⁸ *In re Coy*, 127 U. S. 731, 8 S. Ct. 1263, 31 Fed. 794.

CHAPTER LX.

POSTAL LAW VIOLATIONS.

ART. I. Statutory Provisions,	§§ 2361-2368
II. Matters of Defense,	§§ 2369-2373
III. Indictment,	§§ 2374-2387
IV. Evidence; Variance,	§§ 2388-2391

ARTICLE I. STATUTORY PROVISIONS.

§ 2361. **Federal statutes.**—There are many criminal offenses defined and enumerated in the federal statutes relating to the postal service of the United States, for the details of which the reader is referred to the statutes themselves.

§ 2362. **Obstructing mails.**—A person who knowingly prevents trains running which carry United States mail commits a criminal act by obstructing the passage of the mail, even though he may be willing that mail cars may go, but not other cars.¹

§ 2363. **Scheme to defraud.**—A “scheme or artifice to defraud” by use of the mails does not necessarily mean a common law or statutory fraud, within the meaning of the statute against defrauding through the mails.²

§ 2364. **Advertising counterfeit money.**—Sending circulars through the mails for the purpose of inducing persons to purchase counterfeit money comes within the statute against the use of the mails to defraud.³

¹ In re Grand Jury, 62 Fed. 840. ² U. S. v. Loring, 91 Fed. 881.
See also U. S. v. Debs, 65 Fed. 210; ³ Streep v. U. S., 160 U. S. 128, 16
U. S. v. Cassidy, 67 Fed. 698; U. S. S. Ct. 244.
v. Sears, 55 Fed. 268.

§ 2365. **Collection agency sending paper**—A collection agency, by issuing and sending a paper through the mails, containing notices of accounts against persons who fail to pay their debts, and advertising such accounts in the paper, violates the law, such published notices appearing to have been made for the purpose of coercing payment. This method of enforcing the collection of accounts is "calculated by the term or manner of display, and obviously intended to reflect injuriously upon the character of another."⁴

§ 2366. **Dunning demand and threat on card**.—Under a statute making it a criminal offense to send through the mails any matter upon the envelope or wrapper of which, or any postal card upon which any delineation or language of an indecent, defamatory or threatening character is written or printed, the sending of a postal card through the mail making demand on a person to pay a debt, with the threat that if not paid at once the claim will be placed in the hands of a lawyer, is a violation.⁵

§ 2367. **Obscene language essential**.—Although a letter may have been sent through the mail for an immoral or obscene purpose, or seduction, yet such letter can not be the basis of a criminal prosecution for sending an obscene letter through the mail without containing obscene language.⁶

§ 2368. **Breaking into postoffice**.—The breaking into any building used in part as a postoffice, "with intent to commit larceny therein," is a criminal act by statutory definition, and means that part of such building used for a postoffice.⁷

ARTICLE II. MATTERS OF DEFENSE.

§ 2369. **Opening letter after delivery**.—The opening of a letter and abstracting its contents after it has been delivered as addressed or directed is not a violation of the postal law, the United States no longer having the custody of it after delivery.⁸

⁴U. S. v. Durnell, 75 Fed. 824.
See U. S. v. Dodge, 70 Fed. 235;
U. S. v. Brown, 43 Fed. 135.

⁵U. S. v. Bayle, 40 Fed. 664; U.
S. v. Smith, 69 Fed. 971.

⁶U. S. v. Lamkin, 73 Fed. 459.

⁷U. S. v. Saunders, 77 Fed. 170;
U. S. v. Campbell, 16 Fed. 233, 9
Sawy. 20. See U. S. v. Yennie, 74
Fed. 221 (breaking); U. S. v. Wil-
liams, 57 Fed. 201.

⁸U. S. v. Huilsman, 94 Fed. 486;

§ 2370. **Sending dunning letter.**—The sending of a respectful dunning letter in an unsealed envelope, with the name of the collection bureau thereon, as “Mercantile Protection and Collection Bureau,” is not a violation of the postal law forbidding the sending of envelopes bearing any language of a defamatory or threatening character.⁹

§ 2371. **Issuing money orders without collecting.**—A postmaster who issues money orders without receiving the money for them commits embezzlement of the money order funds; and that he intended to collect and account for the money on making his settlement with the government is no defense.¹⁰

§ 2372. **Letter sealed or not, immaterial.**—The mailing of a letter containing obscene or indecent matter is within the statute, whether such letter is sealed or not, although the envelope may not have on it anything obscene.¹¹

§ 2373. **Fraud ineffective, no defense.**—The sending of any letter, document or circular through the mail for the purpose of carrying out a scheme to defraud is a violation of the postal laws, although such letter or document may not be effective in furthering such unlawful scheme.¹²

ARTICLE III. INDICTMENT.

§ 2374. **Lottery scheme essential.**—An indictment for sending circulars through the mails concerning a lottery, which fails to set out the scheme of such lottery, is defective.¹³

§ 2375. **Indictment, as to lottery.**—An indictment charging the defendant with using the mails for the purpose of carrying on the lottery business, causing letters concerning such lottery business to be addressed to him under a false, fictitious and assumed name, and receiving such letters from the postoffice, sufficiently states the offense.¹⁴

U. S. v. Lee, 90 Fed. 256; U. S. v. Safford, 66 Fed. 942.

⁹ In re Barber, 75 Fed. 980. See U. S. v. Smith, 69 Fed. 971.

¹⁰ Vives v. U. S., 92 Fed. 355.

¹¹ U. S. v. Ling, 61 Fed. 1001; U. S. v. Nathan, 61 Fed. 936; Grimm v. U. S., 156 U. S. 604, 15 S. Ct. 470; U. S. v. Martin, 50 Fed. 918; Andrews v. U. S., 162 U. S. 420.

¹² Durland v. U. S., 161 U. S. 306, 16 S. Ct. 244; Weeber v. U. S., 62 Fed. 740; U. S. v. Mitchell, 36 Fed. 492.

¹³ U. S. v. McDonald, 65 Fed. 486; U. S. v. Beatty, 60 Fed. 740.

¹⁴ McDaniel v. U. S., 87 Fed. 324; U. S. v. Conrad, 59 Fed. 458. Lottery scheme described: U. S. v. Fulkerson, 74 Fed. 619; U. S. v.

§ 2376. **Indictment—Stating lottery scheme.**—Charging in an indictment that the defendant “did knowingly deposit in a postoffice an envelope containing a certain pamphlet concerning a certain lottery, which said lottery was then and there being conducted by a certain corporation,” naming it, sufficiently states the offense.¹⁵

§ 2377. **“Unlawful and wrongful” essential.**—An indictment charging the embezzlement of mail from any postoffice, in failing to allege that the taking was unlawful and wrongful, is not sufficient.¹⁶

§ 2378. **“Of indecent character” immaterial.**—Under a statute making it a criminal offense to deposit in the mail obscene, lewd or lascivious books, letters or other like matter, an indictment charging the offense of depositing an obscene, lewd and lascivious letter in the mails is sufficient. The words, “and of an indecent character,” are not essential.¹⁷

§ 2379. **Indictment, address essential.**—In charging the offense of mailing newspapers containing an obscene article the indictment must contain an averment that such newspapers were addressed or that direction was given for mailing or delivery. An allegation that the newspapers were deposited “for mailing and delivery” is not sufficient.¹⁸

§ 2380. **Indictment—Matter too obscene.**—If the document alleged to have been sent through the mail is so obscene and indecent that it ought not to be spread upon the records of the court, then, if it is so described as to reasonably inform the defendant of the nature of the charge against him, that is sufficient.¹⁹

§ 2381. **Indictment alleging scheme.**—An indictment charging the defendant with devising a fraudulent scheme to be effected by opening correspondence by means of the postoffice establishment must allege

McDonald, 59 Fed. 563; U. S. v. Politzer, 59 Fed. 273; U. S. v. Wallis, 58 Fed. 942; Horner v. U. S., 147 U. S. 449, 13 S. Ct. 409.

¹⁵ U. S. v. Fulkerson, 74 Fed. 619.

¹⁶ U. S. v. Smith, 11 Utah 433, 40 Pac. 708.

¹⁷ Timmons v. U. S., 85 Fed. 204.

¹⁸ U. S. v. Brazeau, 78 Fed. 464.

¹⁹ U. S. v. Fuller, 72 Fed. 771; U. S. v. Reid, 73 Fed. 289; Rosen v. U. S., 161 U. S. 29, 16 S. Ct. 434. See Grimm v. U. S., 156 U. S. 604, 15 S. Ct. 470.

that the defendant designed the accomplishment of such scheme by means of the postoffice.²⁰

§ 2382. Indictment—Manner of conversion immaterial.—In an indictment for carrying on a fraudulent scheme by use of the mails by inducing persons to send money to the defendant, with intent to convert it to his own use, it is not necessary to set out in what manner such conversion was to be accomplished.²¹

§ 2383. Indictment should describe document.—An indictment charging one with depositing a letter in the mail for the purpose of advertising or giving information where and of whom an article for procuring abortions could be obtained should set out the letter or in some manner describe it that the accused may be informed of the nature of the charge against him.²²

§ 2384. Indictment—Not double.—An indictment charging the offense of defrauding persons by use of the mails, “by opening correspondence” with a person, or by inciting the person addressed to open correspondence, is not objectionable in stating the offense “by opening correspondence *and* by inciting the person addressed to open correspondence.”²³

§ 2385. Different acts may be joined in different counts.—Different acts of fraud by use of the mails, growing out of the same fraudulent scheme, may be set out in the indictment in different counts.²⁴ Although the breaking into a postoffice with intent to commit larceny and the actual stealing are distinct offenses, yet, when both acts were done at the same time they constitute but one transaction, and may be joined in a single count in the indictment.²⁵

§ 2386. Consolidating several indictments.—The consolidation of eight different indictments for using the postoffice for a scheme to defraud did not transform them into one case where, on conviction, but one sentence could be pronounced.²⁶

²⁰ U. S. v. Long, 68 Fed. 348; U. S. v. Harris, 68 Fed. 347.

²¹ U. S. v. Loring, 91 Fed. 881.

²² U. S. v. Tubbs, 94 Fed. 356. See U. S. v. Loring, 91 Fed. 881.

²³ U. S. v. Bernard, 84 Fed. 634.

²⁴ U. S. v. Loring, 91 Fed. 881.

²⁵ U. S. v. Yennie, 74 Fed. 221.

²⁶ Howard v. U. S., 75 Fed. 986.

§ 2387. **Prosecution—Where commenced.**—A prosecution for a violation of the postal laws must be commenced in the district in which the offense was committed; as, for instance, where the matter was placed in the mail.²⁷

ARTICLE IV. EVIDENCE; VARIANCE.

§ 2388. **Decoy letters to fictitious person.**—Decoy letters mailed by detectives or officers to fictitious persons for the purpose of detecting criminals are within the statute against abstracting and stealing from the mail.²⁸ The fact that a postoffice inspector opens a letter addressed to himself, under a fictitious name, does not render the evidence of such inspector incompetent.²⁹

§ 2389. **Sending indecent letters—Evidence.**—On a charge of sending lewd and lascivious letters through the mails, evidence that the person sending such letters afterwards had illicit intercourse with the person to whom the letters were sent is incompetent.³⁰

§ 2390. **Way bills competent evidence.**—On a charge of conspiracy to defraud persons through the mails, way bills of a railroad company, showing a shipment of goods obtained from persons by such conspiracy, are competent evidence.³¹

§ 2391. **Variance—Name—Real and fictitious.**—On a charge of using a false, fictitious or assumed name for the purpose of carrying on a scheme to defraud through the mails, evidence that the accused aided a real person of the name mentioned in carrying out such a scheme will not support the charge.³²

²⁷ U. S. v. Sauer, 88 Fed. 249; Horner v. U. S., 143 U. S. 570, 12 S. Ct. 522.

²⁸ Hall v. U. S., 168 U. S. 632, 18 S. Ct. 237; U. S. v. Jones, 80 Fed. 513; Scott v. U. S., 172 U. S. 343, 19 S. Ct. 209; Montgomery v. U. S., 162 U. S. 410, 16 S. Ct. 797; Goode v. U. S., 159 U. S. 663, 16 S. Ct. 136. See 2 McClain Cr. L., § 1335.

²⁹ Andrews v. U. S., 162 U. S. 420, 16 S. Ct. 798; U. S. v. Slenker, 32 Fed. 691.

³⁰ Safter v. U. S., 87 Fed. 329. See U. S. v. Walter Scott, 87 Fed. 721.

³¹ Stokes v. U. S., 157 U. S. 187, 15 S. Ct. 617.

³² Tingle v. U. S., 87 Fed. 320.

CHAPTER LXI.

REVENUE LAW VIOLATIONS.

ART. I.	Statutory Provisions,	§§ 2392-2396
II.	Matters of Defense,	§§ 2397-2403
III.	Indictment,	§§ 2404-2407

ARTICLE I. STATUTORY PROVISIONS.

§ 2392. **Federal statutes.**—The federal statutes relating to the assessment and collection of revenues contain various provisions, violations of which are made criminal offenses, such as retailing spirituous liquors without a license, smuggling imported goods without paying import duty, and other evasions enumerated in the statutes.

§ 2393. **Smuggling and receiving—Misdemeanors.**—The offenses of smuggling and receiving smuggled goods are both misdemeanors, as defined by statute, though the punishment for each may be imprisonment in a state penitentiary in addition to a fine.¹

§ 2394. **Possession of smuggled goods, prima facie.**—If smuggled goods be found in possession of a person, that constitutes *prima facie* evidence of his guilt, and the burden is on him to overcome the presumption of guilt.²

§ 2395. **Unlading goods.**—The federal statute relating to the unlading or transferring of cargoes of vessels after the arrival of vessels in the United States has no application to vessels which have no cargo to be unladen in the United States.³

¹Reagan v. U. S., 157 U. S. 301, 15 S. Ct. 610. ²The Coquitlam (Earle v. U. S.), 77 Fed. 744, 23 C. C. A. 438.

³U. S. v. Fraser, 42 Fed. 140.

§ 2396. **Physician must pay tax.**—A physician in the practice of medicine who prescribes whiskey and furnishes it himself to his patients is liable under the revenue law requiring the payment of a special tax by dealers in spirituous liquors.⁴

ARTICLE II. MATTERS OF DEFENSE.

§ 2397. **Sale by clerk, principal liable.**—Sales of liquor made by the clerk of a druggist without payment of the special tax render the principal liable, if such sales were made by the clerk in the due course of business.⁵

§ 2398. **Proprietary medicines not included.**—Patent or proprietary medicines which are manufactured and sold in good faith as medicines are not included in the law requiring the payment of a special tax on "domestic distilled spirits," although one of the ingredients of such patent medicines may be distilled spirits of sufficient quantity to produce intoxication when used as a beverage.⁶

§ 2399. **Destruction by fire is "removal."**—The destruction of distilled spirits by fire while in the warehouse is a "removal" within the meaning of the law relating to the payment of taxes on such goods.⁷ One who aids and abets another in the unlawful removal of illicit spirits may be prosecuted and convicted as principal, because all participants in a misdemeanor are regarded as principals. And this course may be pursued, although by statute such aiding and abetting are made a distinct offense.⁸

§ 2400. **Shipping or removing applies to all.**—The federal statute making it unlawful for any person to ship, transport or remove any liquors or wines under any other than the proper name or brand designating the kind and quality is not limited in its application to manufacturers, rectifiers and distillers. The intention of the statute is to prevent frauds on the revenue by requiring all packages which are shipped to be marked or branded truthfully, and includes all persons making such shipments.⁹

⁴ U. S. v. Smith, 45 Fed. 115.

⁵ U. S. v. White, 42 Fed. 138. See U. S. v. Davis, 37 Fed. 468; U. S. v. Starnes, 37 Fed. 665; U. S. v. Calhoun, 39 Fed. 604; U. S. v. Allen, 38 Fed. 736. See "Intoxicating Liquors."

⁶ U. S. v. Wilson, 69 Fed. 144.

⁷ U. S. v. Peace, 53 Fed. 999, 4 C. C. A. 148, 8 U. S. App. 283.

⁸ U. S. v. Sykes, 58 Fed. 1000.

⁹ U. S. v. Campe, 89 Fed. 697.

§ 2401. **Forfeiture of distilled spirits.**—The federal statute providing for a forfeiture of “all distilled spirits or wines and personal property found in a distillery,” yard or other place constituting a part of the premises, for unlawfully carrying on the distilling business, applies to any personal property on the premises, even though sold by the distiller before the commission of the offense.¹⁰

§ 2402. **Goods, when subject to forfeiture.**—Removing the contents of casks or packages which have been properly stamped and branded and putting in other distilled spirits of a lower proof renders the goods subject to forfeiture, although there was no intent to defraud any private person.¹¹ Any cask or package of distilled spirits containing more than five gallons, bearing a distillery warehouse stamp and inspection mark, but without any date showing when received into the warehouse, as required by law, is liable to forfeiture. Each cask and package must have on it “each mark and stamp required by law.”¹²

§ 2403. **Giving bond secures costs.**—Where goods are seized by the United States for undervaluation under the revenue laws, the claimant, on giving bond as required, is entitled to have the goods delivered to him without being required to pay the costs incurred by such seizure. The bond so given is ample security in the event of a recovery.¹³

ARTICLE III. INDICTMENT.

§ 2404. **Statutory words sufficient.**—An indictment charging one with aiding in the concealment of distilled spirits on which the tax had not been paid, and which had been removed to a place other than that provided by law, being in the words of the statute, is sufficient, without averring that there was a warehouse for such spirits.¹⁴

§ 2405. **Statutory words—Dealing in liquor.**—An indictment for the unlawful dealing in spiritous liquors, which charges, in the words of the statute, that the defendant “did willfully, unlawfully and feloniously carry on the business of a retail liquor dealer without

¹⁰ U. S. v. Stowell, 133 U. S. 1, 10 S. Ct. 244.

¹¹ U. S. v. 9 Casks & Packages, etc., 51 Fed. 191.

¹² U. S. v. 9 Casks & Packages, etc., 51 Fed. 191.

¹³ U. S. v. Eight Cases of Paper, 98 Fed. 416.

¹⁴ Pounds v. U. S., 171 U. S. 35, 18 S. Ct. 729.

having paid the special tax therefor, as required by law," sufficiently states the offense defined by statute.¹⁵

§ 2406. **Indictment sufficient as to knowledge.**—An indictment which charges that the defendant "did willfully, unlawfully and knowingly, and with intent to defraud the revenues of the United States, smuggle and clandestinely introduce into the United States" certain goods named, sufficiently states the offense without averring that the defendant knew the duty had not been paid on the goods.¹⁶

§ 2407. **Indictment—"Willfully and intentionally."**—Charging in an information that the defendant "did unlawfully change and alter" the marks and stamps on a package is a sufficient averment that the act was willfully and intentionally done.¹⁷

¹⁵ *Ledbetter v. U. S.*, 170 U. S. 606, 18 S. Ct. 774. ¹⁷ *U. S. v. Bardenheier*, 49 Fed. 846.

¹⁶ *Dunbar v. U. S.*, 156 U. S. 185, 15 S. Ct. 325.

CHAPTER LXII.

TREASON.

§ 2408. **Statutory definition.**—This crime is defined by the constitution of the United States: “Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court. The congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the attainted.”¹

§ 2409. **Against federal and state governments.**—“Treason can be committed as well against a state as the United States. But the same act which is treason against the United States is not necessarily such also against the state. By constitutional or statutory provisions in most of the states, the offense against the state is limited substantially as by the national constitution and laws: it is as against the United States.”²

¹ U. S. Const., Art. 3, § 3. See 4 ² 2 Bish. New Cr. L., § 1254.
Bl. Com. 81.

CHAPTER LXIII.

PIRACY.

§ 2410. **Piracy defined—Common law definition.**—Piracy is a crime against the law of nations, and pirates may be captured anywhere on the high seas by any sovereignty or by private ships of any nation, and tried.¹ The offense of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there.² The federal statutes provide that “every person who, on the high seas, commits the crime of piracy, as defined by the law of nations, and is afterward brought into or found in the United States, shall suffer death.”³

§ 2411. **Felonious intent essential.**—To constitute the crime of piracy there must be not only a felonious intent, but an overt act coupled with such intent.⁴

§ 2412. **Who are pirates.**—“Persons who act on the high seas under the assumed authority of a government to which belligerent rights have not been accorded by any recognized government will be treated as pirates; but if a recognized state of belligerency between two opposing powers exist, the United States government will not treat those who act under one of such powers as pirates, although the power under which they act has not been recognized by it as an independent state.”⁵

¹ The *Marianna Flora*, 11 Wheat. (U. S.) 1; *U. S. v. Ross*, 1 Gall. (C. C.) 624; *U. S. v. Pirates*, 5 Wheat. (U. S.) 184; *U. S. v. Furlong*, 5 Wheat. (U. S.) 184.

² 4 Bl. Com. 171, 172; 1 Kent Com. 183; 2 Bish. New Cr. L., § 1057; *U. S. v. Baker*, 5 Blatchf. (C. C.) 6.

³ U. S. Rev. Stat. 1874.

⁴ The *City of Mexico*, 28 Fed. 148; *U. S. v. Jones*, 3 Wash. C. C. 228; *U. S. v. Tully*, 1 Gall. (C. C.) 247.

⁵ 2 McClain Cr. L., § 1359, citing *The Ambrose Light*, 25 Fed. 408; *U. S. v. Klintonck*, 5 Wheat. (U. S.) 144; *The Magellan Pirates*, 1 Spinks Eccl. & Adm. 81.

§ 2413. **Jurisdiction on Potomac river.**—By federal statute, it is made piracy to commit robbery on any vessel within tide waters outside the territorial jurisdiction of the state courts. The federal court located in the state of Virginia has no jurisdiction to try a case of robbery committed on the Potomac river between Washington, D. C., and Alexander, in the state of Virginia.⁶

⁶ *Ex parte Ballinger*, 88 Fed. 781.

PART EIGHT

MATTERS OF DEFENSE

CHAPTER LXIV.

DEFENSES.

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ARTICLE I. ALIBI, AS DEFENSE.

§ 2414. **Alibi—Burden on defendant.**—As to the defense of an *alibi*, the burden is on the defendant to establish in its support such

facts and circumstances, as, when considered in connection with all the other evidence in the case, create in the minds of the jury a reasonable doubt of the truth of the charge against him.¹ In some jurisdictions the burden is on the accused to establish the defense of *alibi* by preponderance of the evidence.²

§ 2415. **Alibi—Burden does not shift.**—The burden of proof does not change when the defendant undertakes to prove an *alibi*; and if, by reason of the evidence of such *alibi*, the jury should have a doubt of the guilt of the defendant, he would be entitled to an acquittal, although the jury might not be able to say that the *alibi* was fully proved.³

§ 2416. **Alibi not to be suspected.**—The defense of *alibi* is as legitimate as any other defense, and the court should not, by instruction or otherwise, throw suspicion upon it.⁴

§ 2417. **Alibi, when not established.**—The defense of *alibi* is not sustained where it appears not inconsistent that the accused might have been at the place where the crime was committed as well as the place where he claimed to have been.⁵

§ 2418. **Alibi—What required.**—When a defense rests upon proof of an *alibi*, it must cover the time when the offense is shown to have

¹ Carlton v. P., 150 Ill. 181, 37 N. E. 244; Garrity v. P., 107 Ill. 162; Mullins v. P., 110 Ill. 46; Ackerson v. P., 124 Ill. 563, 16 N. E. 847; S. v. Taylor, 118 Mo. 153, 24 S. W. 449; Hoge v. P., 117 Ill. 44, 6 N. E. 796; Towns v. S., 111 Ala. 1, 20 So. 598; Beavers v. S., 103 Ala. 36, 15 So. 616; P. v. Pichette, 111 Mich. 461, 69 N. W. 739; Henson v. S., 112 Ala. 41, 21 So. 79; S. v. Fry, 67 Iowa 475, 25 N. W. 738; S. v. McClellan, 23 Mont. 532, 59 Pac. 924; P. v. Resh, 107 Mich. 251, 65 N. W. 99; Underhill Cr. Ev., § 152. *Contra*, S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 222.

² S. v. McCracken, 66 Iowa 569, 24 N. W. 43; S. v. Hamilton, 57 Iowa 596, 11 N. W. 5; Lucas v. S., 110 Ga. 756, 36 S. E. 87.

³ Walters v. S., 39 Ohio St. 215, 4

Am. C. R. 35; 1 Bish. Cr. Proc., § 1061. See also S. v. Lowry, 42 W. Va. 205, 24 S. E. 561; Beavers v. S., 103 Ala. 36, 15 So. 616; Carlton v. P., 150 Ill. 181, 37 N. E. 244; S. v. Conway, 56 Kan. 682, 44 Pac. 627; Harrison v. S., 83 Ga. 129, 9 S. E. 542; P. v. Pichette, 111 Mich. 461, 69 N. W. 739; S. v. Chee Gong, 16 Or. 534, 19 Pac. 607; Ware v. S., 59 Ark. 379, 27 S. W. 485; Borrego v. Ter., 8 N. M. 446, 46 Pac. 349.

⁴ Miller v. P., 39 Ill. 465; Albin v. S., 63 Ind. 598, 3 Am. C. R. 295.

⁵ Aneals v. P., 134 Ill. 401, 25 N. E. 1022; Briceland v. Com., 74 Pa. St. 463, 2 Green C. R. 529. See also Klein v. P., 113 Ill. 596; Norris v. P., 101 Ill. 410; Wisdom v. P., 11 Colo. 170, 17 Pac. 519; Beavers v. S., 103 Ala. 36, 15 So. 616.

been committed, so as to preclude the possibility of the prisoner's presence at the place of the crime. The value of the defense consists in its showing that he was absent from where the deed was done at the very time the evidence of the commonwealth tends to fix its commission upon him; for if it be possible that he could have been at both places, the proof of the *alibi* is valueless.⁶

§ 2419. Impeaching defendant—On alibi.—Where the defendant testified that he was at a place other than where the crime was committed, he may be asked on cross-examination what or whom he saw at the place he claims he was, and the prosecution may call witnesses to contradict him as to what was to be seen at such place.⁷

ARTICLE II. ATTEMPT—ACT ESSENTIAL.

§ 2420. Attempt; overt act essential.—An attempt to commit a crime is an endeavor to accomplish it, carried beyond mere preparation, but falling short of execution of the ultimate design in any part of it. Merely preparing to commit a crime and doing no act toward its perpetration is not indictable.⁸ The mere attempt to deliver tools to a prisoner in jail, without the delivery thereof, will not support a conviction or verdict of guilty of attempting to set at liberty the prisoner, as charged in the indictment.⁹

ARTICLE III. AGE—TOO YOUNG TO COMMIT.

§ 2421. Age—Defendant too young—Seven to fourteen years.—If the defendant is not fourteen years old the law presumes that he lacks the mental capacity to commit criminal acts; and such presumption can be overcome only by evidence strong and clear, beyond all doubt and contradiction, that he was capable of discerning between good and evil.¹⁰ Between the ages of seven and fourteen years, the law presumes the infant *doli incapax*, and it devolves upon the prosecution

⁶ *Briceland v. Com.*, 74 Pa. St. 463, 2 Green C. R. 529. *Contra*, as to "a possibility," *Adams v. S.*, 42 Ind. 373, 2 Green C. R. 686.

⁷ *P. v. Gibson*, 58 Mich. 368, 25 N. W. 316; *Underhill Cr. Ev.*, § 151.

⁸ *Patrick v. P.*, 132 Ill. 534, 24 N. E. 619. See also *Cox v. P.*, 82 Ill. 191; *P. v. Murray*, 14 Cal. 159; *Grif-*

fin v. S., 26 Ga. 493; 3 Greenl. Ev. (Redf. ed.), § 2.

⁹ *Patrick v. P.*, 132 Ill. 534, 24 N. E. 619.

¹⁰ *Angelo v. P.*, 96 Ill. 212; 3 Greenl. Ev. (Redf. ed.), § 4; 1 Bish. Cr. L. (8th ed.), § 368; 4 Bl. Com. 23.

to establish the infant to be *doli capax*, by evidence strong and clear, beyond all doubt and contradiction.¹¹ Under seven years of age, indeed, an infant can not be guilty of felony; for then a felonious discretion is almost an impossibility in nature.¹²

ARTICLE IV. ANOTHER COMMITTED OFFENSE.

§ 2422. **Another committed the crime.**—Although it may be positively proved that one of two or more persons committed a crime, yet, if it is uncertain which is the guilty party, all must be acquitted.¹³ It is competent to show by legal evidence that another committed the crime charged, but this can not be shown by the admissions or threats of a third person not under oath, which are only hearsay.¹⁴

ARTICLE V. DRUNKENNESS AS DEFENSE.

§ 2423. **Drunkenness no excuse.**—Voluntary drunkenness shall not be an excuse for the commission of any crime or misdemeanor; and the statute on the subject is but declaratory of the common law.¹⁵ Where the requisite proof is advanced to show a wicked, intentional murder, the defendant is not permitted to show a voluntary and temporary intoxication in extenuation of his crime.¹⁶ The crime of murder can not be reduced to manslaughter by showing that the perpetrator was drunk, when the same offense, if committed by a sober man, would be murder.¹⁷

¹¹ S. v. Adams, 76 Mo. 355, 4 Am. C. R. 394; Angelo v. P., 96 Ill. 209; S. v. Tice, 90 Mo. 112, 2 S. W. 269; Godfrey v. S., 31 Ala. 323; S. v. Aaron, 4 N. J. L. 231; S. v. Fowler, 52 Iowa 103, 2 N. W. 983; Underhill Cr. Ev., § 20; 4 Bl. Com. 23.

¹² 4 Bl. Com. 23; 1 Hale P. C. 27; P. v. Townsend, 3 Hill (N. Y.) 479. ¹³ Campbell v. P., 16 Ill. 19; Epps v. S., 102 Ind. 539, 1 N. E. 491, 5 Am. C. R. 530; S. v. Westfall, 49 Iowa 328, 3 Am. C. R. 349; P. v. Woody, 45 Cal. 289, 2 Green C. R. 420.

¹⁴ Carlton v. P., 150 Ill. 181, 188, 37 N. E. 244; S. v. Beaudet, 53 Conn. 536, 4 Atl. 237, 7 Am. C. R. 88; S. v. Davis, 77 N. C. 483; Crookham v. S., 5 W. Va. 510; 2 Bish. Cr. Proc., § 623; 1 McClain Cr. L., § 404; P. v. Mitchel, 100 Cal. 328, 34 Pac. 698; Greenfield v. P., 85 N. Y.

75; S. v. Bishop, 73 N. C. 44, 1 Am. C. R. 594; Davis v. Com., 95 Ky. 19, 15 Ky. L. 396, 23 S. W. 585; Holt v. S., 9 Tex. App. 571.

¹⁵ Crosby v. P., 137 Ill. 341, 27 N. E. 49; 4 Bl. Com. 26; 1 Hale P. C. 32; S. v. Tatro, 50 Vt. 483, 3 Am. C. R. 166; Hopt v. Utah, 104 U. S. 631, 4 Am. C. R. 367; Shannahan v. Com., 8 Bush (Ky.) 463, 1 Green C. R. 373; P. v. Miller, 114 Cal. 10, 45 Pac. 986; Conley v. Com., 98 Ky. 125, 17 Ky. L. 678, 32 S. W. 285; Colee v. S., 75 Ind. 511; Upstone v. P., 109 Ill. 178; 1 McClain Cr. L., § 160; Rex v. Carroll, 7 C. & P. 145; Underhill Cr. Ev., § 164; S. v. West, 157 Mo. 309, 57 S. W. 1071.

¹⁶ S. v. Tatro, 50 Vt. 483, 3 Am. C. R. 165.

¹⁷ Rafferty v. P., 66 Ill. 124; McIntyre v. P., 38 Ill. 520; P. v. Rogers,

§ 2424. **Drunkenness, competent to disprove specific intent.**—Where a particular specific intent is charged and forms the gist of the offense, any cause which deprives the defendant of the mental capacity to form such intent will be a defense to the graver crime, and under this rule, drunkenness is competent evidence.¹⁸ Where a deliberate intent to take life is an essential element of one of the degrees of homicide, intoxication is admissible, not as an excuse for crime, nor in mitigation of punishment, but as tending to show that the less, and not the greater, offense was in fact committed.¹⁹

§ 2425. **Drunkenness, rendering one helpless.**—"If a man, by voluntary drunkenness, render himself incapable of walking for a limited time, it is just as competent evidence to show he did not walk during the time he was incapable, as though he had been rendered incapable by paralysis of his limbs from some cause over which he had no control. The cause of the incapacity is immaterial; the material question is, was he, in fact, incapable of doing the acts charged?"²⁰

§ 2426. **Drunkenness—As res gestae.**—It is competent to prove that the accused was drunk at the time of the alleged crime as a part of the *res gestae*.²¹

ARTICLE VI. DETECTIVE—WHEN DEFENSE.

§ 2427. **Decoy letters—Detective exposing criminals.**—That the accused was detected in his criminal acts by means of "decoy" letters,

18 N. Y. 27. See Greenl. Ev., § 148; Com. v. Hawkins, 3 Gray (Mass.) 466.

¹⁹ Crosby v. P., 137 Ill. 342, 27 N. E. 49; Warner v. S., 56 N. J. L. 686, 9 Am. C. R. 529, 29 Atl. 505; Hopt v. Utah, 104 U. S. 631, 4 Am. C. R. 367; Pigman v. S., 14 Ohio 555; Mooney v. S., 33 Ala. 419; S. v. Garvey, 11 Minn. 154; Schwabacher v. P., 165 Ill. 629, 46 N. E. 809; Com. v. Hagenlock, 140 Mass. 125, 3 N. E. 36; S. v. Fiske, 63 Conn. 388, 28 Atl. 572; Jones v. Com., 75 Pa. St. 403; Com. v. Dorsey, 103 Mass. 412; Roberts v. P., 19 Mich. 401; P. v. Walker, 38 Mich. 156; P. v. Young, 102 Cal. 411, 36 Pac. 770; Englehardt v. S., 88 Ala. 100, 7 So. 154; Kerr Homicide, § 209, p. 240; Cline

v. S., 43 Ohio St. 332, 1 N. E. 22; Lancaster v. S., 2 Lea (Tenn.) 575, 3 Am. C. R. 160 (see note); Bolzer v. P., 129 Ill. 121, 21 N. E. 818; 3 Greenl. Ev., § 6; Underhill Cr. Ev., § 166; Jenkins v. S., 93 Ga. 1, 18 S. E. 992; Aszman v. S., 123 Ind. 347, 24 N. E. 123; Chatham v. S., 92 Ala. 47, 9 So. 607.

²⁰ S. v. Johnson, 40 Conn. 136, 2 Green C. R. 491; Shannahan v. Com., 8 Bush (Ky.) 463; Roberts v. P., 19 Mich. 401; S. v. Garvey, 11 Minn. 154; Keenan v. Com., 44 Pa. St. 55; Pigman v. S., 14 Ohio 555; S. v. Faino, 1 Marv. (Del.) 492, 41 Atl. 134.

²¹ Ingalls v. S., 48 Wis. 647, 4 N. W. 785.

²² Rafferty v. P., 66 Ill. 124.

is no defense.²² That the accused was a detective and acted with others in the commission of a criminal offense for the purpose of exposing such others, is a good defense.²³

ARTICLE VII. OWNER CONSENTING TO ACT.

§ 2428. **Owner consents to offense.**—A detective, by previous arrangements, entered the building with the consent of the owner, and took money from the owner's safe, with no intent to steal it, but with the intention to entrap others whom he had induced to join him in the enterprise, in accordance with such previous arrangements. Held to be no criminal offense.²⁴ Where one arranges to have a crime committed against his property, or himself, and knows that an attempt is to be made to encourage others to commit the act by one acting in concert with such owner, it is not a crime.²⁵ The crime of larceny is not committed when the owner's property is taken with his consent, however guilty may be the purpose of the person taking, as where a detective, with the consent of the owner, by previous arrangement, seeks to entrap the taker.²⁶

ARTICLE VIII. IGNORANCE OF LAW.

§ 2429. **Ignorance of law no defense.**—"Ignorance of the law excuses no one," and is no defense to a criminal charge.²⁷ The legal

²² Goode v. U. S., 159 U. S. 666, 16 S. Ct. 136, 10 Am. C. R. 263; Grimm v. U. S., 156 U. S. 604, 15 S. Ct. 470.

²³ Price v. P., 109 Ill. 113; Aldrich v. P., 101 Ill. 19, 9 Am. C. R. 90; Backenstoe v. S., 19 Ohio C. C. 568, 10 Ohio C. D. 688; S. v. McKean, 36 Iowa 343, 2 Green C. R. 635; Com. v. Hollister, 157 Pa. St. 13, 27 Atl. 386; P. v. Noelke, 94 N. Y. 137; Underhill Cr. Ev., § 69.

²⁴ Love v. P., 160 Ill. 508, 43 N. E. 710; Strait v. S., 77 Miss. 693, 27 So. 617; Allen v. S., 40 Ala. 334; 2 East P. C., ch. 16, § 111; Williams v. S., 55 Ga. 391. But see S. v. Jansen, 22 Kan. 498.

²⁵ Love v. P., 160 Ill. 508, 43 N. E. 710; P. v. McCord, 76 Mich. 200, 8 Am. C. R. 121, 42 N. W. 1106; S. v. Hayes, 105 Mo. 76, 16 S. W. 514; Allen v. S., 40 Ala. 334. See Speiden

v. S., 3 Tex. App. 156, 30 Am. R. 126; S. v. Hull, 33 Or. 56, 54 Pac. 159; P. v. Collins, 53 Cal. 185; Kemp v. S., 11 Humph. (Tenn.) 320.

²⁶ Connor v. P., 18 Colo. 373, 33 Pac. 159; Williams v. S., 55 Ga. 395; Kemp v. S., 11 Humph. (Tenn.) 320; Rex v. McDaniel, Foster 121. See "Robbery;" "Larceny;" "Embezzlement."

²⁷ Miles v. U. S., 103 U. S. 304; U. S. v. Anthony, 11 Blatchf. (C. C.) 200; Dodd v. S., 18 Ind. 56; P. v. Cook, 39 Mich. 236; P. v. Powell, 63 N. Y. 88; Hoover v. S., 59 Ala. 57; Com. v. Goodman, 97 Mass. 117; Reg. v. Downes, 13 Cox C. C. 111; Gardner v. P., 62 N. Y. 299; Jellico Coal Mining Co. v. Com., 96 Ky. 373, 16 Ky. L. 463, 29 S. W. 26; P. v. Kilvington, 104 Cal. 86, 37 Pac. 799; S. v. Foster (R. I.), 46 Atl. 833, 50 L. R. A. 339.

maxim, "*Ignorantia legis neminem excusat*," in its application to the law of crimes, is subject, as it is sometimes in respect to civil rights, to certain important exceptions. Where the act done is *malum in se*, or where the law is well-settled and plain, the maxim, "Ignorance of the law excuses no one," in its rigor, will be applied; but where the law is not settled, or is obscure, and where the guilty intention, being a necessary constituent of the offense, is dependent on the knowledge of the law, this rule, if enforced, would be misapplied.²⁸

ARTICLE IX. INSANITY AS DEFENSE.

§ 2430. **Insanity as defense—Degree.**—To establish a defense on the grounds of insanity, it must be clearly proved that at the time of committing the alleged crime the accused was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.²⁹

§ 2431. **Insanity after committing offense.**—"If a man in his sound memory commit a capital offense, and before arraignment for it becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought."³⁰

§ 2432. **Insanity—Preliminary inquiry.**—The accused is placed on trial for the crime with which he is charged, and the question of his insanity being put in issue, it becomes material to the case—even though a jury had been impaneled to try the question and disagreed as to his sanity.³¹ But the court must have reasonable grounds to doubt the sanity of the person about to be tried for a felony before a jury will be impaneled to inquire into his mental condition.³² A man can not plead or be tried, convicted or sentenced while in a state of insanity, and when objection to proceeding with the trial is

²⁸ Cutter v. S., 36 N. J. L. 125, 2 Green C. R. 590; Com. v. Bradford, 9 Metc. (Mass.) 268; Rex v. Hall, 3 C. & P. 409; Com. v. Shed, 1 Mass. 228; 3 Greenl. Ev., §§ 20, 21; S. v. Brown, 38 Kan. 390, 16 Pac. 259, 8 Am. C. R. 171.

²⁹ Mackin v. S., 59 N. J. L. 495, 36 Atl. 1040; Plake v. S., 121 Ind. 433, 23 N. E. 273; P. v. Taylor, 138 N. Y. 398, 406, 34 N. E. 275.

³⁰ 4 Bl. Com. 24; 1 Hale P. C. 34; 2 Bish. Cr. Proc., 666.

³¹ French v. S., 85 Wis. 407, 55 N. W. 566; 1 McClain Cr. L., § 166.

³² S. v. Harrison, 36 W. Va. 729, 9 Am. C. R. 633, 15 S. E. 982, citing Webber v. Com., 119 Pa. St. 223, 13 Atl. 427; Jones v. S., 13 Ala. 157; S. v. Arnold, 12 Iowa 483. *Contra*, Guagando v. S., 41 Tex. 626.

made, on that account, whether raised orally or otherwise, the evidence must be received and the issue must in some way be disposed of before proceeding with the trial.³³

§ 2433. **Insanity—Special plea.**—Counsel conducting the defense of one charged with crime may file a special plea alleging that the accused is insane at the time of the trial; and when such plea is filed it becomes the duty of the court to cause the issue thus made to first be tried by a special jury, and if the plea is found to be true an order should be entered committing the accused to the insane asylum.³⁴

§ 2434. **Insanity—Weight of evidence.**—An examination of a large number of decisions of the courts of different states, and courts of England, shows that there are three distinct and well-defined theories on the subject of insanity as a defense: First, that the proof must satisfy the minds of the jury beyond a reasonable doubt that the defendant was insane at the time of the commission of the act; second, that the burden of proof is upon the defendant to show by a fair preponderance of evidence that he was incapable of distinguishing right from wrong, and consequently insane; third, that if, upon the whole of the evidence by the prosecution and defense, there is a reasonable doubt as to the sanity of the accused, he should be acquitted.³⁵

§ 2435. **Insanity—Degree, preponderance required.**—The adjudged cases in this country present a vast weight of authority favorable to the doctrine that insanity is a defense which must be established to the satisfaction of the jury by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.³⁶

³³ S. v. Reed, 41 La. 582, 7 So. 132; 4 Bl. Com. 25.

³⁴ Carr v. S., 96 Ga. 284, 22 S. E. 570, 10 Am. C. R. 330. See 4 Bl. Com. 25.

³⁵ S. v. Scott, 49 La. 253, 10 Am. C. R. 591, 21 So. 271. Many cases are cited in illustration of the three theories; and see also note at the foot of S. v. Scott, 10 Am. C. R. 601.

³⁶ S. v. Scott, 49 La. 253, 21 So.

271, 10 Am. C. R. 585, 594; Parsons v. S., 81 Ala. 577, 7 Am. C. R. 266, 2 So. 854; Com. v. Gerade, 145 Pa. St. 289, 22 Atl. 464; Coyle v. Com., 100 Pa. St. 573, 4 Cr. L. Mag. 76; Carlisle v. S. (Tex. Cr.), 56 S. W. 365. See P. v. Nino, 149 N. Y. 317, 43 N. E. 853; King v. S., 74 Miss. 576, 21 So. 235; S. v. Larkins (Idaho), 47 Pac. 945; S. v. Cole, 2 Pen. (Del.) 344, 45 Atl. 391; Graves v. S., 45 N. J. L. 203, 4 Am. C. R.

§ 2436. **Insanity—Preponderance not required.**—But there are numerous cases by courts of high authority holding that where a *prima facie* case is made out against a defendant, he is never bound to rebut it by a preponderance of the evidence of insanity. He is only required to raise a reasonable doubt as to his guilt. The burden of proof is always upon the state, and never shifts from the state to the defendant. The making out of a *prima facie* case against the defendant does not shift the burden of proof.³⁷

§ 2437. **Sanity is presumed—Exception to rule.**—The law presumes every man to be sane until the contrary is shown. But this legal presumption may be overcome by evidence from either side tending to prove insanity of the accused which is sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act. Then the burden shifts.³⁸ The presumption of sanity inheres at every stage of the trial until insanity is made to appear by the evidence sufficient to raise a reasonable doubt of sanity at the time of the act.⁴⁰ After a person has been found insane by inquest, properly

387, 390; Coates v. S., 50 Ark. 330, 7 S. W. 304, 7 Am. C. R. 585; S. v. Smith, 53 Mo. 267, 2 Green C. R. 599; P. v. Wilson, 49 Cal. 13, 1 Am. C. R. 358; Ortwein v. Com., 76 Pa. St. 414, 1 Am. C. R. 298.

³⁷ S. v. Crawford, 11 Kan. 32, 2 Green C. R. 642-3; P. v. McCann, 16 N. Y. 58, 64; Chase v. P., 40 Ill. 353; P. v. Hettick, 126 Cal. 425, 58 Pac. 918. See also P. v. McCarthy, 115 Cal. 255, 46 Pac. 1073; S. v. Schaef-er, 116 Mo. 96, 22 S. W. 447; Ford v. S., 73 Miss. 734, 19 So. 665; Walker v. P., 88 N. Y. 81, 88; Smith v. Com., 1 Duv. (Ky.) 224, 228; P. v. Holmes, 111 Mich. 364, 69 N. W. 501; Armstrong v. S., 30 Fla. 170, 204, 11 So. 618; S. v. Davis, 109 N. C. 780, 14 S. E. 55; Underhill Cr. Ev., § 157. See cases cited under § 2437, in notes 38 and 40.

³⁸ Dacey v. P., 116 Ill. 572, 6 N. E. 165; Chase v. P., 40 Ill. 353; Montag v. P., 141 Ill. 80, 30 N. E. 337; Cunningham v. S., 56 Miss. 269; Maas v. Ter. (Okla., 1901), 63 Pac. 960; P. v. Garbutt, 17 Mich. 9; O'Connell v. P., 87 N. Y. 377; S. v. Bartlett, 43 N. H. 224; Hopps v. P., 31 Ill. 394; Langdon v. P., 133 Ill. 406, 24 N. E. 874; Dunn v. P., 109 Ill. 635;

Meyer v. P., 156 Ill. 129, 40 N. E. 490; Brotherton v. P., 75 N. Y. 159, 3 Am. C. R. 219; Com. v. Pomeroy, 117 Mass. 143; Cunningham v. S., 56 Miss. 269; Plake v. S., 121 Ind. 433, 23 N. E. 273; S. v. Nixon, 32 Kan. 205, 4 Pac. 159; Ballard v. S., 19 Neb. 609, 28 N. W. 271; S. v. Crawford, 11 Kan. 32, 2 Green C. R. 641; Davis v. U. S., 160 U. S. 469, 16 S. Ct. 353; Dove v. S., 3 Heisk. (Tenn.) 348, 1 Green C. R. 764, 769; P. v. Taylor, 138 N. Y. 398, 34 N. E. 275; Keener v. S., 97 Ga. 388, 24 S. E. 28; P. v. McCarthy, 115 Cal. 255, 46 Pac. 1073; S. v. Scott, 49 La. 253, 21 So. 271; S. v. Wright, 134 Mo. 404, 35 S. W. 1145; S. v. Stickley, 41 Iowa 232, 237; Underhill Cr. Ev., § 157.

⁴⁰ Dacey v. P., 116 Ill. 572, 6 N. E. 165; Langdon v. P., 133 Ill. 406, 24 N. E. 874; S. v. Nixon, 32 Kan. 205, 4 Pac. 159, 5 Am. C. R. 315; Dove v. S., 3 Heisk. (Tenn.) 348, 1 Green C. R. 764; Com. v. Gerade, 145 Pa. St. 289, 22 Atl. 464; S. v. Scott, 49 La. 253, 21 So. 271, 10 Am. C. R. 586; 3 Greenl. Ev., § 5. See also O'Connell v. P., 87 N. Y. 377; Bolling v. S., 54 Ark. 588, 602, 16 S. W. 658.

held, the presumption of insanity may continue until it is rebutted by evidence of sanity.⁴¹ But to this rule there are exceptions and qualifications. It is not sufficient that there be proof of a temporary or spasmodic mania to come within the rule.⁴²

§ 2438. **Insanity—"Right and wrong" test.**—"Where reason and judgment were not overcome, but the person retained the power to choose between right and wrong as to the particular act done, he could not escape responsibility for his acts under the plea of insanity." Where a man knows that it is wrong to do a certain act and possesses the power of mind to do or not to do the act, he should be held responsible.⁴³ Where insanity is the defense to a criminal charge the inquiry is always to be reduced to the single question of the capacity of the accused to discriminate between right and wrong at the time of the alleged criminal act.⁴⁴ The court, in considering insanity as a defense, in *Parsons v. State*, hold the true test of legal responsibility to be, "not only the knowledge of good and evil, but the power to choose the one and refrain from the other."⁴⁵

§ 2439. **Insanity—Nature or quality.**—Insanity must be of such a degree as to create an uncontrollable impulse to do the act charged, by overriding the reason and judgment and obliterating the sense of right as to the particular act done, and depriving the accused of the power of choosing between them.⁴⁶ "Every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, which is necessary to form a legal excuse. If a real luna-

⁴¹ *Langdon v. P.*, 133 Ill. 404, 24 N. E. 874; *Titcomb v. Vantyle*, 84 Ill. 371; 1 Greenl. Ev., § 42; 2 Bish. Cr. Proc., § 674; 1 Whar. Cr. L., § 63; *S. v. Wilner*, 40 Wis. 304; *S. v. Reddick*, 7 Kan. 143.

⁴² *S. v. Lowe*, 93 Mo. 547, 5 S. W. 889; *P. v. Francis*, 38 Cal. 183; 1 Whar. Cr. L., § 63; *S. v. Spencer*, 21 N. J. L. 196; *P. v. Lane*, 101 Cal. 513, 36 Pac. 16.

⁴³ *Dunn v. P.*, 109 Ill. 644; *Flanagan v. P.*, 52 N. Y. 467, 1 Green C. R. 378.

⁴⁴ *S. v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 9 Am. C. R. 638; *Carr v. S.*, 96 Ga. 284, 22 S. E. 570, 10

Am. C. R. 331; *S. v. Mowry*, 37 Kan. 369, 15 Pac. 282; *P. v. Carpenter*, 102 N. Y. 238, 6 N. E. 584; *S. v. Pagels*, 92 Mo. 300, 4 S. W. 931; *P. v. Hoin*, 62 Cal. 120; *S. v. Lawrence*, 57 Me. 577. See *Mangrum v. Com.*, 19 Ky. L. 94, 39 S. W. 703; *Com. v. Gerade*, 145 Pa. St. 289, 22 Atl. 464; *S. v. Hockett*, 70 Iowa 442, 30 N. W. 742. *Contra*, *Parsons v. S.*, 81 Ala. 577, 2 So. 854, 7 Am. C. R. 266.

⁴⁵ *Parsons v. S.*, 81 Ala. 577, 7 Am. C. R. 266, 2 So. 854, citing *Spann v. S.*, 47 Ga. 553, 1 Green C. R. 391, 7 Cr. L. Mag. 567, 600.

⁴⁶ *Hopps v. P.*, 31 Ill. 391; *Lilly v.*

tic kills himself in a lucid interval, he is *felo de se* as much as another man."⁴⁷

§ 2440. **Insanity from drink.**—The fact that the insanity, amounting to a mental disease, was induced or brought about by the use of intoxicating liquors, will make it none the less a defense, in criminal cases.⁴⁸

§ 2441. **Deaf mute.**—A deaf mute was tried for felony and was found guilty. The jury were requested and directed to determine whether in their opinion the prisoner was capable of understanding and had understood the nature of the proceedings; and the finding was that the defendant was not capable and did not understand such proceedings. Held that no conviction could be had, but that the defendant must be detained as an insane person.⁴⁹

ARTICLE X. SELF-DEFENSE.

§ 2442. **Self-defense—What constitutes.**—"If the defendant was pursued or assaulted by the deceased in such a way as to induce in him a reasonable and well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm, when acting under the influence of such apprehension, he was justified in defending himself, whether the danger was real or only apparent."⁵⁰

P., 148 Ill. 473, 36 N. E. 95; Dacey v. P., 116 Ill. 572, 6 N. E. 165; Meyer v. P., 156 Ill. 129, 40 N. E. 490; U. S. v. Faulkner, 35 Fed. 731.

⁴⁷ 4 Bl. Com. 190; P. v. Hubert, 119 Cal. 216, 51 Pac. 329.

⁴⁸ Abbott's Cr. Brief, § 775, citing P. v. Blake, 65 Cal. 275, 4 Pac. 1; P. v. O'Connell, 62 How. Pr. (N. Y.) 436; Erwin v. S., 10 Tex. App. 700. See also P. v. Fellows, 122 Cal. 233, 54 Pac. 830. See Cannon v. S. (Tex. Cr.), 56 S. W. 351 (temporary).

⁴⁹ Queen v. Berry, L. R. 1. Q. B. D. 447, 3 Am. C. R. 428; Rex v. Dyson, 7 C. & P. 305; Reg. v. Pritchard, 7 C. & P. 303.

⁵⁰ Campbell v. P., 16 Ill. 17; Steinmeyer v. P., 95 Ill. 389; Schnier v. P., 23 Ill. 17; Steiner v. P., 187 Ill. 245, 58 N. E. 383; Roach v. P., 77 Ill. 25; Maher v. P., 24 Ill. 242; Gainey v. P., 97 Ill. 277; Kinney v.

P., 108 Ill. 519; Panton v. P., 114 Ill. 505, 2 N. E. 411; Walker v. P., 133 Ill. 115, 24 N. E. 424; Allen v. P., 77 Ill. 487; Enright v. P., 155 Ill. 35, 39 N. E. 561; S. v. Zeigler, 40 W. Va. 593, 21 S. E. 763, 10 Am. C. R. 473; S. v. Evans, 33 W. Va. 422, 10 S. E. 792; Coffman v. Com., 10 Bush (Ky.) 495, 1 Am. C. R. 294; Frank v. S., 94 Wis. 211, 68 N. W. 657; Walker v. S., 97 Ga. 350, 23 S. E. 992; Elliott v. P., 22 Colo. 466, 45 Pac. 404; Ingram v. S., 62 Miss. 142; King v. S. (Miss.), 23 So. 766; Hensen v. S., 120 Ala. 316, 25 So. 23; S. v. Pennington, 146 Mo. 27, 47 S. W. 799; S. v. Gentry, 125 N. C. 733, 34 S. E. 706; McCrory v. S. (Miss.), 25 So. 671; Bonardo v. P., 182 Ill. 411, 55 N. E. 519; S. v. Sadler, 51 La. 1397, 26 So. 390; S. v. Sloan, 22 Mont. 293, 56 Pac. 364. See also Erwin v. S., 29 Ohio St. 186,

§ 2443. **Self-defense—Danger apparent.**—While the danger at the time the mortal blow was given need not be real, yet it must be apparently imminent, urgent and pressing to justify killing the assailant. A mere belief of danger is not sufficient.⁵¹ In self-defense the accused is only required to prove that the killing was apparently necessary and not "absolutely necessary."⁵² Where the defense is self-defense, it is for the jury, and not the prisoner, to judge of the reasonable grounds for apprehension as to the danger or threatened danger.⁵³

§ 2444. **Provoking quarrel.**—The defendant has not the right to provoke a quarrel and take advantage of it, and then justify the homicide on the grounds of self-defense.⁵⁴ The law will not permit a person to follow up his enemy, and, if an encounter ensue, justify the killing as being done in self-defense. The accused must be wholly free from fault in bringing on the difficulty.⁵⁵

§ 2445. **Flying from assailant.**—A man who is without fault is not obliged to fly from an assailant, who by violence or surprise maliciously seeks to take his life or do him enormous bodily harm.⁵⁶ The ancient doctrine as to the duty of a person assailed to retreat as far as he can, before he is justified in repelling force by force, has been greatly modified in this country, and has with us a much narrower application than formerly. Indeed, the tendency of the American

2 Am. C. R. 257; 3 Greenl. Ev., § 8; 1 Hale P. C. 478.

⁵¹ Price v. P., 131 Ill. 234, 23 N. E. 639; 1 McClain Cr. L., § 303; Kilgore v. S., 124 Ala. 24, 27 So. 4; Alvarez v. S., 41 Fla. 532, 27 So. 40; P. v. Kennedy, 159 N. Y. 346, 54 N. E. 51; Nabors v. S., 120 Ala. 323, 25 So. 529 (belief).

⁵² Enright v. P., 155 Ill. 35, 39 N. E. 561; Ingram v. S., 62 Miss. 142, 5 Am. C. R. 485; S. v. Palmer, 88 Mo. 568. See McCoy v. P., 175 Ill. 230, 51 N. E. 777.

⁵³ 2 Thomp. Trials, § 2160, citing S. v. Harris, 1 Jones L. (N. C.) 190, Horr. & Thomp. Cas. Self Def. 276; Cotton v. S., 31 Miss. 504, Horr. & Thomp. Cas. Self. Def. 310; P. v. McLeod, 1 Hill (N. Y.) 377, Horr. & Thomp. Cas. Self Def. 784; S. v. Bohan, 19 Kan. 28; Davis v. P., 88 Ill. 350; S. v. Abarr, 39 Iowa 185. See "Homicide."

⁵⁴ Adams v. P., 47 Ill. 379; Kinney v. P., 108 Ill. 527; S. v. Campbell, 107 N. C. 948, 12 S. E. 441; Logsdon v. Com., 19 Ky. L. 413, 40 S. W. 775; S. v. Pennington, 146 Mo. 27, 47 S. W. 799; S. v. Ballou, 20 R. I. 607, 40 Atl. 861; S. v. Adler, 146 Mo. 18, 47 S. W. 794; Teague v. S., 120 Ala. 309, 25 So. 209; S. v. Vaughan, 141 Mo. 514, 42 S. W. 1080; Roberson v. S., 53 Ark. 516, 14 S. W. 902. But see Patterson v. S., 75 Miss. 670, 23 So. 647.

⁵⁵ Hughes v. P., 116 Ill. 335, 6 N. E. 55; Crawford v. S., 112 Ala. 1, 21 So. 214; Hughes v. S., 117 Ala. 25, 23 So. 677; Welch v. S., 124 Ala. 41, 27 So. 307; Jackson v. Com. (Va.), 36 S. E. 487; Swanner v. S. (Tex. Cr.), 58 S. W. 72.

⁵⁶ Erwin v. S., 29 Ohio St. 186, 2 Am. C. R. 261 (common law authorities reviewed); S. v. Warner, 100 Iowa 260, 69 N. W. 546.

mind seems to be very thoroughly against the enforcement of any rule which requires a person to flee when assailed, to avoid chastisement or even to save human life, and that tendency is well illustrated by the recent decisions of our courts, bearing on the general subject of the right of self-defense.⁵⁷ But in some jurisdictions the ancient doctrine prevails that the defendant is bound to decline the combat in good faith, and to use all means for his safety that reasonable men would adopt under similar circumstances.⁵⁸ But this ancient doctrine does not apply to an officer whose duty is to preserve the peace: he is not required to decline a combat when resisted in the discharge of his duty.^{58a}

§ 2446. Retreat—When unnecessary.—If a man without fault is violently assaulted in his own home by a person who enters the same with force or surprise, he, in resisting such assaults in the necessary defense of his person or habitation, is not bound to retreat.⁵⁹ "In the case of justifiable self-defense, the injured party may repel force with force in defense of his person, habitation or property against one who manifestly intendeth and endeavoreth, with violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he findeth himself out of danger, and if, in a conflict between them, he happeneth to kill, such killing is justifiable."⁶⁰ When a person, being without fault and in a place where he has a right to be (in his own house or on his own premises), is violently assaulted, he is not bound to retreat, but may stand his ground in defending himself.⁶¹

§ 2447. Previous threats—Threat explained.—Previous threats, or even acts of hostility, however violent, will not of themselves excuse

⁵⁷ Runyan v. S., 57 Ind. 80, 26 Am. R. 52, 2 Am. C. R. 351; S. v. Huds-peth, 150 Mo. 12, 51 S. W. 483; Palmer v. S. (Wyo., 1900), 59 Pac. 793. See La Rue v. S., 64 Ark. 144, 41 S. W. 53; 4 Bl. Com. 185.

⁵⁸ Davison v. P., 90 Ill. 231; S. v. Spears, 46 La. 1524, 16 So. 467, 9 Am. C. R. 624; S. v. Rheams, 34 Minn. 18, 24 N. W. 302, 6 Am. C. R. 540; 4 Bl. Com. 185; S. v. Warren, 1 Marv. (Del.) 487, 41 Atl. 190.

^{58a} Lynn v. P., 170 Ill. 536, 48 N. E. 964.

⁶⁰ 1 Hale P. C. 486; Runyan v. S., 57 Ind. 80, 26 Am. R. 52, 2 Am. C. R. 320; Williams v. S., 81 Ala. 1, 1

So. 179, 7 Am. C. R. 447; S. v. Reed, 154 Mo. 122, 55 S. W. 278; Kerr Homicide, §§ 181, 184; S. v. Middleham, 62 Iowa 150, 17 N. W. 446; S. v. Scheele, 57 Conn. 307, 18 Atl. 256; S. v. Peacock, 40 Ohio St. 333; S. v. Patterson, 45 Vt. 308.

⁶⁰ Foster C. C., ch. 3, p. 273 (cited in Erwin v. S., 29 Ohio St. 186, 2 Am. C. R. 258); P. v. Lewis, 117 Cal. 186, 48 Pac. 1088; Foster C. C. 273.

⁶¹ Babe Beard v. U. S., 158 U. S. 550, 15 S. Ct. 962, 9 Am. C. R. 332-336; P. v. Newcomer, 118 Cal. 263, 50 Pac. 405; S. v. Robertson, 50 La. 92, 23 So. 9; Foster v. Ter. (Ariz., 1899), 56 Pac. 738.

the slayer, but there must be some words or overt acts at the time clearly indicative of a present purpose to do the injury.⁶³ That the defendant had been previously attacked by the deceased, and had had the deceased bound over to keep the peace, is competent, not for the purpose of excusing the subsequent conduct of the defendant, in shooting the deceased, but as tending to explain the threat made by the defendant and as tending to confirm the nature and character of those threats.⁶⁴

§ 2448. Declining further struggle.—Although the defendant may have originally been in the wrong and inflicted a serious injury on his antagonist, yet if he in good faith declines any further struggle and withdraws and makes known to his adversary his intention to so withdraw, he will then have the right to act in self-defense.⁶⁵

§ 2449. Self-defense—Not bound to wait—Enemy.—Where a person is pursued or assaulted by another in such a way as to induce in him a reasonable and well-grounded belief that he is actually in danger of losing his life or suffering great bodily harm, he need not wait until his adversary gets advantage over him, in defending himself from the threatened attack.⁶⁶ When a man's life has been repeatedly threatened by a desperate and lawless enemy, when an actual attempt has been made to assassinate him, and the declaration has been made by such enemy that he intended to kill him on sight, he has the right to consider himself in imminent peril on meeting such enemy, and is not obliged to wait until he is actually assailed before acting in self-defense.⁶⁷

ARTICLE XI. DEFENDING OTHERS.

§ 2450. Defending others.—The sense in which the house has a peculiar immunity is, that it is sacred for the protection of one's per-

⁶³ *Barnards v. S.*, 88 Tenn. 183, 12 S. W. 431; *Rippy v. S.*, 2 Head (Tenn.) 218; *Ewing v. S.* (Tex. Cr.), 42 S. W. 381; *S. v. Albright*, 144 Mo. 638, 46 S. W. 620; *S. v. Hickey*, 50 La. 600, 23 So. 504.

⁶⁴ *Bolzer v. P.*, 129 Ill. 122, 21 N. E. 818. See *Underhill Cr. Ev.*, § 326.

⁶⁵ *P. v. Button*, 106 Cal. 628, 39 Pac. 1073; 4 Bl. Com. 184; 3 Greenl. Ev., § 116; *S. v. Talmage*, 107 Mo.

543, 17 S. W. 990; *Wall v. S.*, 51 Ind. 453; *S. v. Vaughan*, 141 Mo. 514, 42 S. W. 1080; *Padgett v. S.*, 40 Fla. 451, 24 So. 145.

⁶⁶ *S. v. Matthews*, 148 Mo. 185, 49 S. W. 1085; *McCrorry v. S.* (Miss., 1899), 25 So. 671; *Bohannon v. Com.*, 8 Bush (Ky.) 481, 1 Green C. R. 617.

⁶⁷ *Bohannon v. Com.*, 8 Bush (Ky.) 481, 1 Green C. R. 617.

son and his family. An assault on the house can be regarded as an assault on the person only in case the purpose of such assault be injury to the person of the occupant or members of his family, and in order to accomplish this the assailant attacks the castle in order to reach the inmates. In this view, it is settled in such case, the inmate need not flee from his house in order to escape injury, but may meet him at the threshold and prevent him from breaking in by any means rendered necessary, the same as in the necessary defense of his person.⁶⁸ On the same grounds that one may kill his assailant in self-defense, he will be justified in defending another, as a father defending his son or daughter from a deadly assault.⁶⁹

ARTICLE XII. DEFENDING HABITATION.

§ 2451. **Defending habitation.**—A man's house is his castle, and he may defend it even to the taking of life, if necessary, or apparently necessary, to prevent forcible entrance against his will.⁷⁰ Where the habitation of the accused was attacked in the night time by the deceased and others, in a wanton, riotous and violent manner, by breaking the door and windows while the accused was therein, in the peace of the people, he had a right to defend his habitation from such assaults, even to the taking of life.⁷¹

ARTICLE XIII. ACCIDENT AS DEFENSE.

§ 2452. **Accident, a defense.**—If an assault was made upon the accused which he did not provoke, and he shot at his assailant, but missed him and killed a bystander, no guilt would attach if the assault upon him was such as would have justified him in killing his assailant. The killing would be a misadventure.⁷²

⁶⁸ S. v. Patterson, 45 Vt. 308, 1 Green C. R. 498.

⁶⁹ Campbell v. Com., 88 Ky. 402, 10 Ky. L. 975, 11 S. W. 290; Utterback v. Com., 20 Ky. L. 1515, 49 S. W. 479; S. v. Westfall, 49 Iowa 328, 3 Am. C. R. 349; S. v. Melton, 102 Mo. 683, 15 S. W. 139; West v. S., 59 Ind. 113; Alberty v. U. S., 162 U. S. 499, 16 S. Ct. 864; P. v. Cook, 39 Mich. 236; 3 Greenl. Ev., § 116; 4 Bl. Com. 186.

⁷⁰ Davison v. P., 90 Ill. 229. See

note, Defense of Habitation, 8 Am. C. R. 564.

⁷¹ Brown v. P., 39 Ill. 408. See S. v. Scheele, 57 Conn. 307, 18 Atl. 256, 8 Am. C. R. 552, 556.

⁷² Butler v. S., 92 Ga. 601, 19 S. E. 51; Reg. v. Knock, 14 Cox C. C. 1; Hart v. Com., 85 Ky. 77, 8 Ky. L. 419, 2 S. W. 673. See "Homicide," 4 Bl. Com. 27, 181; Perry v. S. (Tex. Cr.), 45 S. W. 566.

§ 2453. **Accident—When, and when not.**—Where a man is doing a lawful act, and, without intention of hurt, unfortunately kills another, as when a man is at work with a hatchet, and the head flies off and kills a bystander, or where a person qualified to keep a gun is shooting at a mark, and undesignedly kills a man, the effect is merely accidental, for the act is lawful.⁷³ If one intends to do another felony, and undesignedly kills a man, this is murder. Thus, if one shoots at A and misses him, but kills B, this is murder, because of the previous felonious intent, which the law transfers from one to the other.⁷⁴

ARTICLE XIV. SUICIDE AS DEFENSE.

§ 2454. **Suicide as a defense.**—For the purpose of showing that the deceased had committed suicide of her own accord, and without participation by him, the prisoner called a witness with whom the deceased had resided some six years prior to her death, and offered to prove by the witness that the deceased, while living with the witness, was of a melancholy disposition of mind and was predisposed to, and had threatened to commit suicide. Held competent as a defense, though remote. The lapse of time should go merely to the weight and not to the competency of the testimony.⁷⁵

ARTICLE XV. TAKING ONE'S OWN PROPERTY.

§ 2455. **Taking or reclaiming one's own.**—A person, by taking property from another under the *bona fide* belief that it is his own property, can not be convicted of robbery, even though he seized it violently.⁷⁶ If one's property be wrongfully held by another, he may retake it from the person so wrongfully taking it, using no more than reasonable force in doing so; and what is reasonable force is a question of fact for the jury.⁷⁷

⁷³ 4 Bl. Com. 182; 3 Greenl. Ev., § 116.

⁷⁴ 4 Bl. Com. 201.

⁷⁵ Blackburn v. S., 23 Ohio St. 146, 2 Green C. R. 534. See 3 Greenl. Ev., § 134; Hall v. S., 132 Ind. 317, 325, 31 N. E. 536; Boyd v. S., 14 Lea (Tenn.) 161; Underhill Cr. Ev., § 312.

⁷⁶ Brown v. S., 28 Ark. 126; Rex v. Hall, 3 C. & P. 409; S. v. Brown, 104 Mo. 365, 16 S. W. 406; P. v.

Hughes, 11 Utah 100, 39 Pac. 492; Crawford v. S., 90 Ga. 701, 17 S. E. 628; S. v. Hollyway, 41 Iowa 200. See P. v. Slayton (Mich.), 82 N. W. 205.

⁷⁷ Com. v. Donahue, 148 Mass. 529, 20 N. E. 171, 8 Am. C. R. 45; S. v. Elliot, 11 N. H. 540, 545. See also Brown v. S., 28 Ark. 126; Rex v. Hall, 3 C. & P. 409; Bray v. S., 41 Tex. 204; Neely v. S., 8 Tex. App. 64.

§ 2456. **Compelled to do an act.**—"When the defendant sets up that he acted under necessity, as under command of a superior officer, in time of war, or under compulsion of any kind, the burden is on him in such cases to prove the defense he sets up, and he must establish this by a preponderance of proof, it being an extrinsic defense."⁷⁸

§ 2457. **Corporation—When guilty.**—Corporations can not be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects; they can not be guilty of treason or felony, of perjury or offenses against the person.⁷⁹

ARTICLE XVI. WIFE COMPELLED BY HUSBAND.

§ 2458. **Wife compelled by husband.**—The doctrine of the common law is that, by marriage, the husband and wife become one person in law; that she is under his protection, influence, power and authority. This condition of the wife is designated by the expressive term *coverture*. One effect of it is, as a general rule, though subject to many exceptions, to excuse her from punishment for many crimes committed by her in the presence of her husband, on the ground that she acted under his compulsion. He alone is responsible for such crimes.⁸⁰

ARTICLE XVII. MUTUAL COMBAT.

§ 2459. **Mutual combat.**—"In cases of mutual combat both parties are the aggressors, and if one is killed it will be manslaughter, at least, unless the survivor can prove that before the mortal stroke was given he refused any further combat, and retreated as far as he could with safety, and that he killed his adversary from necessity to avoid his own destruction, or great bodily harm to him."⁸¹

ARTICLE XVIII. STATUTE REPEALED.

§ 2460. **Statute repealed, a defense.**—No principle is better settled than that a conviction can not be had after the repeal of a law which

⁷⁸ Kent v. P., 8 Colo. 563, 5 Am. C. R. 423, 9 Pac. 852; Com. v. Boyer, 7 Allen (Mass.) 306; S. v. Morphy, 33 Iowa 270.

⁷⁹ Cumberland Canal v. Portland, 56 Me. 77; Com. v. Proprietors, 2 Gray (Mass.) 345.

⁸⁰ Com. v. Wood, 97 Mass. 225; Com. v. Barry, 115 Mass. 146, 2 Green C. R. 285; 3 Greenl. Ev., § 7; 4 Bl. Com. 28.

⁸¹ S. v. Spears, 46 La. 1524, 9 Am. C. R. 624, 16 So. 467.

has been violated, unless the repealing act contains a provision for that purpose.⁸²

ARTICLE XIX. MERE PRESENCE, NO OFFENSE.

§ 2461. **Mere presence, no offense.**—The fact that a person is present at the time an offense is committed, and knows it is to be committed, does not connect him with the crime. The evidence must show that such person aided or in some manner participated in the commission of the crime before he can be held responsible.⁸³

ARTICLE XX. STATUTE OF LIMITATIONS.

§ 2462. **Statute of limitations.**—The statute of limitations begins to run when an offense is actually committed, and not at some later time; as, for example, when a public officer embezzles and converts to his own use money entrusted to him by virtue of his office, the statute begins to run at the time of such conversion, and not at some future time when he failed or refused to pay over to his successor on demand made.⁸⁴

⁸² *Whitehurst v. S.*, 43 Ind. 473; *Calkins v. S.*, 14 Ohio St. 222; *Wheeler v. S.*, 64 Miss. 462, 1 So. 632; *S. v. Meader*, 62 Vt. 458, 20 Atl. 730; *Griffin v. S.*, 39 Ala. 541; *S. v. Ingersoll*, 17 Wis. 631; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *S. v. Daley*, 29 Conn. 272; *Hartung v. P.*, 28 N. Y. 400; *Smith v. S.*, 45 Md. 49, 2 Am. C. R. 485; *Keller v. S.*, 12 Md. 322; *U. S. v. Finlay*, 1 Abb. (U. S.) 364; *Sheppard v. S.*, 1

Tex. App. 522, 28 Am. R. 422; *S. v. Brewer*, 22 La. 273; *S. v. Long*, 78 N. C. 571.

⁸³ *Drury v. Ter.*, 9 Okl. 398, 60 Pac. 101; *White v. P.*, 81 Ill. 337; *Crosby v. P.*, 189 Ill. 300, 59 N. E. 546; *Leslie v. S. (Tex. Cr.)*, 57 S. W. 659. See § 2474.

⁸⁴ *Weimer v. P.*, 186 Ill. 503, 58 N. E. 378; *Baschleben v. P.*, 188 Ill. 261, 58 N. E. 946. See *McArthur v. S. (Neb.)*, 83 N. W. 196.

CHAPTER LXV.

INTENT.

ART.	I. Intent, Element of Crime,	§ 2463
	II. Intent, When Presumed,	§§ 2464-2466
	III. Willfully and Maliciously,	§ 2467
	IV. Intent, When Immaterial,	§§ 2468-2469
	V. Intent, When Essential,	§ 2470
	VI. Good Faith and Belief,	§ 2471
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ARTICLE I. INTENT, ELEMENT OF CRIME.

§ 2463. **Crime defined.**—To constitute a crime a public statute must be violated by the joint operation of an act and intention or criminal negligence.¹

ARTICLE II. INTENT, WHEN PRESUMED.

§ 2464. **Intent presumed from act.**—Every man is presumed to intend the natural and probable consequences of his act, and it has been uniformly held, therefore, that the intent may be inferred from the acts of the person charged with crime, as well as by words and declarations, or from the character, manner and circumstances of the assault.² It is only a presumption that a party intends the ordinary

¹ Kent v. P., 8 Colo. 563, 9 Pac. 852, 5 Am. C. R. 414; Roberts v. P., 19 Mich. 414; Buckner v. Com., 14 Bush (Ky.) 601.

² Crosby v. P., 137 Ill. 336, 27 N. E. 49; Fitzpatrick v. P., 98 Ill. 269; Weaver v. P., 132 Ill. 536, 24 N. E. 571; Hanrahan v. P., 91 Ill. 147; Kerr Homicide, § 29; Conn v. P., 116 Ill. 464, 6 N. E. 463; Perry v. P., 14 Ill. 496; Danaway v. P., 110 Ill. 333; P. v. Langton, 67 Cal. 427, 7 Pac. 843, 7 Am. C. R. 439; S. v. Milholland, 89 Iowa 5, 56 N. W. 403; Rosin v. U. S., 161 U. S. 29, 16 S. Ct. 43; S. v. Patterson, 116 Mo. 505, 22 S. W. 696; S. v. Barbee, 92 N. C. 820, 6 Am. C. R. 180; 3 Greenl. Ev., §§ 13, 14.

and probable consequences of his act, and such presumption may be rebutted by competent evidence.³

§ 2465. **Actual knowledge immaterial.**—No doubt where guilty knowledge is an ingredient of the offense such knowledge must be alleged and proven, but actual, positive knowledge is not usually required. It may be presumed from the proof of circumstances.⁴

§ 2466. **Positive intent and indifference.**—There can be but little distinction, except in degree of criminality, between a positive intent to do wrong and an indifference whether wrong is done or not.⁵

ARTICLE III. WILLFULLY AND MALICIOUSLY.

§ 2467. **"Willfully" implies bad intent—"Maliciously."**—The words of our statute are that "if any person shall willfully give any false answer to the selectman or moderator presiding at an election he shall forfeit a penalty," etc. The *quo animo* with which the act is done is material and must be alleged in the indictment.⁶ The word "maliciously," when used in the definition of a statutory crime, the act forbidden being merely *malum prohibitum*, has almost always the effect of making a bad intent or evil mind a constituent of the offense, and the proof must show that the injury was done either out of a spirit of wanton cruelty or of wicked revenge.⁷

ARTICLE IV. INTENT, WHEN IMMATERIAL.

§ 2468. **Intent, when not material.**—There is a large class of cases in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that gave character to his act. In such cases he acts at his peril and must know whether his act constitutes a criminal offense. Among these cases are violations of the laws relating to the sale of intoxicating liquors, the unlawful sale of naphtha, selling adulterated milk, and other like

³ *Filkins v. P.*, 69 N. Y. 101, 25 Am. R. 143; *Robinson v. S.*, 53 Md. 151; *S. v. Rivers*, 58 Iowa 102, 12 N. W. 117.

⁴ *Bonker v. P.*, 37 Mich. 4, 2 Am. C. R. 84; *Schriedley v. S.*, 23 Ohio St. 130; *Andrews v. P.*, 60 Ill. 354.

⁵ *Belk v. P.*, 125 Ill. 584, 17 N. E. 744; 2 Ros. Cr. Ev., § 725.

⁶ *Com. v. Shaw*, 7 Metc. (Mass.) 52, 56; 1 McClain Cr. L., § 124; *S. v. Startup*, 39 N. J. L. 423.

⁷ *Folwell v. S.*, 49 N. J. L. 31, 6 Atl. 619, 7 Am. C. R. 289. See "Malicious Mischief."

offenses.⁸ It is not material whether the defendant in issuing warehouse receipts intended to defraud the bank or other persons, if in fact his act, knowingly committed, was within the prohibition of the statute.⁹

§ 2469. Result of recklessness.—If persons having control of horses attached to the vehicle in which they are riding, knowing of the danger of the collision and the probable consequences following therefrom, recklessly and negligently, or wantonly and willfully permit the horses to run and collide with the vehicle of another, without using such means as are reasonably at their command to prevent the same, they should be held penally responsible for the result of their negligence or willful omission of duty.¹⁰

ARTICLE V. INTENT, WHEN ESSENTIAL.

§ 2470. Intent, when essential.—It is necessary to allege an intent in the indictment only when the statutory terms mention the intent as one of the elements of the offense defined.¹¹

ARTICLE VI. GOOD FAITH AND BELIEF.

§ 2471. Good faith and belief.—The marriage act provides that "if any person shall join in marriage any minor without the written consent of the parent, guardian or other person having charge of such minor," he shall be liable to a penalty. That the accused acted in good faith, under the belief that the minor was of full age and had the appearance of being over twenty-one, can not be set up as a defense

⁸ *Com. v. Murphy*, 165 Mass. 66, 42 N. E. 504, 10 Am. C. R. 67; *Com. v. Wentworth*, 118 Mass. 441; *S. v. White Oak River Corp.*, 111 N. C. 661, 16 S. E. 331; *Halsted v. S.*, 41 N. J. L. 552, 32 Am. R. 247.

⁹ *Sykes v. P.*, 127 Ill. 131, 19 N. E. 705; *McCutcheon v. P.*, 69 Ill. 601; *Seacord v. P.*, 121 Ill. 631, 13 N. E. 194.

¹⁰ *Belk v. P.*, 125 Ill. 590, 17 N. E. 744; 1 Bish. Cr. L. (8th ed.), § 314; *S. v. Grote*, 109 Mo. 345, 19 S. W. 93; *Smith v. Com.*, 100 Pa. St. 324;

Com. v. Hawkins, 157 Mass. 553, 32 N. E. 862; *Com. v. Matthews*, 89 Ky. 291, 11 Ky. L. 505, 12 S. W. 333; 1 McClain Cr. L., § 130.

¹¹ *Meadowcroft v. P.*, 163 Ill. 72, 45 N. E. 303; *McCutcheon v. P.*, 69 Ill. 605; *S. v. Trolson*, 21 Nev. 419, 32 Pac. 930; *S. v. Ross*, 25 Mo. 426; *S. v. Aleck*, 41 La. 83, 5 So. 639; *S. v. Combs*, 47 Kan. 136, 27 Pac. 818; *Halsted v. S.*, 41 N. J. L. 552; *S. v. Noland*, 111 Mo. 473, 19 S. W. 715; 1 Bish. Cr. Proc., § 523.

for a violation of the statute. The law explicitly declares what is required for his protection.¹²

ARTICLE VII. PROVING DEFENDANT'S INTENT.

§ 2472. Defendant may tell his intention.—“We think a defendant has a right to testify what his intention was in the commission of the act with which he is charged.”¹³

¹² Beckham v. Nacke, 56 Mo. 546, 2 486; Berry v. S., 30 Tex. App. 423, Green C. R. 619. 17 S. W. 1080; Kerrains v. P., 60 N. Y. 228; Fenwick v. S., 63 Md. 239, N. E. 107; P. v. Baker, 96 N. Y. 340; 24 Am. L. Reg. 745; S. v. Evans, 33 White v. S., 53 Ind. 595, 16 Am. L. W. Va. 417, 10 S. E. 792; 1 Roscoe Reg. 751; Bolen v. S., 26 Ohio St. Cr. Ev. (8th ed.), § 130; Underhill 371; S. v. Wright, 40 La. 589, 4 So. Cr. Ev., § 59.

CHAPTER LXVI.

PRINCIPAL AND ACCESSORY.

ART. I.	When Accessory,	§ 2473
II.	When Not Accessory,	§§ 2474-2475
III.	Unknown Principal,	§§ 2476-2476a
IV.	Accessory, When Principal,	§ 2477
V.	Accessory After Fact,	§ 2478
VI.	Aiding in Misdemeanors,	§ 2479
VII.	Indicting Jointly,	§ 2480
VIII.	Record of Conviction,	§ 2481
IX.	Intent of Principal and Accessory,	§ 2482
X.	Wife Not Accessory,	§ 2483
XI.	Acquittal of Principal,	§ 2484
XII.	Defendant Principal and Accessory,	§ 2485

ARTICLE I. WHEN ACCESSORY.

§ 2473. **Accessory before fact defined.**—By the common law an accessory before the fact is “one who, being absent at the time of the commission of the offense, doth yet procure, counsel or command another to commit it. And absence, it is said, is indispensably necessary to constitute one an accessory; for if he be actually or constructively present when the felony is committed he is an aider and abetter and not an accessory before the fact.”¹⁴ If one person instructs another to commit murder by poison, and he effects it with a sword, the former is accessory to the murder, for that was the principal thing to be done and was the substance of the instruction.¹⁵ But if, when instructed to burn a house, he, moreover, commits a robbery while so doing, he

¹⁴ 1 Hale P. C. 615; 1 Bish. Cr. L. Ev., § 42; 1 Russell Cr. (Greenl. 673; Usselton v. P., 149 Ill. 612, 36 ed.) 26.
¹⁵ 3 Greenl. Ev., § 44.
 N. E. 952; 4 Bl. Com. 36; 3 Greenl.

stands single in the latter crime, and the other is not held responsible for it as accessory.¹⁶

ARTICLE II. WHEN NOT ACCESSORY.

§ 2474. **When not accessory—Mere presence.**—One who stands by when a crime is committed and consents to the perpetration is not a party to the crime unless he aided, abetted or assisted.¹⁷

§ 2475. **One resisting officer.**—If one of two persons, in resistance of an arrest for a crime, shoots an officer in the presence of the other, such other person will not be responsible for the shooting, unless it appear that he combined with the one shooting to resist arrest. It is not sufficient that he may have had an intention to resist in his own mind.¹⁸

ARTICLE III. UNKNOWN PRINCIPAL.

§ 2476. **Advising unknown principal.**—A defendant can be charged with advising, aiding, encouraging and abetting an unknown principal in the perpetration of a crime.¹⁹

§ 2476a. **Aiding by signs.**—One person may aid or abet another by the use of signs or motions, but turning around and putting his hands in his coat pockets when the officer said that they must go with him is not necessarily a threatening movement, in aid of the other, even though both had stolen goods.²⁰

ARTICLE IV. ACCESSORY, WHEN PRINCIPAL.

§ 2477. **Accessory a principal.**—Under the statutes of some of the states an accessory at or before the fact is a principal, and must be indicted as principal and not otherwise.²¹

¹⁶ 3 Greenl. Ev., § 44.

¹⁷ White v. P., 81 Ill. 337; P. v. Chapman, 62 Mich. 280, 7 Am. C. R. 570, 28 N. W. 896; P. v. Woodward, 45 Cal. 293, 2 Green C. R. 422; White v. P., 139 Ill. 149, 28 N. E. 1083; Jones v. P., 166 Ill. 268, 46 N. E. 723; Kemp v. Com., 80 Va. 443; S. v. Farr, 33 Iowa 553; S. v. Cox, 65 Mo. 29; 3 Greenl. Ev., § 41; S. v. Hann, 40 N. J. L. 228; Green v. S., 51 Ark. 189, 10 S. W. 266; Crosby v. P., 189

Ill. 300, 59 N. E. 546; P. v. Garnett, 129 Cal. 364, 61 Pac. 1114. See § 2461.

¹⁸ White v. P., 139 Ill. 150, 28 N. E. 1083; White v. P., 81 Ill. 337; Lamb v. P., 96 Ill. 82.

¹⁹ Spies v. P., 122 Ill. 241, 12 N. E. 865, 17 N. E. 898; 1 Archbold Cr. Pl. & Pr., § 15.

²⁰ White v. P., 139 Ill. 149, 28 N. E. 1083.

²¹ Coates v. P., 72 Ill. 303; Usselton v. P., 149 Ill. 614, 36 N. E. 952; Bax-

ARTICLE V. ACCESSORY AFTER FACT.

§ 2478. **Accessory after fact, distinct offense.**—A person indicted with others as principal can not be convicted as an accessory after the fact, the latter being a distinct offense and not the same transaction.²²

ARTICLE VI. AIDING IN MISDEMEANORS.

§ 2479. **Aiding in misdemeanor.**—Where a person is charged with aiding and abetting another in the perpetration of a felony, and is found guilty of aiding and abetting in the perpetration, not of felony, but of a misdemeanor included in the felony charge, he is guilty as principal, because there are no degrees of guilt in misdemeanors.²³

ARTICLE VII. INDICTING JOINTLY.

§ 2480. **Indicting principal and accessory jointly.**—The principal and accessory can be joined in the same count of the indictment by proper allegations showing the commission of the offense by one and alleging the facts showing the other to be accessory.²⁴ In drawing an indictment against an accessory, it may be advisable to describe the circumstances of the offense as it actually occurred, but it is not indispensable.²⁵

ARTICLE VIII. RECORD OF CONVICTION.

§ 2481. **Record of conviction, prima facie evidence.**—The principal having been tried and convicted, the record of such trial and conviction is competent evidence and sufficient to make out a *prima facie*

ter v. P., 3 Gilm. (Ill.) 382; Fixmer v. P., 153 Ill. 129, 38 N. E. 667; P. v. Lyon, 99 N. Y. 210, 1 N. E. 673, 5 Am. C. R. 11; Wixson v. P., 5 Park. Cr. (N. Y.) 121; Hatfield v. Com., 21 Ky. L. 1461, 55 S. W. 679. *Contra*, S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 10 Am. C. R. 48; P. v. Rozelle, 78 Cal. 84, 20 Pac. 36; Smith v. S., 37 Ark. 274; Rex v. Manners, 7 C. & P. 801.

²² Reynolds v. P., 83 Ill. 480; White v. P., 81 Ill. 337. *Contra*, Yoe v. P., 49 Ill. 414. See 4 Bl. Com. 40.

²³ Queen v. Waudby, 2 Q. B. D. 482, 10 Am. C. R. 24; Atkins v. S., 95 Tenn. 474, 32 S. W. 391, 10 Am. C. R.

420; Curlin v. S., 4 Yerg. (Tenn.) 144; S. v. Caswell, 2 Humph. (Tenn.) 400.

²⁴ Pelties v. Com., 126 Mass. 242; Loyd v. S., 45 Ga. 57; S. v. Atkinson, 40 S. C. 363, 18 S. E. 1021. See also S. v. Testerman, 68 Mo. 408; Com. v. Adams, 127 Mass. 15; S. v. Ruby, 68 Me. 543.

²⁵ Coates v. P., 72 Ill. 304; Baxter v. P., 3 Gilm. (Ill.) 383; Usselton v. P., 149 Ill. 612, 36 N. E. 952; Brandt v. Com., 94 Pa. St. 290; S. v. Bogue, 52 Kan. 79, 34 Pac. 410. See Goins v. S., 46 Ohio St. 457, 21 N. E. 476, 8 Am. C. R. 25; Fixmer v. P., 153 Ill. 130, 38 N. E. 667.

case of the principal's guilt, where such guilt must be established as a part of the case against the accessory, who is afterwards tried. The record is *prima facie* evidence of the guilt of the principal, but is not conclusive.²⁶ A defendant was tried and convicted for counseling, aiding and abetting his mother in the commission of a murder, who had been previously convicted of the murder. Upon the trial of the son the record of the conviction of the mother, as well as the testimony of witnesses, was introduced in evidence, and the court instructed the jury that such record of conviction was *prima facie* evidence of the guilt of the mother. Held competent on the trial of the son.²⁷

ARTICLE IX. INTENT OF PRINCIPAL AND ACCESSORY.

§ 2482. **Intent of principal and accessory.**—It is necessary in all cases that the accessory have the same intent with the principal, and unless by virtue of some statutory provision, no one who is indicted as principal can be convicted as accessory, or *vice versa*.²⁸

ARTICLE X. WIFE NOT ACCESSORY.

§ 2483. **Wife not accessory.**—A *feme covert* can not become an accessory by the receipt and concealment of her husband, for she is presumed to act under his coercion, and therefore she is not bound; neither ought she to discover her lord.²⁹

ARTICLE XI. ACQUITTAL OF PRINCIPAL.

§ 2484. **Acquittal of principal acquits accessory.**—"The leading doctrine in respect to an accessory is, that he follows like a shadow his principal. He can neither be guilty of a higher offense than his principal, nor guilty at all as an accessory, unless his principal is guilty. So, according to the general doctrine, not only a man can not be guilty as an accessory unless there is a principal who is guilty,

²⁶ S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 10 Am. C. R. 49; Anderson v. S., 63 Ga. 675; P. v. Buckland, 13 Wend. (N. Y.) 593; Com. v. York, 9 Mete. (Mass.) 93; S. v. Mosley, 31 Kan. 355, 2 Pac. 782; Levy v. P., 80 N. Y. 327.

²⁷ S. v. Mosley, 31 Kan. 355, 2 Pac.

782, 4 Am. C. R. 529; Levy v. P., 80 N. Y. 327; Arnold v. S., 9 Tex. App. 435.

²⁸ Meister v. P., 31 Mich. 99, 1 Am. C. R. 101; 1 Hale P. C. 617; S. v. Cassady, 12 Kan. 550, 1 Am. C. R. 568.

²⁹ 4 Bl. Com. 39; 1 Hale P. C. 621.

but also he can not be convicted except jointly with or after the principal, whose acquittal acquits him."³⁰ An accessory was tried and convicted of an assault and battery with intent to kill, but before judgment on the verdict the principal was tried on the same charge and acquitted. Such acquittal entitled the accessory to his discharge.³¹

ARTICLE XII. DEFENDANT PRINCIPAL AND ACCESSORY.

§ 2485. **Defendant principal and accessory.**—If the defendant was in fact both a principal and an accessory, and if, in law, on the plea of former conviction, he could not be convicted of either crime, after he had been convicted of the other, he could, on the plea of not guilty, be convicted of either, when he had been previously convicted of neither.³²

³⁰ *McCarty v. S.*, 44 Ind. 214, 15 Am. R. 232, 2 Green C. R. 715; *Johns v. S.*, 19 Ind. 421, 81 Am. D. 408.

³¹ *McCarty v. S.*, 44 Ind. 214, 15 Am. R. 232, 2 Green C. R. 715.

³² *S. v. Buzzell*, 59 N. H. 65, 4 Am. C. R. 413; *Com. v. Bakeman*, 105 Mass. 53-61; *Com. v. Dean*, 109 Mass. 349, 351.

CHAPTER LXVII.

REASONABLE DOUBT.

ART.	I. Duty of Jury,	§§ 2486-2487
	II. Reasonable Doubt Defined,	§ 2488
	III. "Moral Certainty,"	§ 2489
	IV. Doubt, on "Each Link,"	§ 2490
	V. Applied to Facts Only,	§ 2491
	VI. Doubt in Court of Review,	§ 2492
	VII. Instructions on Doubt,	§§ 2493-2494

ARTICLE I. DUTY OF JURY.

§ 2486. **Each juror to be convinced.**—Each of the jurors individually must be satisfied of the guilt of the accused beyond a reasonable doubt before a conviction can be had, and the accused is entitled to an instruction to that effect.³³

§ 2487. **What is required of jury.**—A person accused of crime is entitled to have the evidence closely and carefully considered, and he can only be lawfully convicted when, after such scrutiny, the jury can say upon oath that the evidence leaves in their minds no reasonable doubt of the guilt of the accused. It is the duty of the jury to scrutinize the evidence with the utmost caution and care, bringing to bear such reason and prudence as they would exercise in the most important affairs of life.³⁴

ARTICLE II. REASONABLE DOUBT DEFINED.

§ 2488. **What constitutes doubt.**—It is difficult to define what is a reasonable doubt, but all the authorities agree that such a doubt

³³ S. v. Witt, 34 Kan. 488, 8 Pac. 769; Stitz v. S., 104 Ind. 359, 4 N. E. 145; Little v. P., 157 Ill. 153, 42 N. E. 389; S. v. Sloan, 55 Iowa 217, 220, 7 N. W. 516; Underhill Cr. Ev., § 15.

³⁴ Anderson v. S., 41 Wis. 430, 2 Am. C. R. 199. See P. v. Ah Sing, 51 Cal. 372, 2 Am. C. R. 482.

must be actual and substantial, as contra-distinguished from a mere vague apprehension, and must arise out of the evidence.³⁵ A reasonable doubt, which will authorize an acquittal, is one as to the guilt of the accused on the whole of the evidence, and not as to any particular fact.³⁶ "A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause."³⁷ The jury may be said to entertain a reasonable doubt when, after a comparison and consideration of all the evidence, they can not say that they feel an abiding conviction to a moral certainty of the truth of the charge.³⁸

ARTICLE III. "MORAL CERTAINTY."

§ 2489. "Moral certainty."—Proof "beyond a reasonable doubt" and "to a moral certainty," are synonymous and equivalent.³⁹

ARTICLE IV. DOUBT, ON "EACH LINK."

§ 2490. Doubt as to "each link."—It is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the defendant is guilty, and not beyond a reasonable doubt as to each link in the chain of circumstances relied upon for conviction.⁴⁰

ARTICLE V. APPLIED TO FACTS ONLY.

§ 2491. Applied to facts only.—We do not think the rule as to reasonable doubt has ever been carried so far as to be made applicable to the law.⁴¹

³⁵ 3 Greenl. Ev. (Redf. ed.), § 29; Earll v. P., 73 Ill. 329; Carlton v. P., 150 Ill. 181, 192, 37 N. E. 244; Hopt v. Utah, 120 U. S. 430, 439, 7 S. Ct. 614; Underhill Cr. Ev., § 10.

³⁶ Mullins v. P., 110 Ill. 47; Crews v. P., 120 Ill. 321, 11 N. E. 404; Davis v. P., 114 Ill. 98, 29 N. E. 192; Leigh v. P., 113 Ill. 379; Williams v. P., 166 Ill. 136, 46 N. E. 749. See Walker v. P., 88 N. Y. 81.

³⁷ Dunn v. P., 109 Ill. 635; May v. P., 60 Ill. 119; Connaghan v. P., 88 Ill. 462; Little v. P., 157 Ill. 158, 42 N. E. 389; Com. v. Miller, 139 Pa. St. 77, 21 Atl. 138, 8 Am. C. R. 623. See P. v. Ah Sing, 51 Cal. 372, 2 Am. C. R. 482; P. v. Cheong Foon Ark, 61 Cal. 527.

³⁸ Com. v. Webster, 5 Cush. (Mass.) 320; Carlton v. P., 150 Ill. 181, 192, 37 N. E. 244; P. v. Ashe, 44 Cal. 288, 2 Green C. R. 399; P. v. Kernaghan, 72 Cal. 609, 14 Pac. 566. See Underhill Cr. Ev., § 12.

³⁹ Carlton v. P., 150 Ill. 192, 37 N. E. 244; Com. v. Castley, 118 Mass. 1.

⁴⁰ Bressler v. P., 117 Ill. 422, 8 N. E. 62; Keating v. P., 160 Ill. 484, 43 N. E. 724. *Contra*, S. v. Furney, 41 Kan. 115, 21 Pac. 213, 8 Am. C. R. 137; P. v. Aiken, 66 Mich. 460, 33 N. W. 821, 7 Am. C. R. 362; Clare v. P., 9 Colo. 122, 10 Pac. 799, 8 Cr. L. Mag. 184; Marion v. S., 16 Neb. 349, 5 Cr. L. Mag. 859, 20 N. W. 289.

⁴¹ O'Neil v. S., 48 Ga. 66, 2 Green C. R. 581.

ARTICLE VI. DOUBT IN COURT OF REVIEW.

§ 2492. **In court of review.**—It must appear that there is clearly a reasonable and well founded doubt of the guilt of the accused before a court of review will interpose on the weight of the evidence.⁴² A case will be reversed purely on questions of fact where the facts do not convince the court of the guilt of the accused beyond a reasonable doubt.⁴³

ARTICLE VII. INSTRUCTIONS ON DOUBT.

§ 2493. **Instruction erroneous.**—An instruction, that “if the evidence is such that a man of prudence would act upon it in his own affairs of the greatest importance, then there can not remain a reasonable doubt within the meaning of the law,” is erroneous.⁴⁴

§ 2494. **Instruction correct.**—An instruction “that the state must make out the case beyond a reasonable doubt, but that it is not necessary for the state to show that it is impossible for the crime to have been committed by anybody else, or that it might not, by bare possibility, have been done by some one else, but the state must show that it was the prisoner to a moral certainty.” Held correct.⁴⁵

⁴² *Gainey v. P.*, 97 Ill. 275; *Falk v. P.*, 42 Ill. 333; *McCoy v. P.*, 175 Ill. 229, 51 N. E. 777. The rule requiring the guilt of the accused to be established beyond a reasonable doubt applies to misdemeanor as well as felony cases: *Vandeventer v. S.*, 38 Neb. 592, 57 N. W. 397; *Fuller v. S.*, 12 Ohio St. 433; *Stewart v. S.*, 44 Ind. 237.

⁴³ *Price v. P.*, 109 Ill. 110; *Collins v. P.*, 103 Ill. 23; *Roberts v. P.*, 99 Ill. 276; *Falk v. P.*, 42 Ill. 333; *Stuart v. P.*, 73 Ill. 21; *P. v. Hamilton*, 46 Cal. 540, 2 Green C. R. 433.

⁴⁴ *P. v. Ah Sing*, 51 Cal. 372, 2 Am. C. R. 483. See also *P. v. Brannon*, 47 Cal. 96; 2 Green C. R. 435.

⁴⁵ *Houser v. S.*, 58 Ga. 78. See also *P. v. Dewey*, 2 Idaho 79, 6 Pac. 103; *Parrish v. S.*, 14 Neb. 60, 15 N. W. 357. The evidence in the following cases was held sufficient within the meaning of the rule of reasonable doubt: *Silger v. P.*, 107 Ill. 563; *McMahon v. P.*, 120 Ill. 581, 11 N. E. 883; *Clark v. P.*, 111 Ill. 404; *Mooney v. P.*, 111 Ill. 388; *Keenan v. P.*, 104 Ill. 386.

CHAPTER LXVIII.

CONSTITUTIONAL LAW.

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ARTICLE I. SUPREME POWER, WHERE.

§ 2495. **Supreme power in parliament.**—Parliament can do everything that is not naturally impossible: that what parliament doeth no authority upon earth can undo, but the law-making powers of our states and the United States are hedged about with constitutional limitations.¹

¹ Hawthorn v. P., 109 Ill. 305; Andrews v. S., 3 Heisk. (Tenn.) 165, 543.
1 Green C. R. 469; Cooley Const.

ARTICLE II. VALIDITY OF STATUTES.

§ 2496. **Statutes presumed constitutional.**—The courts never interfere to declare a law unconstitutional in case of doubt. The presumption is in favor of the validity of a law, and the courts will, if possible, give such construction as will sustain the law.²

§ 2497. **Statutes partly valid.**—When constitutional and unconstitutional provisions in a statute are distinct and separable the valid provisions may stand and the invalid be rejected.³

ARTICLE III. TITLE OF ACT, WHAT EMBRACED.

§ 2498. **Title of an act expressing subject.**—It is not necessary that the title of an act shall express all the minor divisions of the general subject to which the act relates, but if the title should express such minor subdivisions such expression will not render the title obnoxious to the constitutional provision.⁴

§ 2499. **Title of act—Embrace one subject.**—An act which is entitled "An act to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same," is not violative of the constitution of Illinois, which provides "that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title."⁵ There may be included in an act any means which are reasonably adapted to secure the objects indicated by the title of the act without violating the constitutional provision forbidding more than one subject to be expressed in the title of the act.⁶

² P. v. Gault, 149 Ill. 47, 36 N. E. 576; Hawthorn v. P., 109 Ill. 307; Cooley Const. Lim. (6th ed.), 216; Powell v. Com., 114 Pa. St. 265, 7 Atl. 913, 7 Am. C. R. 34.

³ P. v. Illinois State Reformatory, 148 Ill. 425, 36 N. E. 76; Donnersberger v. Prendergast, 128 Ill. 229, 21 N. E. 1; Cornell v. P., 107 Ill. 372; Noel v. P., 187 Ill. 587, 597, 58 N. E. 616; S. v. Wheeler, 25 Conn. 290; S. v. Newton, 59 Ind. 173; P. v. Rochester, 50 N. Y. 525; S. v. Beddo (Utah, 1900), 63 Pac. 96.

⁴ Hronek v. P., 134 Ill. 144, 24 N. E. 861; Plummer v. P., 74 Ill. 361; Fuller v. P., 92 Ill. 182; Magner v. P., 97 Ill. 320; Cole v. Hall, 103 Ill.

30; Prescott v. Chicago, 60 Ill. 121; Hawthorn v. P., 109 Ill. 302; P. v. Wright, 70 Ill. 389. See also P. v. Loewenthal, 93 Ill. 205; Johnson v. P., 83 Ill. 436; Sykes v. P., 127 Ill. 126, 19 N. E. 705.

⁵ Hronek v. P., 134 Ill. 144, 24 N. E. 861.

⁶ Cohn v. P., 149 Ill. 486, 37 N. E. 60; Larned v. Tiernan, 110 Ill. 177; Blake v. P., 109 Ill. 504; Gunter v. Dale Co., 44 Ala. 639; Thomasson v. S., 15 Ind. 449; S. v. Squires, 26 Iowa 345; P. v. Briggs, 50 N. Y. 553; Fuller v. P., 92 Ill. 185. See also S. v. Cantieny, 34 Minn. 1, 24 N. W. 458, 6 Am. C. R. 424.

ARTICLE IV. POLICE POWER, SCOPE.

§ 2500. Forming classes for police regulation.—The legislature has power to form classes for the purpose of police regulation in the enactment of statutes regulating certain kinds of business, providing it does not arbitrarily discriminate between persons in substantially the same situation. The discrimination in such classification must rest upon reasonable grounds of difference.⁷

§ 2501. Police power defined.—The police power is that inherent and plenary power which enables the state to restrain or prohibit all things hurtful to the comfort, safety and welfare of society.⁸ "A police regulation has reference to the health, comfort, safety and welfare of society," which can not include a barber shop kept open on Sunday or any other harmless business.⁹

§ 2502. Statutes against speculating on markets.—Gambling on the market prices of grain and other commodities is universally recognized as a pernicious evil, and a statute which declares grain option contracts to be gambling is valid police regulation, and is not in violation of the constitutional provision against depriving a person of liberty or property without due process of law.¹⁰

§ 2503. Flag law unconstitutional.—The legislature, under the guise of police regulations, can not, by statutory enactment, prohibit the use of the national flag for commercial purposes or as an advertising medium. Such legislation is unconstitutional and invades the personal rights and personal liberty of the individual citizen.¹¹

ARTICLE V. CLASS LEGISLATION.

§ 2504. Class legislation invalid.—A statute forbidding any person, company or corporation engaged in manufacturing or mining

⁷ Lasher v. P., 183 Ill. 231, 55 N. E. 663.

⁸ Meadowcroft v. P., 163 Ill. 65, 45 N. E. 303; Dunne v. P., 94 Ill. 120; Harmon v. City of Chicago, 110 Ill. 400; Cooley Const. Lim. (6th ed.) 704; Powell v. Com., 114 Pa. St. 265, 7 Am. C. R. 37, 7 Atl. 913; Com. v. Bearse, 132 Mass. 542; Jacob's Case, 98 N. Y. 98.

⁹ Eden v. P., 161 Ill. 306, 43 N. E. 1108; Austin v. Murray, 16 Pick. (Mass.) 121; Jacobs' Case, 98 N. Y.

98; Frorer v. P., 141 Ill. 186, 31 N. E. 395; Millett v. P., 117 Ill. 303, 7 N. E. 631; Watertown v. Mayo, 109 Mass. 315; P. v. Marx, 99 N. Y. 377, 2 N. E. 29; S. v. Granneman, 132 Mo. 326, 33 S. W. 784; Ex parte Jentzsch, 112 Cal. 468, 44 Pac. 803. *Contra*, P. v. Havnor, 149 N. Y. 195, 43 N. E. 541. ¹⁰ Booth v. P., 186 Ill. 43, 57 N. E. 798.

¹¹ Ruhstrat v. P., 185 Ill. 133, 57 N. E. 41.

business from engaging or being interested in, directly or indirectly, the keeping of any truck store for supplying its or their employes with clothing, tools, groceries or provisions while so engaged in mining or manufacturing, is unconstitutional and void.¹² The legislature has no power to deny to persons in one kind of business the privilege to contract for labor and sell their products without regard to weight, while at the same time allowing other persons this privilege in all other kinds of business.¹³

§ 2505. Class legislation, when not.—Commission merchants dealing in the small products of the farm are of a different class from those who transact business in the great markets for the sale of grain, live stock and dressed meats. The state laws for the inspection of grain provide for the protection of shippers in that market, and there is also state inspection of live stock and dressed meats. The law, which classifies small commission merchants engaged in the produce commission business, rests upon a reasonable ground as a basis for the classification.¹⁴

ARTICLE VI. TRIAL BY JURY.

§ 2506. Trial by jury.—Section 5 of Article 2 of the constitution of Illinois, of 1870, provides as follows: "The right of trial by jury as heretofore enjoyed shall remain inviolate." This provision means the right of trial by jury as it existed at common law, and does not include any statutory rights existing prior to the adoption of the constitution.¹⁵

§ 2507. Jury trial—Violation of ordinances.—The constitutional provision declaring that "in all prosecutions the accused shall be allowed to have a speedy public trial by an impartial jury" is not intended to include prosecutions for violations of city ordinances, but

¹² *Frorer v. P.*, 141 Ill. 174, 31 N. E. 395; *Ramsey v. P.*, 142 Ill. 383, 32 N. E. 364.

¹³ *Millett v. P.*, 117 Ill. 304, 7 N. E. 631; *Bailey v. P.*, 190 Ill. 31; *Eden v. P.*, 161 Ill. 300, 43 N. E. 1108; *Harding v. P.*, 160 Ill. 464, 43 N. E. 624. See *Whitebreast Fuel Co. v. P.*, 175 Ill. 51, 51 N. E. 853; *S. v. Loomis*, 115 Mo. 307, 22 S. W. 350; *Godcharles v. Wigeman*, 113 Pa. St. 431, 6 Atl. 354; *S. v. Goodwill*, 33

W. Va. 179, 10 S. E. 285; *Lippman v. P.*, 175 Ill. 104, 51 N. E. 872; *Johnson v. St. Paul, etc., R. Co.*, 43 Minn. 223, 45 N. W. 156; *Ramsey v. P.*, 142 Ill. 380, 32 N. E. 364.

¹⁴ *Lasher v. P.*, 183 Ill. 232, 55 N. E. 663.

¹⁵ *George v. P.*, 167 Ill. 417, 47 N. E. 741; *East Kingston v. Towle*, 48 N. H. 57; *S. v. Griffin*, 66 N. H. 326, 29 Atl. 414, 10 Am. C. R. 399.

is intended to include only prosecutions for violations of the laws of the state.¹⁶

§ 2508. Trial without jury.—The constitution of Mississippi declares that: "The legislature, in cases of petit larceny, assault, assault and battery, affray, riot, unlawful assembly, drunkenness, vagrancy and other misdemeanors of like character, may dispense with an inquest of a grand jury and may authorize prosecutions before justices of the peace." A statute authorizing prosecutions before justices of the peace, for violations of a law prohibiting the sale of intoxicating liquors, is valid under the above constitutional provision, even where it provides for trial without a jury.¹⁷

ARTICLE VII. CERTAIN PROPERTY RIGHTS.

§ 2509. Statutes on labor unions.—A statute which makes it a criminal offense for an employer to discharge his employes because they belong to labor unions is unconstitutional, as depriving a person of his constitutional rights.¹⁸

§ 2510. Property rights, in general.—To limit the use and enjoyment of property by legislative action is not taking it away from the owner or depriving him of the use of it without due process of law, within the meaning of the constitution providing that "no person shall be deprived of life, liberty or property without due process of law," when the property, whose use and enjoyment are so limited, is invested in a business affected with a public use, or is used as an accessory to carry on such business.¹⁹ It is a well-settled rule of the law that all property of the citizen is held subject to such police and other regulations as the legislature may provide for the protection of the health and safety of the people, and that no right of property can intervene to arrest the enforcement of penalties for the violation of the criminal statutes of the state.²⁰

¹⁶ *S. v. City of Topeka*, 36 Kan. 76, 12 Pac. 310, 7 Am. C. R. 490; *Dyers v. Com.*, 42 Pa. St. 89; *In re Rolfs*, 30 Kan. 758, 4 Am. C. R. 451, 1 Pac. 523.

¹⁷ *Ex parte Wooten*, 62 Miss. 174, 5 Am. C. R. 181.

¹⁸ *Gillespie v. P.*, 188 Ill. 176, 58

N. E. 1007; *S. v. Julow*, 129 Mo. 163, 31 S. W. 781.

¹⁹ *Burdick v. P.*, 149 Ill. 606, 36 N. E. 948; *Com. v. Wilson*, 14 Phila. (Pa.) 384.

²⁰ *Martin v. Blattner*, 68 Iowa 286, 6 Am. C. R. 150, 25 N. W. 131, 27 N. W. 244.

§ 2511. **Property rights—Destruction of certain animals.**—The natural, essential and inherent right of protecting property, declared in the bill of rights, is the right to do whatever, under the circumstances of each case, is apparently reasonably necessary to be done in defense of property; and a statute forbidding the destruction of certain fur-bearing animals during a certain period of the year is not applicable to cases in which such destruction is an exercise of the constitutional right of protecting property.²¹

ARTICLE VIII. CERTAIN BUSINESS REGULATED.

§ 2512. **Banking is affected with public interest.**—The business of a banker is not *juris private*, but, like that of an inn-keeper or common carrier, is affected with a public interest, and, therefore, subject to public regulation by legislation.²²

§ 2513. **Restricting sale of tickets.**—The statute of Illinois restricting the sale of railroad tickets to agents to whom authority has been given by the railroad is not violative of the constitution of Illinois, nor of the constitution of the United States.²³

§ 2514. **Restricting commerce—Killing game.**—A statute prohibiting persons from killing, selling or having possession for sale, certain kinds of game during a certain period of each year, includes any such game shipped into the state from other states for sale; and such statute is not in conflict with the constitution of the United States, which confers upon congress power to regulate commerce among the states.²⁴

§ 2515. **Seizing and destroying goods.**—Under the various acts of congress, goods and things are seized, condemned and destroyed without service of process on the owner other than seizure of the goods and arrest of the person in whose possession they are found. Such proceedings are regarded as valid and constitutional.²⁵

²¹ Aldrich v. Wright, 53 N. H. 398; 2 Green C. R. 307.

²² Meadowcroft v. P., 163 Ill. 64, 45 N. E. 303 (citing Nance v. Hemphill, 1 Ala. 551; Curtis v. Leavitt, 15 N. Y. 52; Bank of Augusta v. Earle, 13 Pet. (U. S.) 519); Robertson v. P., 20 Colo. 279, 38 Pac. 326, 9 Am. C. R. 287.

²³ Burdick v. P., 149 Ill. 603, 36 N. E. 948, 24 L. R. A. 152; S. v. Corbett,

57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; Jamison v. S. (Tex. Cr.), 51 S. W. 1156; Com. v. Keary (Pa.), 48 Atl. 472; P. v. Warden of City Prison, 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264.

²⁴ Magner v. P., 97 Ill. 333.

²⁵ Glennon v. Britton, 155 Ill. 245, 40 N. E. 594; Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524.

§ 2516. **Destruction of dogs—Taxing dogs.**—Statutes of the states and city ordinances providing for the summary destruction of dogs found running at large in violation of the ordinances are valid, and not unconstitutional.²⁶ The registration fee required to be paid upon the registration of each dog is a tax, but clearly not that kind of tax contemplated by the constitutional provision calling for “a uniform and equal rate of assessment and taxation.” It is a tax levied for the purpose of regulation and restriction, and is not levied merely for the purpose of raising revenue, as the provision of the constitution contemplates. It is not unconstitutional.²⁷

ARTICLE IX. DUE PROCESS OF LAW.

§ 2517. **Due process of law defined.**—“Due process of law” mentioned in the constitution means “law of the land,” as used in *Magna Charta*, and means in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.²⁸

§ 2518. **Right to public trial.**—Where one was on trial for murder, for the court to order the officer to exclude all persons from the court room except “respectable” persons, is error and violative of the defendant’s constitutional right to a public trial.²⁹

ARTICLE X. NATURE OF PUNISHMENT.

§ 2519. **Maximum term of imprisonment.**—The legislature has constitutional authority to fix the maximum term of imprisonment as the

²⁶ *S. v. City of Topeka*, 36 Kan. 76, 12 Pac. 310; *Woolf v. Chalker*, 31 Conn. 121; *Blair v. Forehand*, 100 Mass. 136; *Lowell v. Gathright*, 97 Ind. 313; *Morey v. Brown*, 42 N. H. 373; *Marshall v. Blackshire*, 44 Iowa 475; *Cole v. Hall*, 103 Ill. 30. See also *City of Faribault v. Wilson*, 34 Minn. 254, 6 Am. C. R. 546, 25 N. W. 449; 1 McClain Cr. L., § 539.

²⁷ *S. v. City of Topeka*, 36 Kan. 76, 12 Pac. 310, 7 Am. C. R. 485; *Cole v. Hall*, 103 Ill. 30; *Holst v. Roe*, 39 Ohio St. 340; *Kalthoff v. Hendrie*, 48 Mich. 306, 12 N. W. 191; *Tenney v. Lenz*, 16 Wis. 589; *Mowery v. Salisbury*, 82 N. C. 175; *Mitchell v. Williams*, 27 Ind. 62.

²⁸ *Burdick v. P.*, 149 Ill. 600, 36 N. E. 948; *Cooley Const. Lim.* (5th ed.) 356; *Davidson v. New Orleans*, 96 U. S. 97; *Rhinehart v. Schuyler*, 2 Gilm. (Ill.) 473; *Millett v. P.*, 117 Ill. 301, 7 N. E. 631; *Eden v. P.*, 161 Ill. 303, 43 N. E. 1108; *Harding v. P.*, 160 Ill. 464, 43 N. E. 624; *Janes v. Reynolds*, 2 Tex. 251; *Wynehamer v. P.*, 13 N. Y. 432; *In re Buchanan*, 146 N. Y. 264, 40 N. E. 883, 9 Am. C. R. 499; *Ex parte Virginia*, 100 U. S. 346; *Munn v. Illinois*, 94 U. S. 115.

²⁹ *P. v. Murry*, 89 Mich. 276, 9 Am. C. R. 720, 50 N. W. 995.

punishment for violation of the criminal code by offenders under the age of twenty-one years; such punishment is not disproportionate to the offense, nor cruel or unusual.³⁰

§ 2520. Punishment fixed by law—Not jury.—A prisoner on trial for burglary and larceny, or for any other violation of the criminal law, has not the constitutional right to have the quantity of his punishment fixed by a jury.³¹

§ 2521. Death penalty—By electricity.—A statute providing that a person who is sentenced to death as the penalty for the commission of crime shall be kept in solitary confinement until executed, is not in conflict with the constitution of the United States; nor is the law which provides for execution by electricity unconstitutional.³²

ARTICLE XI. PROSECUTIONS IN PEOPLE'S NAME.

§ 2522. Prosecutions in name of people.—The constitutional provision of Illinois, that "all prosecutions shall be carried on in the name and by the authority of the people of the State of Illinois, and conclude against the peace and dignity of the same," has no application to summary proceedings, either under statute or at common law, such as striking an attorney from the roll or suspending him from practice.³³

ARTICLE XII. DEFENDANT'S RIGHTS.

§ 2523. Compelling defendant to testify.—The constitution of Illinois provides that "no person shall be compelled in any criminal case to give evidence against himself." To compel a defendant to appear before the grand jury and give evidence against himself is a violation of this provision.³⁴

ARTICLE XIII. RESTRICTIONS ON COMMERCE.

§ 2524. Corporations are "persons."—Any laws the sovereign power may find it necessary or salutary to enact; regulating, controlling, re-

³⁰ P. v. Illinois State Reformatory, 148 Ill. 421, 36 N. E. 76; George v. P., 167 Ill. 417, 47 N. E. 741; S. v. Peters, 43 Ohio St. 629, 4 N. E. 81.

³¹ P. v. Illinois State Reformatory, 148 Ill. 422, 36 N. E. 76; George v. P., 167 Ill. 417, 47 N. E. 741.

³² McElvaine v. Brush, 142 U. S.

155, 12 S. Ct. 156; Wilkerson v. Utah, 99 U. S. 130.

³³ Moutray v. P., 162 Ill. 197, 44 N. E. 496.

³⁴ Boone v. P., 148 Ill. 449, 36 N. E. 99; Blackwell v. S., 67 Ga. 76, 4 Am. C. R. 184; Minters v. P., 139 Ill. 365, 29 N. E. 45.

stricting or prohibiting the sale of a particular kind of property for the general benefit, as a police regulation, apply as well to the property of corporations as to individuals. They are presumed to be passed for the common good, and to be necessary for the protection of the public, and can not be said to impair any right, or to do any injury in the proper and legal sense of these terms.³⁵

§ 2525. Restricting commerce—Peddlers.—A statute which provides that "whoever shall deal in selling of goods, wares or merchandise, other than the growth, product or manufacture, by going from place to place, either by land or by water, to sell the same, is declared to be a peddler," and should obtain a license to so peddle. This statute is held to be in conflict with the commerce clause of the constitution of the United States, and, therefore, null and void.³⁶

ARTICLE XIV. IMPRISONMENT FOR DEBT.

§ 2526. Imprisonment for debt.—A statute providing that the defendant, on failure to pay fine and costs, may be committed to jail by order of the court, there to remain until the fine and costs are fully paid, or he is discharged according to law, is not unconstitutional. Such costs are not a debt within the meaning of the constitution referring to imprisonment.³⁷ The constitutional provision that "no person shall be imprisoned for debt unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in case where there is strong presumption of fraud," does not extend to actions for torts nor to fines and penalties arising from a violation of the penal statutes of the state. It has reference to debts arising *ex contractu*.³⁸

ARTICLE XV. ARREST WITHOUT WARRANT.

§ 2527. Arrests without warrant.—Arrests for misdemeanors without a warrant, committed in the presence of the officer making the arrest, are not violative of the constitution.³⁹

³⁵ Com. v. Intox. Liq., 115 Mass. 153, 2 Green C. R. 291; Coats v. N. Y., 7 Cowen 585, 604; Thorpe v. Railroad, 27 Vt. 140; Brick Pr. Church v. Mayor, etc., of N. Y., 5 Cowen 538; P. v. Hawley, 3 Mich. 330. See § 2540.

³⁶ S. v. McGinnis, 37 Ark. 362, 4 Am. C. R. 350; Welton v. S., 1 Otto (U. S.) 275.

³⁷ Kennedy v. P., 122 Ill. 652, 13 N. E. 213.

³⁸ Kennedy v. P., 122 Ill. 652, 13 N. E. 213; Rich v. P., 66 Ill. 515; P. v. Cotton, 14 Ill. 414; McKindley v. Rising, 28 Ill. 343.

³⁹ North v. P., 139 Ill. 105, 28 N. E. 966. See "Arrests."

ARTICLE XVI. PLACE OF TRIAL.

§ 2528. **Place of trial.**—A statute providing that “Where an offense shall be committed on a county line, or within one hundred rods of the same, it may be so alleged, and the trial may be in either county divided by such line,” is unconstitutional.⁴⁰

ARTICLE XVII. CIVIL RIGHTS.

§ 2529. **Violating civil rights.**—A statute of a state which provides that only white male persons of the state shall be liable to serve as jurors is violative of the rights of the colored race and discriminates against them.⁴¹ The federal statute relating to the civil rights of the colored race is unconstitutional; such rights are matters for the states.⁴²

ARTICLE XVIII. FEDERAL CONSTITUTION.

§ 2530. **Application of federal constitution.**—The federal and state courts, without diversity of opinion, have long held that the provisions of the federal constitution do not apply to the states, unless the states are referred to by clear implication, or express words. The law upon this point has long been settled.⁴³

§ 2531. **Application of fourteenth amendment.**—The fourteenth amendment to the constitution of the United States prohibits the states from depriving any person of life, liberty or property, without due process of law, but it does not prohibit the states from proceeding in felony cases by information when that procedure is authorized by the state constitution.⁴⁴

⁴⁰ *Buckrice v. P.*, 110 Ill. 32; *S. v. Lowe*, 21 W. Va. 783, 45 Am. R. 570.

⁴¹ *Virginia v. Rives*, 100 U. S. 313, 3 Am. C. R. 532; *Strauder v. West Virginia*, 100 U. S. 303.

⁴² *Civil Rights Cases*, 109 U. S. 3, 3 S. Ct. 18.

⁴³ *S. v. Boswell*, 104 Ind. 541, 4 N. E. 675, 5 Am. C. R. 167; *Barron v. Mayor*, 7 Pet. (U. S.) 243; *Andrews v. S.*, 3 Heisk. (Tenn.) 165, 1 Green C. R. 469; *Fox v. Ohio*, 5 How.

(U. S.) 410; *Kring v. Missouri*, 107 U. S. 221, 2 S. Ct. 443; *Twitchell v. Com.*, 7 Wall. (U. S.) 321; *Pearson v. Yewdall*, 95 U. S. 294; *Cooley Const. Lim.* (5th ed.), 19; *P. v. Illinois State Reformatory*, 148 Ill. 425, 36 N. E. 76.

⁴⁴ *S. v. Boswell*, 104 Ind. 541, 4 N. E. 675, 5 Am. C. R. 168; *S. v. Barnett*, 3 Kan. 250; *Hurtado v. California*, 110 U. S. 516, 4 S. Ct. 111, 292; *Rowan v. S.*, 30 Wis. 129.

CHAPTER LXIX.

CONSTRUCTION.

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ARTICLE I. CONSTRUCTION IS LEGAL QUESTION.

§ 2532. **Construction is question of law.**—The general rule of law is that the construction of every written instrument is matter of law, and, as a necessary consequence, that courts must, in the first instance, judge of the legal force and effect of the language. The meaning of words, and the grammatical construction of the English language, so far as they are established by the rules and usages of language, are *prima facie* matters of law to be construed and passed upon by the court.¹

ARTICLE II. INTENT MUST GOVERN.

§ 2533. **Intent must govern.**—In construing the law, the intent of the law-making power must govern, even to changing the language of the statute.² In the construction of a statute the courts are not con-

¹ Brown v. Brown, 8 Metc. (Mass.) 573; S. v. Baldwin, 36 Kan. 1, 7 Am. C. R. 395, 12 Pac. 318; 1 Greenl. Ev., § 5; Rogers Exp. Test., § 121; Rodgers v. Kline, 56 Miss. 818; Haley v. S., 63 Ala. 89.
² P. v. Gaulter, 149 Ill. 39, 36 N. E. 576; Cain v. S., 20 Tex. 355; Ex

fined to the literal meaning of the words of the statute, but the intention may be collected from the necessity or objects of the act, and the words may be enlarged or restricted according to its true intent.³

ARTICLE III. RULES FOR CONSTRUING.

§ 2534. **Rule for construing—Title of act.**—In construing a statute to arrive at the legislative intention, the court will look at the whole act and may also consider other and prior acts relating to the same general subject, as well as the mischief and the remedy.⁴ Resort may be had to the title of an act to enable the court to discover the intent, and remove what otherwise might be uncertain or ambiguous, in construing statutes.⁵

§ 2535. **General words restricted—Proviso.**—"If general words follow an enumeration of particular cases, such general words are held to apply only to cases of the same class or kind as those which are expressly mentioned."⁶ A proviso in a statute is intended to qualify what is affirmed in the body of the act, section or paragraph preceding it.⁷

§ 2536. **Strained construction not permitted.**—If a case is fully within the mischief to be remedied, and is even of the same class, and within the same reason as other cases enumerated, still, if not within the words, construction will not be permitted to bring it within the statute.⁸

parte Evers, 29 Tex. App. 539, 16 S. W. 343.

³Cruse v. Aden, 127 Ill. 239, 20 N. E. 73; Smith v. S., 28 Ind. 321; S. v. Robinson, 33 Me. 564; Bradley v. P., 8 Colo. 599, 9 Pac. 783; Pierce v. S., 13 N. H. 536.

⁴Soby v. P., 134 Ill. 71, 25 N. E. 109; Bobel v. P., 173 Ill. 23, 50 N. E. 322; Townsend v. S., 92 Ga. 732, 19 S. E. 55, 9 Am. C. R. 300; Stribling v. Prettyman, 57 Ill. 371; Wright v. P., 101 Ill. 131; Cruse v. Aden, 127 Ill. 237, 20 N. E. 73; Zarresseller v. P., 17 Ill. 102; S. v. Smith, 13 Kan. 274; Farrell v. S., 54 N. J. L. 421, 24 Atl. 725; S. v. Robinson, 33 Me. 564; Smith v. P., 47 N. Y. 303.

⁵Cohn v. P., 149 Ill. 486, 37 N. E. 60; U. S. v. Palmer, 3 Wheat. (U. S.) 631; Williams v. Williams, 8 N. Y. 535; Myer v. Car Co., 102 U. S.

1; P. v. Gaultier, 149 Ill. 49, 36 N. E. 576; Perry County v. Jefferson Co., 94 Ill. 214.

⁶Shirk v. P., 121 Ill. 65, 11 N. E. 888; In re Swigert, 119 Ill. 88, 6 N. E. 469; Canadian Bank v. McCrea, 106 Ill. 289; Swigart v. P., 154 Ill. 289, 40 N. E. 432; U. S. v. Chase, 135 U. S. 255, 10 S. Ct. 756, 8 Am. C. R. 654; S. v. Black, 75 Wis. 491, 44 N. W. 635; S. v. Bryant, 90 Mo. 535, 2 S. W. 836; Lippman v. P., 175 Ill. 104, 51 N. E. 872.

⁷Sutton v. P., 145 Ill. 285, 34 N. E. 420; Huddleston v. Francis, 124 Ill. 195, 16 N. E. 243; City of Chicago v. Phoenix Ins. Co., 126 Ill. 280, 18 N. E. 668.

⁸Bish. Stat. Cr., § 220; S. v. Graham, 38 Ark. 519, 4 Am. C. R. 277; 2 Hawk. P. C. 188.

§ 2537. Statute construed—Rule applied.—A statute is as follows: "That if any person shall receive or buy any goods or chattels, that shall have been stolen or taken by robbers, with intent to defraud the owners, or shall harbor or conceal any thief or robber, knowing him or her to be such, he shall be guilty of a misdemeanor." The first clause of this statute was construed to include thieves as well as robbers—to meet the legislative intent.⁹

ARTICLE IV. IMPLIED AUTHORITY.

§ 2538. Implied authority to assess fine.—When the legislature excludes the power of the court to impose a fine of less than one hundred dollars, it, by implication, authorizes the exercise of power to impose a fine of more than that sum.¹⁰

§ 2539. "May" and "shall" construed.—The word "may," means "shall," whenever the rights of the public or of third persons depend upon the exercise of the power, or the performance of the duty to which it refers.¹¹

ARTICLE V. PERSONS INCLUDED.

§ 2540. Person includes corporation.—The word "person," will include the names of corporations, the state or United States, when reference is made in a statute to the person or persons injured or defrauded.¹²

§ 2541. "County clerk"—"Clerk of county court."—By statute the county clerk is made the clerk of the county court. The words, "county clerk," shall be held to include "clerk of the county court," and the words, "clerk of the county court," to include county clerk.¹³

ARTICLE VI. STATUTES WITH TWO MEANINGS.

§ 2542. Statute with two meanings.—If a statute admits equally of two constructions, that which is more favorable to the defendant is to be preferred; and when the statute is silent as to the place of imprisonment, there being a county jail for persons convicted of mis-

⁹ Schriedley v. S., 23 Ohio St. 130, 2 Green C. R. 531.

¹⁰ Hawkins v. P., 106 Ill. 633; Drake v. S., 5 Tex. App. 649.

¹¹ James v. Dexter, 112 Ill. 491.

¹² S. v. Herold, 9 Kan. 194; U. S. v.

Amedy, 11 Wheat. (U. S.) 392; Ochs v. P., 124 Ill. 399, 413, 16 N. E. 662. See § 2524.

¹³ Tucker v. P., 122 Ill. 591, 13 N. E. 809.

demeanors and a penitentiary for those convicted of higher crimes, the former, rendering the punishment less severe, must be selected.¹⁴

ARTICLE VII. STATUTES OF OTHER STATES.

§ 2543. **Adopting statute of other states.**—It is a rule that when the legislature adopts substantially the statute of another state, it is presumed also to adopt the construction previously given by the courts of that state, unless such construction is inconsistent with the spirit and policy of the law.¹⁵

ARTICLE VIII. REPEAL OF COMMON LAW.

§ 2544. **Statute, when repeals common law.**—A statute revising an entire subject-matter repeals the common law as to that matter, but a statute only repeals the common law as to a particular crime when it covers the whole ground. If both the statute and the common law can consistently take effect together, they are to be construed as concurrent, and the statute is cumulative.¹⁶

ARTICLE IX. EQUITABLE CONSTRUCTION.

§ 2545. **Statute shall be construed equitably.**—A strict construction is not violated by giving the words of the statute a reasonable meaning, according to the sense in which they were intended; a statute for the good of the public, though penal, ought to receive an equitable construction.¹⁷

ARTICLE X. LAW OF PROCEDURE.

§ 2546. **Law of procedure—Strict construction.**—The rule of strict construction relating to penal statutes has no application, as a rule, to statutes of procedure.¹⁸

¹⁴ *Brooks v. P.*, 14 Colo. 413, 24 Pac. 553; *St. Louis v. Goebel*, 32 Mo. 295; *Homer v. S.*, 1 Or. 267; *S. v. Crowley*, 60 Me. 103; *Kent v. S.*, 8 Blackf. (Ind.) 163; *U. S. v. Garretson*, 42 Fed. 22.

¹⁵ *Streeter v. P.*, 69 Ill. 598, citing *Rigg v. Wilton*, 13 Ill. 15; *Campbell v. Quinlan*, 3 Scam. (Ill.) 288.

¹⁶ *Com. v. Cooley*, 10 Pick. (Mass.) 37; *S. v. Wilson*, 43 N. H. 415; *Jen-*

nings v. Com., 17 Pick. (Mass.) 80; *Com. v. King*, 13 Metc. (Mass.) 115; *S. v. Norton*, 23 N. J. L. 33; *Wood v. Com.*, 12 S. & R. (Pa.) 213; *Beard v. S.*, 74 Md. 130, 21 Atl. 700.

¹⁷ *Meadowcroft v. P.*, 163 Ill. 71, 45 N. E. 303; *Bish. Stat. Cr.*, § 200. See *Harding v. P.*, 10 Colo. 387, 15 Pac. 727.

¹⁸ *S. v. Chadbourne*, 74 Me. 506.

CHAPTER LXX.

STATUTES.

ART.	I. Repeal Generally,	§§ 2547-2551
	II. New Statute Repeals Old,	§ 2552
	III. Indeterminate Sentence Statute,	§ 2553
	IV. Statute, on Second Offense,	§ 2554
	V. Validity of Certain Statutes,	§§ 2555-2556
	VI. Proving Validity of Statute,	§ 2557

ARTICLE I. REPEAL GENERALLY.

§ 2547. **Repeal by implication not favored.**—Repeal of statutes by implication is not favored; such repeal will be recognized only where the two statutes are repugnant.¹⁹

§ 2548. **General law not repealed.**—The legislature, by conferring upon an incorporated city or town the power to sell, regulate or prohibit the sale of intoxicating liquors, does not by implication repeal the general law on the same subject.²⁰

§ 2549. **Repeal by amendatory act.**—Where an amendatory act declares that a certain section of the amended act “shall be so amended that it shall read as follows,” and then proceeds to make a distinct provision on the subject, it will operate to repeal the section of the amended act named, substituting therefor the amendatory section.²¹

¹⁹ *Swigart v. P.*, 154 Ill. 296, 40 N. E. 432; *P. v. Gustin*, 57 Mich. 407, 6 Am. C. R. 291, 24 N. W. 156; *Cooley Const. Lim.* 182; *S. v. Trolson*, 21 Nev. 419, 32 Pac. 930, 9 Am. C. R. 251; *Ryan v. Com.*, 80 Va. 385, 6 Am. C. R. 348; *Sifred v. Com.*, 104 Pa. St. 179, 4 Am. C. R. 305; *Com. v. Duff*, 87 Ky. 586, 10 Ky. L. 617, 9 S. W. 816.

²⁰ *Gardner v. P.*, 20 Ill. 434; *Sloan v. S.*, 8 Blackf. (Ind.) 361; *Baldwin v. Green*, 10 Mo. 410.

²¹ *Goodall v. P.*, 123 Ill. 389, 15 N. E. 171; *P. v. Young*, 38 Ill. 490; *Kepley v. P.* 123 Ill. 378, 13 N. E. 512; *P. v. Supervisor*, 67 N. Y. 109; *Blakemore v. Dolan*, 50 Ind. 194; *Goodno v. City of Oshkosh*, 31 Wis. 127.

§ 2550. **Repeal in part—New penalty.**—A statute imposing a new penalty for an offense is an implied repeal of so much of a prior statute as imposed a different penalty for the same offense.²²

§ 2551. **Repeal when repugnant.**—One statute will not repeal a former unless there is such a repugnancy between the provisions of the two statutes that they can not stand together.²³

ARTICLE II. NEW STATUTE REPEALS OLD.

§ 2552. **New statute repeals old.**—A new statute, designed to cover the whole subject-matter of a former statute, will operate as a repeal of the former, without a repealing clause or section in the new statute.²⁴

ARTICLE III. INDETERMINATE SENTENCE STATUTE.

§ 2553. **Indeterminate sentence law, valid.**—The indeterminate sentence act of Illinois, empowering penitentiary commissioners to provide for the temporary release of prisoners on parol, is valid.²⁵

ARTICLE IV. STATUTE, ON SECOND OFFENSE.

§ 2554. **Statute as to second offense.**—A statute providing that any person convicted a second time of the crime of petit larceny shall be deemed guilty of a felony and punished by imprisonment in the state prison, will be construed to include a first conviction of petit larceny had prior to the enactment of such statute, and can not be said to be *ex post facto* in its operation.²⁶

²² *Sullivan v. P.*, 15 Ill. 234; *Nichols v. Squire*, 5 Pick. (Mass.) 168; *Com. v. Kimball*, 21 Pick. (Mass.) 373; *Rex v. Caton*, 4 Burr. 2026; *Leighton v. Walker*, 9 N. H. 59; *P. v. Tisdale*, 57 Cal. 104. See *S. v. Wish*, 15 Neb. 448, 19 N. W. 686.

²³ *Barr v. P.*, 103 Ill. 112; *Kepley v. P.*, 123 Ill. 367, 13 N. E. 512; *S. v. Archibald*, 43 Minn. 328, 45 N. W. 606. See *P. v. Platt*, 67 Cal. 21, 7 Am. C. R. 501, 7 Pac. 1; *Sykes v. P.*, 127 Ill. 129, 19 N. E. 705; *Ryan v. Com.*, 80 Va. 385, 6 Am. C. R. 346; *Bish. Stat. Cr.*, § 155; 1 McClain Cr. L., § 91; *Dingman v. P.*, 51 Ill. 279; *Mullen v. P.*, 31 Ill. 445; *Sullivan v. P.*, 15 Ill. 234; *Hayes v. S.*, 55 Ind.

99; *Com. v. Kimball*, 21 Pick. (Mass.) 373.

²⁴ *Wagoner v. S.*, 90 Ind. 504; *Cullen v. S.*, 42 Conn. 55; *S. v. Rollins*, 77 Me. 120; *P. v. Bussell*, 59 Mich. 104, 26 N. W. 306; *S. v. Campbell*, 44 Wis. 529, 3 Am. C. R. 313. See *P. v. Jaehne*, 103 N. Y. 182, 8 N. E. 374; *Ochs v. P.*, 124 Ill. 399, 413, 16 N. E. 662; *Com. v. Ballou*, 124 Mass. 26; *Seifried v. Com.*, 101 Pa. St. 200; *P. v. Furman*, 85 Mich. 110, 48 N. W. 169.

²⁵ *George v. P.*, 167 Ill. 417, 47 N. E. 741. See *P. v. Illinois State Reformatory*, 148 Ill. 413, 36 N. E. 76.

²⁶ *Ex parte Gutierrez*, 45 Cal. 429, 2 Green C. R. 423; *P. v. Mortimer*,

ARTICLE V. VALIDITY OF CERTAIN STATUTES.

§ 2555. **Butter and cheese factory—Statute.**—"An act to require butter and cheese factories on the co-operation plan to give bonds, and to prescribe the penalties for the violation thereof," is not unconstitutional.²⁷

§ 2556. **Statute on trade-marks valid.**—An act to protect associations, unions of workingmen, and persons, in their labels, trade-marks and forms of advertising, is not special legislation, in violation of the constitution.²⁸

ARTICLE VII. PROVING VALIDITY OF STATUTE.

§ 2557. **Proving validity of statute.**—Resort may be had to the journals of the two houses to ascertain the steps that were taken by each of the bodies in the passage of the act, and thereby determine whether it was passed in conformity to the constitutional requirements.²⁹

46 Cal. 114, 2 Green C. R. 428; Ross' Case, 2 Pick. (Mass.) 165; Rand v. Com., 9 Gratt. (Va.) 738.

²⁷ Hawthorn v. P., 109 Ill. 312. On adulteration of dairy products, statute sustained: Powell v. Com., 114 Pa. St. 265, 7 Am. C. R. 32, 7 Atl. 913.

²⁸ Cohn v. P., 149 Ill. 486, 37 N. E. 60.

²⁹ Robertson v. P., 20 Colo. 279, 9 Am. C. R. 288, 38 Pac. 326. See P. v. DeWolf, 62 Ill. 253; P. v. Loewenthal, 93 Ill. 191.

CHAPTER LXXI.

JURISDICTION.

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	VI.	Wrong Action,	§ 2565
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	IX.	Sentence, When,	§§ 2569-2571
	X.	Jurisdiction Suspended,	§§ 2572-2574
	XI.	State or Federal Courts,	§§ 2575-2579
	XII.	What Court or County,	§§ 2580-2581
	XIII.	Facts Determining Jurisdiction,	§ 2582
	XIV.	Judgment Only Voidable,	§ 2583

ARTICLE I. JURISDICTION DEFINED.

§ 2558. **Jurisdiction defined.**—The power to hear and determine a cause is jurisdiction.¹

ARTICLE II. NOT CONFERRED BY CONSENT.

§ 2559. **Jurisdiction not conferred by consent.**—It is a maxim in the law that consent can never confer jurisdiction—that is, the consent of the parties can not empower a court to act upon subjects which are not submitted to its determination and judgment by the law.² It is the duty of the courts to see that the constitutional rights

¹Kelly v. P., 115 Ill. 589, 4 N. E. E. 563; Cooley Const. Lim., 398; Peak v. P., 71 Ill. 278; Foley v. P., 644.

²Harris v. P., 128 Ill. 591, 21 N. Breese (Ill.) 58; In re Webb, 89 Wis.

of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction.³

ARTICLE III. WAIVING JURY.

§ 2560. **Jury can not be waived.**—An indictment in a felony case can not be waived; nor can a jury be waived in a felony case even by express consent. These are jurisdictional questions.⁴

ARTICLE IV. JURISDICTION BY APPEAL.

§ 2561. **Appeal confers jurisdiction.**—The defendant, having been convicted in a justice court for violation of a village ordinance, took an appeal to the circuit court, as provided by statute. By filing his appeal bond he thereby entered his appearance in the circuit court and waived all defects in the process, as well as in the service of or want of service before the justice, even though he made his motion in the justice court to quash the process and for a dismissal of the suit.⁵

ARTICLE V. JURISDICTION BY FRAUD.

§ 2562. **If obtained by fraud—Void.**—Where jurisdiction is obtained by fraud it is not actual, but only apparent jurisdiction, and may be impeached.⁶

§ 2563. **Void affidavit, no jurisdiction.**—An affidavit which is so defective that it fails to charge the prisoner with a crime will not confer jurisdiction on a justice of the peace to issue a warrant.⁷

354, 62 N. W. 177, 9 Am. C. R. 704; S. v. Morgan, 62 Ind. 35, 3 Am. C. R. 153.

³ Ter. v. Ah Wah, 4 Mont. 149, 1 Pac. 732, 4 Am. C. R. 578; Williams v. S., 12 Ohio St. 622; Brown v. S., 16 Ind. 496; P. v. O'Neil, 48 Cal. 258; Bell v. S., 44 Ala. 393; Bowles v. S., 5 Sneed (Tenn.) 360; Carpenter v. S., 4 How. (Miss.) 163.

⁴ 4 Bl. Com. 349; Harris v. P., 128 Ill. 585, 21 N. E. 563; Morgan v. P., 136 Ill. 161, 26 N. E. 651; Ex parte Bain, 121 U. S. 1, 7 S. Ct. 781; Brown Jurisdiction, §§ 102, 103; Lemons v. S., 4 W. Va. 755, 1 Green C. R. 666, 6 Cr. L. Mag. 189. See §§ 2583, 2979.

⁵ Village of Coulterville v. Gillen, 72 Ill. 602.

⁶ Caswell v. Caswell, 120 Ill. 377, 384, 11 N. E. 342; Adams v. Adams, 51 N. H. 388; Edson v. Edson, 108 Mass. 590; Graves v. Graves, 36 Iowa 310.

⁷ Housh v. P., 75 Ill. 491; S. v. Leach, 7 Conn. 452. All that part of an affidavit which precedes the words, "who says," is mere recital and forms no part of that which is sworn to by the affiant: Maynard v. P., 135 Ill. 430, 25 N. E. 740; Miller v. Chicago, etc., R. Co., 58 Wis. 310, 17 N. W. 130; E. D. P. v. S., 18 Fla. 175.

§ 2564. **Justice proceeding, when no bar.**—The accused, without any complaint having been made against him, went before a justice of the peace and became his own prosecutor without any notice to the state or its representatives, for a misdemeanor (gaming), and confessed his guilt and submitted to a judgment of fine of one hundred dollars. Held that such proceeding was void and was no bar to an indictment for the same transaction.⁹

ARTICLE VI. WRONG ACTION.

§ 2565. **Wrong action, no jurisdiction.**—Where the statute provides for a penalty for a violation, to be recovered in an action of debt, one-half of the same for the use of the informer and the other half for the use of the county, it is a *qui tam* action, and should be brought in the name of the informer or county, and not in the name of the people.¹⁰ When the statute provides for the recovery of a penalty by action of debt in the name of the people, the court can not take jurisdiction by indictment.¹¹

ARTICLE VII. STATUTE INVALID.

§ 2566. **When statute invalid.**—The power to render judgment in a criminal case is limited to a constitutional trial. The supreme court of the United States says: "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional right than an unconstitutional conviction under a valid law."¹²

ARTICLE VIII. JURISDICTION LOST.

§ 2567. **When jurisdiction lost.**—An adjournment of a cause by a justice of the peace on the plaintiff's motion, unsupported by affidavit, without the consent of the defendant, where the statute requires a showing to be made under oath, loses the jurisdiction.¹³ Where the prosecution holds and continues a cause beyond the statutory limit

⁹ *Drake v. S.*, 68 Ala. 510, 4 Am. C. R. 321.

¹⁰ *Higby v. P.*, 4 Scam. (Ill.) 166; *Carle v. P.*, 12 Ill. 285; 2 Hawk. P. C. 370, § 20.

¹¹ *Carle v. P.*, 12 Ill. 285.

¹² *Brown Jurisdiction*, § 97, pp. 249-251. But see *P. v. Jonas*, 173 Ill. 316, 50 N. E. 1051.

¹³ *VanFleet Col. Attack*, § 675, citing *Grace v. Mitchell*, 31 Wis. 533.

against the objection of the defendant, the indictment becomes null and void, and the defendant is consequently entitled to be discharged.¹⁴

§ 2568. **Suspending sentence indefinitely.**—The indefinite suspension of sentence on a plea of guilty or conviction, without continuing the cause for further adjudication, loses the jurisdiction, and the court will not have the power to sentence the accused at a future term of the court.¹⁵ The power to suspend sentence at common law is asserted by writers of acknowledged authority and by numerous adjudged cases.¹⁶

ARTICLE IX. SENTENCE, WHEN.

§ 2569. **Sentence, at once—Same term.**—Upon a conviction or plea of guilty it is the duty of the court to sentence the accused and pronounce judgment *at that time*, unless, upon motion for a new trial, in arrest of judgment, or for other cause, the case is continued for further adjudication. The court can not suspend sentence indefinitely.¹⁷

§ 2570. **Sentence after term expires.**—The court has no power to sentence a prisoner after the term expires at which conviction was had, where no continuance was had for that purpose, the court having lost jurisdiction of the cause.¹⁸

§ 2571. **Term of court abolished.**—The August term having been abolished by statute, the court would not be authorized to try the accused at that time.¹⁹

ARTICLE X. JURISDICTION SUSPENDED.

§ 2572. **Writ of error suspends jurisdiction.**—The jurisdiction of the trial court over a cause is not taken away by the allowance of a writ of error, but its power to act in a cause is only stayed or sus-

¹⁴ Brooks v. P., 88 Ill. 328.

¹⁵ P. v. Allen, 155 Ill. 63, 39 N. E. 568; Weaver v. P., 33 Mich. 296; P. v. Morrisette, 20 How. Pr. (N. Y.) 118, 2 Am. C. R. 475.

¹⁶ P. v. Court of Sessions, 141 N. Y. 288, 36 N. E. 386, 9 Am. C. R. 441.

¹⁷ P. v. Allen, 155 Ill. 65, 39 N. E. 568. See also In re Webb, 89 Wis. 354, 62 N. W. 177, 9 Am. C. R. 703;

P. v. Morrisette, 20 How. Pr. (N. Y.) 118, 2 Am. C. R. 475; Weaver v. P., 33 Mich. 296, 1 Am. C. R. 552.

¹⁸ Com. v. Foster, 122 Mass. 317, 23 Am. R. 326; P. v. Allen, 155 Ill. 63, 39 N. E. 568; P. v. Whitson, 74 Ill. 20; Brown Jurisdiction, 273; Abbott Cr. Brief, § 155.

¹⁹ Goodall v. P., 123 Ill. 394, 15 N. E. 171.

pended during the pendency of the writ of error.²⁰ A statute fixing a limit of time or terms of court within which a prisoner shall be tried has no application, and is not in operation during the pendency of a writ of error in a court of review; and in case of reversal, such statute will not be in operation during any delay resulting from the pendency of the writ of error. The production of the mandate of the court reversing the cause is essential to authorize the trial court to proceed to a new trial.^{20a}

§ 2573. Two punishments, voidable only.—The judgment having been rendered by a court which had jurisdiction of the party and of the offense, on a valid verdict, the error of the court in imposing the two punishments mentioned in the statute, when it had only the alternative of one of them, did not make the judgment wholly void.²¹

§ 2574. Unlawful arrest.—The legality of the arrest of a fugitive from justice in a foreign country is not necessary to give the court jurisdiction; no matter by what means the fugitive may have been brought from such foreign country, whether lawful or unlawful, the court has jurisdiction.²²

ARTICLE XI. STATE OR FEDERAL COURTS.

§ 2575. State or federal court.—Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases.²³

§ 2576. Federal—not state court.—A state court has no jurisdiction to try an officer of a national bank for the embezzlement of the funds of such bank.²⁴ The state court has jurisdiction to try and

²⁰ *Perteet v. P.*, 70 Ill. 171; *Blackerby v. P.*, 5 Gilm. (Ill.) 267. See *Marzen v. P.*, 190 Ill. 86.

^{20a} *Marzen v. P.*, 190 Ill. 85, 86.

²¹ *Ex parte Lange*, 18 Wall. (U. S.) 163, 2 Green C. R. 111; *Miller v. Finkle*, 1 Park. Cr. (N. Y.) 374.

²² *Ker v. P.*, 110 Ill. 633; *Ker v. Illinois*, 119 U. S. 436, 7 S. Ct. 225; *S. v. Ross*, 21 Iowa 467; *Cook v. Hart*, 146 U. S. 183, 13 S. Ct. 40. See §§ 2657, 3419.

²³ *Taylor v. Taintor*, 16 Wall. (U. S.) 366, 2 Green C. R. 145; *Taylor v. Carryl*, 20 How. (U. S.) 584; *Hagan v. Lucas*, 10 Pet. (U. S.) 400; *Ex parte Baldwin*, 69 Iowa 502, 29 N. W. 428; *S. v. Williford*, 91 N. C. 529; *S. v. Chinault*, 55 Kan. 326, 40 Pac. 662.

²⁴ *Com. v. Ketner*, 92 Pa. St. 372, 37 Am. R. 692. Compare *Com. v. Tenney*, 97 Mass. 50. Compare also

punish one who forges a draft on a national bank of the United States, although such person may be a bookkeeper of the bank, and may be liable to punishment under the United States statute for the same act.²⁵ When property is stolen from a receiver appointed by the federal court, a state court has concurrent jurisdiction to try the offense.²⁶

§ 2577. State or federal court.—The rule is that so long as the federal government has not declared the act an offense against its laws, it is competent for the states to declare it an offense and punish therefor. But when, as to a matter within the competency of the United States, congress undertakes to legislate, and covers the whole subject, the jurisdiction of the state is or may thereafter be denied.²⁷

§ 2578. Two states involved—Goods stolen.—If the criminal act done in one state was intended to take effect in another, and did actually take effect in the latter, as intended, then the court in the latter state has jurisdiction of the offense.²⁸ If the fatal stroke or poison be given in one state, and death ensue in another state, the offender shall be tried by the court in the state where the stroke or poison was given.²⁹ If a person receives stolen property in the state of Kansas, knowingly, he may be tried in that state, although the property was originally stolen in another state.³⁰

§ 2579. State and federal courts concurrent.—The state courts, in the exercise of the general police power of the state, will have juris-

Hoke v. P., 122 Ill. 511, 13 N. E. 823; Com. v. Felton, 101 Mass. 204.

²⁵ Hoke v. P., 122 Ill. 517, 13 N. E. 823; Com. v. Luberg, 94 Pa. St. 85. See Com. v. Tenney, 97 Mass. 50. *Contra*, Com. v. Felton, 101 Mass. 204.

²⁶ S. v. Coss, 12 Wash. 673, 42 Pac. 127.

²⁷ S. v. Bardwell, 72 Miss. 535, 18 So. 377, 10 Am. C. R. 74; P. v. White, 34 Cal. 183; Fox v. Ohio, 5 How. (U. S.) 410; Moore v. Illinois, 14 How. (U. S.) 13.

²⁸ S. v. Morrow, 40 S. C. 221, 18 S. E. 853, 9 Am. C. R. 42; P. v. Rathbun, 21 Wend. (N. Y.) 534; Noyes v. S., 41 N. J. L. 418; 1 Bish. Cr. L., § 110; P. v. Staples, 91 Cal.

23, 27 Pac. 523. See Com. v. Parker, 165 Mass. 526, 43 N. E. 499; Queen v. Holmes, L. R. 12 Q. B. D. 23, 4 Am. C. R. 591; S. v. Chapin, 17 Ark. 565.

²⁹ Stout v. S., 76 Md. 317, 25 Atl. 299, 9 Am. C. R. 398; 1 Hale P. C. 426; S. v. Carter, 27 N. J. L. 499; 2 Hawk. P. C. 120, § 13; Kirkham v. P., 170 Ill. 12, 48 N. E. 465; S. v. Bowen, 16 Kan. 475; Ex parte McNeeley, 36 W. Va. 84, 14 S. E. 436; U. S. v. Guiteau, 1 Mackey 498, 47 Am. R. 247; S. v. Hall, 114 N. C. 909, 19 S. E. 602; Tyler v. P., 8 Mich. 320.

³⁰ S. v. Suppe, 60 Kan. 566, 57 Pac. 106.

diction of certain offenses, such as counterfeiting and the like, though punishable under and by the laws of the United States.³¹

ARTICLE XII. WHAT COURT OR COUNTY.

§ 2580. **Circuit or county court.**—The county court, in Illinois, in certain cases, can not have exclusive, but only concurrent, jurisdiction with the circuit courts.³²

§ 2581. **County of jurisdiction.**—A court of one county has no jurisdiction to indict and try persons for the violation of law in the state in another county, and such jurisdiction can not be conferred by statute.³³

ARTICLE XIII. FACTS DETERMINING JURISDICTION.

§ 2582. **Facts presumed if record silent—Fact may be shown.**—If the record is silent as to the jurisdictional facts, they will be presumed to have been duly established, but such presumption may be rebutted by extrinsic evidence.³⁴ In all cases when the facts going to the jurisdiction do not appear of record, the party complaining may, for the purpose of impeaching the jurisdiction, show the facts as they actually existed.³⁵

ARTICLE XIV. JUDGMENT ONLY VOIDABLE.

§ 2583. **Judgment only voidable, if jury waived.**—Although a defendant in a criminal case can not, by consent or otherwise, waive a trial by jury, yet, if he does so, and consents and is tried by the judge of the court, the judgment rendered will not be void, but only voidable, the court having jurisdiction of the subject-matter and person. The error committed in such case consists in the improper exercise of jurisdiction, and does not proceed from a want of jurisdiction.³⁶

³¹ *P. v. McDonnell*, 80 Cal. 285, 22 Pac. 190, 8 Am. C. R. 150; *U. S. v. Cruikshank*, 92 U. S. 542; *Com. v. Fuller*, 8 Metc. (Mass.) 313; *Dashing v. S.*, 78 Ind. 357; *Prigg v. Pennsylvania*, 16 Pet. (U. S.) 625; *Fox v. Ohio*, 5 How. (U. S.) 410; *Bells v. P.*, 4 Scam. (Ill.) 512.

³² *Myers v. P.*, 67 Ill. 509; *Weatherford v. P.*, 67 Ill. 521.

³³ *Buckrice v. P.*, 110 Ill. 32. *Con-*

tra, *S. v. Pugsley*, 75 Iowa 744, 8 Am. C. R. 103, 38 N. W. 498.

³⁴ *Hurd Habeas Corpus*, citing 1 *Smith Leading Cases* (5th ed.) 816.

³⁵ *Brown Jurisdiction*, 71-73. See *In re Rolfs*, 30 Kan. 758, 1 Pac. 523, 4 Am. C. R. 446.

³⁶ *Kelly v. P.*, 115 Ill. 589, 4 N. E. 644. See also *Lowery v. Howard*, 103 Ind. 440, 3 N. E. 124; *Ex parte Watkins*, 3 Pet. (U. S.) 193. See § 2560.

CHAPTER LXII.

JEOPARDY.

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ARTICLE I. ONCE ACQUITTED, BAR.

§ 2584. **Once fairly acquitted.**—The prevailing current of decision in this country, if not in England, is to the effect that no person who

has once been fairly acquitted by a jury upon a proceeding purely criminal can again be put upon trial without his consent.¹

ARTICLE II. MISDEMEANORS INCLUDED.

§ 2585. **Misdemeanors included—Common law reaffirmed.**—The constitutional provision of Illinois, that “no person shall be twice put in jeopardy for the same offense,” includes all misdemeanors where the penalty is a fine only, recoverable in justice courts, as well as courts of record, such as penalties for violating the fish law, liquor law, and the like.² The constitutional provision that “no person shall, for the same offense, be twice put in jeopardy of his life or limb,” is but a reaffirmance of the common law.³

ARTICLE III. TWO GOVERNMENTS INVOLVED.

§ 2586. **Same act—Offense against two governments.**—The same act may be an offense or transgression of the laws of the state or territory, and of the United States, for which the offender is justly punishable, and a punishment for a violation of both laws would not be putting the violator twice in jeopardy for the same offense.⁴ If a person violate the laws of the United States, the laws of the state and ordinances of a city or village by one act, he may be punished for each; a conviction on one is no bar to the others.⁵

¹ S. v. Lee, 10 R. I. 494, 2 Green C. R. 380; Mount v. S., 14 Ohio 295; Com. v. Cummings, 3 Cush. (Mass.) 212; P. v. Webb, 38 Cal. 267; Day v. Com., 23 Gratt. (Va.) 915; P. v. Com-ing, 2 Const. 1; S. v. Benham, 7 Conn. 414; 4 Bl. Com. 361; S. v. Gooch, 60 Ark. 218, 29 S. W. 640.

² P. v. Miner, 144 Ill. 309, 33 N. E. 40; P. v. Royal, 1 Scam. (Ill.) 557; P. v. Dill, 1 Scam. (Ill.) 257; Berkowitz v. U. S., 93 Fed. 452.

³ Freeland v. P., 16 Ill. 381; 4 Bl. Com. 335.

⁴ Hoke v. P., 122 Ill. 517, 13 N. E. 823; Moore v. Illinois, 14 How. (U. S.) 13; In re Murphy, 5 Wyom. 297, 40 Pac. 398, 9 Am. C. R. 127; P. v.

McDonnell, 80 Cal. 285, 22 Pac. 190, 8 Am. C. R. 150; Com. v. Fuller, 8 Metc. (Mass.) 313; U. S. v. Lackey, 99 Fed. 952.

⁵ Wragg v. Penn Tp., 94 Ill. 18; Robbins v. P., 95 Ill. 177; Gardner v. P., 20 Ill. 434; Hughes v. P., 8 Colo. 536, 9 Pac. 50, 5 Am. C. R. 81; Cooley Const. Lim. 199. See also S. v. Sly, 4 Or. 277, 2 Am. C. R. 52; Moore v. P., 14 How. (U. S.) 13; S. v. Crummey, 17 Minn. 72; S. v. Fourcade, 45 La. 717, 13 So. 187; Ex parte Hong Shen, 98 Cal. 681, 33 Pac. 799; Koch v. S., 53 Ohio St. 433, 41 N. E. 689; S. v. Stevens, 114 N. C. 873, 19 S. E. 861; S. v. Gustin, 152 Mo. 108, 53 S. W. 421.

ARTICLE IV. WHEN JEOPARDY COMMENCES.

§ 2587. **Jeopardy attaches when jury sworn.**—Jeopardy attaches at the time the jury is sworn to try the cause, when all the preliminary steps have been taken necessary to the trial.⁶

ARTICLE V. WHEN SAME OFFENSE.

§ 2588. **Two indictments, when bar.**—"According to sound principle and the weight of sound authority, not only where each of two indictments contains all the necessary constituents of a compound offense, such as an aggravated assault, or an assault and battery, but where one contains them all and the other enough of them to constitute a minor offense, a conviction or acquittal upon either indictment will, under the strict rule of former jeopardy, bar the other, provided that, by the law of the former, a conviction for the minor offense may be had upon the indictment for the major."⁷ "If the first indictment were such that the prisoner could have been legally convicted upon it, by any legal evidence admissible, though sufficient evidence was not in fact adduced, his acquittal upon that indictment is a bar to the second indictment for the same offense."⁸ Where the facts charged in the second indictment would, if true, have procured a conviction on the first, then the plea of *autre fois acquit* is well pleaded, and if the evidence offered to prove the second indictment was competent on the first, then the first is a bar to the second.⁹

§ 2589. **Identity of offense.**—To entitle a defendant to the benefit of a plea of *autre fois acquit*, it must be upon a prosecution for the same identical act and crime, which may be shown by parol evidence.¹⁰

⁶ Weaver v. S., 83 Ind. 289, 4 Cr. L. Mag. 29; Ex parte McGehan, 22 Ohio St. 442; Franklin v. S., 85 Ga. 570, 11 S. E. 876, 8 Am. C. R. 292; Hilands v. Com., 111 Pa. St. 1, 2 Atl. 70, 6 Am. C. R. 340; Adams v. S., 99 Ind. 244, 4 Am. C. R. 311; 1 Bish. Cr. L., § 1014; Alexander v. Com., 105 Pa. St. 1; Nolan v. S., 55 Ga. 521, 21 Am. R. 281; S. v. Sommers, 60 Minn. 90, 61 N. W. 907; Whitmore v. S., 43 Ark. 271; S. v. Paterno, 43 La. 514, 9 So. 442. See O'Brien v. Com., 6 Bush (Ky.) 563.
⁷ Franklin v. S., 85 Ga. 570, 11 S. E. 876, 8 Am. C. R. 294.

⁸ 3 Greenl. Ev. (Redf. ed.), § 36; Garvey's Case, 7 Colo. 384, 3 Pac. 903, 4 Am. C. R. 261; Com. v. Wade, 17 Pick. (Mass.) 396; Com. v. Robinson, 126 Mass. 259, 3 Am. C. R. 147; Duncan v. Com., 6 Dana (Ky.) 295; Wilson v. S., 24 Conn. 57; 4 Bl. Com. 336.

⁹ Durham v. P., 4 Scam. (Ill.) 172; Guedel v. P., 43 Ill. 230; Com. v. Cunningham, 13 Mass. 245; P. v. Warren, 1 Park. Cr. (N. Y.) 338; S. v. Vines, 34 La. 1079, 4 Am. C. R. 297; Com. v. Roby, 12 Pick. (Mass.) 496; Rex v. Emden, 9 East 437.

¹⁰ Campbell v. P., 109 Ill. 572;

ARTICLE VI. JEOPARDY, HOW REMOVED.

§ 2590. **New trial removes jeopardy—Also arrest of judgment.**—If a new trial be granted on the defendant's application, this is in itself no bar to a second trial on the same or another indictment.¹¹ If the defendant cause the judgment to be arrested on motion, held not in jeopardy.¹²

§ 2591. **Jeopardy removed by reversal.**—A judgment of the trial court having been reversed by a court of review, the defendant may be tried again for the same offense.¹³

§ 2592. **Indictments, held to be the same.**—Where two or more persons are named and described as a firm, to wit, "Irwin & Co.," in the first indictment, and "John Irwin & Co." in the second indictment, the charge is the same offense, and a trial on the first is a bar to the second. The description is surplusage.¹⁴

ARTICLE VII. SEVERAL VIOLATIONS, ONE ACT.

§ 2593. **Murder—Killing two in one act.**—Where the defendant killed two persons by the same act, a conviction on an indictment charging the killing of one is a bar to an indictment for killing the other.¹⁵

Swalley v. P., 116 Ill. 249, 4 N. E. 379; Freeland v. P., 16 Ill. 382; 3 Greenl. Ev., § 36; 4 Bl. Com. 336; 1 Chitty Cr. L. 452; Burns v. P., 1 Park. Cr. (N. Y.) 182; P. v. Saunders, 4 Park. Cr. (N. Y.) 196; Reg. v. Morris, 10 Cox C. C. 480; Wallace v. S., 41 Fla. 547, 26 So. 713. See Underhill Cr. Ev., § 197.

¹¹ Gannon v. P., 127 Ill. 522, 21 N. E. 525; S. v. Blaisdell, 59 N. H. 328; S. v. Hart, 33 Kan. 218, 6 Pac. 288, 6 Am. C. R. 269; Wharton Cr. Pl. & Pr. (9th ed.), § 435; P. v. Eppinger, 109 Cal. 294, 41 Pac. 1037; U. S. v. Ball, 163 U. S. 662, 16 S. Ct. 1192; S. v. Bowman, 94 Iowa 228, 62 N. W. 759.

¹² Phillips v. P., 88 Ill. 163 (citing Com. v. Hardy, 2 Mass. 303; Bedee v. P., 73 Ill. 322; Gerard v. P., 3

Scam. (Ill.) 363; 4 Bl. Com. 393); P. v. Eppinger, 109 Cal. 294, 41 Pac. 1037; S. v. Owen, 78 Mo. 367; Brown v. S., 109 Ga. 570, 34 S. E. 1031; Taylor v. S., 110 Ga. 150, 35 S. E. 161.

¹³ McGinn v. S., 46 Neb. 427, 65 N. W. 46; S. v. Rhodes, 112 N. C. 857, 17 S. E. 164. See Com. v. Murphy, 174 Mass. 369, 54 N. E. 860, 48 L. R. A. 393.

¹⁴ Durham v. P., 4 Scam. (Ill.) 173.

¹⁵ Clem v. S., 42 Ind. 420, 13 Am. R. 369, 2 Green C. R. 687; Woodford v. P., 62 N. Y. 117, 40 Am. R. 463; Kannon v. S., 10 Lea (Tenn.) 390; Gunter v. S., 111 Ala. 23, 20 So. 632; Ben v. S., 22 Ala. 9. *Contra*, P. v. Majors, 65 Cal. 138, 3 Pac. 597, 5 Am. C. R. 489; P. v. Alibez, 49 Cal. 452, 1 Am. C. R. 345.

§ 2594. **Shooting at different person.**—Where the defendant is convicted of shooting at one person with intent to kill, while the facts show that he intended to shoot another, the conviction and sentence are a bar to further prosecution.¹⁶

ARTICLE VIII. MURDER, WHEN BARRED.

§ 2595. **Murder, when barred.**—The accused having been convicted of manslaughter on an indictment for murder, and having been granted a new trial, could not be again tried on the charge of murder; his conviction of manslaughter was in legal effect an acquittal of murder.¹⁷

ARTICLE IX. SEVERAL COUNTS INVOLVED.

§ 2596. **Conviction on one count acquits on others.**—Where the indictment contains several distinct counts, and a conviction on some of the counts and the verdict are silent as to the others, this is an acquittal on the counts on which the verdict is silent.¹⁸ The defendants were tried on an indictment containing two distinct felonies, burglary and grand larceny, alleged in separate counts in the indictment, which, under the statute, were not subject to the doctrine of merger, and they were convicted of burglary. The verdict was set aside and the defendants granted a new trial. On the second trial they were convicted of grand larceny. Held error, they having been acquitted on that charge on the first trial.¹⁹

¹⁶ S. v. Pujo, 41 La. 346, 6 So. 339. *Contra*, Baker v. Com., 20 Ky. L. 879, 47 S. W. 864.

¹⁷ Barnett v. P., 54 Ill. 331; Brennan v. P., 15 Ill. 518; Johnson v. S., 29 Ark. 31, 2 Am. C. R. 430; Hurt v. S., 25 Miss. 378; S. v. Tweedy, 11 Iowa 351; Guenther v. P., 24 N. Y. 100; Clem v. S., 42 Ind. 420, 13 Am. R. 369, 2 Green C. R. 690; Jordan v. S., 22 Ga. 558; S. v. Ross, 29 Mo. 32; Jones v. S., 13 Tex. 168; S. v. Martin, 30 Wis. 216; Slaughter v. S., 6 Humph. (Tenn.) 412; P. v. Gilmore, 4 Cal. 378; S. v. Lessing, 16 Minn. 75; Mixon v. S., 35 Tex. Cr. 458, 34 S. W. 290; S. v. Belden, 33 Wis. 120, 2 Green C. R. 649.

¹⁸ Thomas v. P., 113 Ill. 531; Stoltz v. P., 4 Scam. (Ill.) 168; P. v. Whitson, 74 Ill. 26; Keedy v. P., 84 Ill. 569; Bell v. S., 48 Ala. 684, 2 Green C. R. 627; Hurt v. S., 25 Miss. 378; Mount v. S., 14 Ohio 295; P. v. Gilmore, 4 Cal. 376; Shepherd v. P., 25 N. Y. 406; S. v. Martin, 30 Wis. 223; P. v. Dowling, 84 N. Y. 478; S. v. McNaught, 36 Kan. 624, 14 Pac. 277; S. v. Kattlemann, 35 Mo. 105; S. v. Severson, 79 Iowa 750, 45 N. W. 305; George v. S., 59 Neb. 163, 80 N. W. 486.

¹⁹ Bell v. S., 48 Ala. 684, 2 Green C. R. 627. *Contra*, Brown v. U. S. (Ind. Ter., 1899), 52 S. W. 56.

ARTICLE X. SEVERAL FORGED CHECKS.

§ 2597. **Possession of several forged checks.**—Having possession of several forged bank notes of different banks at the same time, with intent to pass them, is but one offense.²⁰

ARTICLE XI. INCLUDED OFFENSES.

§ 2598. **Part of libelous words.**—An acquittal on an indictment on part of the libelous words of an article is a bar to a trial on the other libelous words of the same article in another indictment.²¹

§ 2599. **Conviction of included offense.**—When the greater and lesser offenses are both included in the same count, a conviction on the lesser is a bar to the greater.²² Where, under the indictment or complaint, there could have been no conviction of the greater offense, then a conviction of the lesser is no bar to the greater.²³

§ 2600. **Conviction of lesser offense.**—To convict of an assault, when the indictment is for a felony, the indictment must be for a felony which necessarily includes an assault. It is not necessary that it should be expressly charged on the face of the indictment.²⁴

§ 2601. **Conviction of second degree.**—If the defendant be convicted of murder in the second degree the verdict in effect is an acquittal of the first degree.²⁵

ARTICLE XII. ONE OFFENSE, TWO INDICTMENTS.

§ 2602. **One offense—Two indictments.**—If a person commit an offense with intent to aid two prisoners to escape, one of whom had been convicted of a misdemeanor, the other of a felony, and such person be indicted in two indictments for attempting to release each prisoner, a conviction on one indictment is a bar to the other.²⁶

²⁰ S. v. Benham, 7 Conn. 414.

²¹ P. v. Stephens, 79 Cal. 428, 21 Pac. 856.

²² Barnett v. P., 54 Ill. 331; S. v. Brannon, 55 Mo. 63, 2 Green C. R. 608; P. v. McGowan, 17 Wend. (N. Y.) 386.

²³ Whar. Cr. Ev. (8th ed.), § 585; Severin v. P., 37 Ill. 422.

²⁴ Reg. v. Smith, 34 U. C. Q. B. 552,

1 Am. C. R. 511; Reg. v. Reid, 2 Den. C. C. 94.

²⁵ S. v. Murphy, 13 Wash. 229, 43 Pac. 44; S. v. Helm, 92 Iowa 540, 61 N. W. 246; Golding v. S., 31 Fla. 262, 12 So. 525. *Contra*, S. v. Bradley, 67 Vt. 465, 32 Atl. 238; P. v. Keefer, 65 Cal. 232, 3 Pac. 818.

²⁶ Hurst v. S., 86 Ala. 604, 6 So. 120.

ARTICLE XIII. SHOOTING OR STRIKING.

§ 2603. **Killing by shooting—Or striking.**—An indictment for murder by shooting from a gun by means of powder and shot is not a bar to an indictment for killing the same person by striking the deceased upon the head with a gun.²⁷

ARTICLE XIV. PRINCIPAL AND ACCESSORY.

§ 2604. **Principal and accessory after fact.**—The acquittal of a party indicted as a principal is no bar to an indictment against him as an accessory after the fact, and *vice versa*.²⁸

ARTICLE XV. DEFECTIVE INDICTMENT.

§ 2605. **Acquittal on defective indictment.**—A defendant having been tried and acquitted by the verdict of a jury on a defective indictment, to which he pleaded not guilty, can not be again tried, having been once in legal jeopardy.²⁹

§ 2606. **Quashing defective indictment.**—Where a defective indictment is quashed, even after a jury has been impaneled, the defendant may again be put on trial for the same offense on another indictment.³⁰

ARTICLE XVI. CONVICTION IN WRONG PLACE.

§ 2607. **Conviction without jurisdiction—In wrong state.**—The conviction and punishment of a person in one sovereignty is no bar to his conviction and punishment in another in which the offense was actually committed.³¹ The accused committed an offense (assault) on a ferry boat in the Mississippi, and was tried in the district court in the state of Iowa, in Muscatine county, and convicted. Held no

²⁷ Guedel v. P., 43 Ill. 226; Rex v. Martin, 5 C. & P. 128; Rex v. Hughes, 5 C. & P. 126; 1 McClain Cr. L., § 377.

²⁸ Reynolds v. P., 83 Ill. 481, citing 1 Hale P. C. 626.

²⁹ U. S. v. Ball, 163 U. S. 662, 16 S. Ct. 1192. See Harp v. S., 59 Ark. 113, 26 S. W. 714. *Contra*, Conley v. S., 85 Ga. 348, 11 S. E. 659; McNeill v. S. (Tex. Cr.), 33 S. W. 977. Compare P. v. Schmidt, 64 Cal. 260,

30 Pac. 814; Timon v. S., 34 Tex. Cr. 363, 30 S. W. 808; Gerard v. P., 3 Scam. (Ill.) 363; Tufts v. S., 41 Fla. 663, 27 So. 218.

³⁰ S. v. Jenkins, 20 S. C. 351; Com. v. Farrell, 105 Mass. 189; S. v. Taylor, 34 La. 978. See S. v. Reinhart, 26 Or. 466, 38 Pac. 822; Dilger v. Com., 88 Ky. 550, 11 Ky. L. 67, 11 S. W. 651.

³¹ Phillips v. P., 55 Ill. 433.

bar to a prosecution for the same transaction alleged to have been committed in the state of Illinois.³²

§ 2608. **Acquittal in wrong county.**—An acquittal in one county is not a bar to another indictment for the same offense in the proper county.³³

ARTICLE XVII. CONVICTION, WHEN NO BAR.

§ 2609. **Conviction, when no bar, though same transaction.**—The fact that the accused had been tried and convicted (but not sentenced) on another indictment for the murder of a different person than the deceased named in the second indictment, is not a bar to the second, though growing out of the same transaction.³⁴ An indictment for stealing the property of C. charges a different offense than that of the larceny of the property of B. and W., though growing out of the same transaction; and the one is not a bar to the other.^{34a}

ARTICLE XVIII. DIFFERENT OFFENSES.

§ 2610. **"Keeping gaming house," distinct from "gaming."**—The offense of keeping a gaming house is a distinct offense from gaming, and a conviction or acquittal on one will not be a bar to the other.³⁵

§ 2611. **Riot and assault.**—A conviction for assault and battery is no bar to an indictment for riot arising out of the same transaction.³⁶

§ 2612. **Single offense—Splitting offenses.**—Upon general principles a single offense can not be split into separate parts and the accused be prosecuted for each of such separate parts, although each part may of itself constitute a separate offense. If the offender be prosecuted for one part that ends the prosecution for that offense, provided such part of itself constitutes an offense for which a conviction can be had.³⁷

³² Phillips v. P., 55 Ill. 433. See Underhill Cr. Ev., § 196, citing McNeil v. S., 29 Tex. App. 48, 14 S. W. 393; S. v. Phillips, 104 N. C. 786, 10 S. E. 463; S. v. Sommers, 60 Minn. 90, 61 N. W. 907; Brown v. S., 105 Ala. 117, 16 So. 929; P. v. Connor, 142 N. Y. 130, 36 N. E. 807; Dulin v. Lillard, 91 Va. 718, 20 S. E. 821; Blyew v. Com., 91 Ky. 200, 12 Ky. L. 742, 15 S. W. 356.

³³ Campbell v. P., 109 Ill. 571, 573.

³⁴ Peri v. P., 65 Ill. 22.

^{34a} Riffe v. Com., 21 Ky. L. 1331, 56 S. W. 265; S. v. Council, 58 S. C. 368, 36 S. E. 663.

³⁵ Tuberson v. S., 26 Fla. 472, 7 So. 858; P. v. Dewy, 58 Hun 602, 11 N. Y. Supp. 602; S. v. Mosby, 53 Mo. App. 571.

³⁶ Freeland v. P., 16 Ill. 383. See Powell v. S. (Tex. Cr.), 57 S. W. 94; Ford v. S. (Tex. Cr.), 56 S. W. 918; Taylor v. S. (Tex. Cr.), 56 S. W. 753.

³⁷ S. v. Colgate, 31 Kan. 511, 3

§ 2613. **Arson and murder at one act.**—The prisoner had been indicted, tried and convicted for arson. While still in custody under this proceeding he was arraigned on an indictment for the murder of two persons, who were in the house when it was burned. The conviction for arson was held a bar to the indictment for murder.³⁸

ARTICLE XIX. JURY UNLAWFULLY DISCHARGED.

§ 2614. **When jury can not agree—Dismissal.**—The discharge of a jury because of a failure to agree, after all efforts to agree had been exhausted, is no bar to another trial.³⁹

§ 2615. **Discharging jury after jeopardy.**—When jeopardy has begun, and the jury are unnecessarily and without the consent of the prisoner discharged, such discharge of the jury is equivalent to an acquittal, and the prisoner thereby becomes entitled to exemption from further prosecution for the same offense.⁴⁰ After the jury were sworn, but before any statement of the case had been made to them, one of the jurors (who had not been specially interrogated as to his qualifications as a juror, but others called with him were so interrogated in his presence and hearing) informed the court that he had, by inadvertence, incorrectly answered the court's inquiry as to some of his qualifications as a juror; that he was in fact neither a freeholder nor a householder. The defendant, by his counsel, in answer to the court, said: "We decline to change the jury; we object to a discharge of the jury." The court, over objection and exception, discharged the jury and proceeded to impanel another jury. Held that the defendant, having been in jeopardy, the discharge of the jury was equivalent to an acquittal.⁴¹

Pac. 346, 5 Am. C. R. 74. See also *U. S. v. Miner*, 11 Blatchf. (U. S.) 511, 2 Green C. R. 246; *Powell v. S.* (Tex. Cr.), 57 S. W. 94; *Clem v. S.*, 42 Ind. 420, 13 Am. R. 369, 2 Green C. R. 691; *S. v. Chinault*, 55 Kan. 326, 40 Pac. 662.

³⁸ *S. v. Cooper*, 1 Green (N. J.) 361; *Ex parte Lange*, 18 Wall. (U. S.) 163, 2 Green C. R. 109.

³⁹ *Dreyer v. P.*, 188 Ill. 46, 58 N. E. 620; *S. v. Whitson*, 111 N. C. 695, 16 S. E. 332; *Com. v. Cody*, 165 Mass. 133, 42 N. E. 575; *P. v. Harding*, 53 Mich. 481, 19 N. W. 155; *In re Allison*, 13 Colo. 525, 22 Pac. 820; *Adams v. S.*, 34 Fla. 185, 15 So. 905;

S. v. Hager, 61 Kan. 504, 59 Pac. 1080, 41 L. R. A. 254.

⁴⁰ *Adams v. S.*, 99 Ind. 244, 4 Am. C. R. 311; *Cook v. S.*, 60 Ala. 39, 3 Am. C. R. 306; *P. v. Arnett*, 129 Cal. 306, 61 Pac. 930; *P. v. Hunckeler*, 48 Cal. 331, 1 Am. C. R. 507; *Jones v. S.*, 55 Ga. 625, 1 Am. C. R. 510; *O'Brian v. Com.*, 9 Bush (Ky.) 333, 1 Am. C. R. 520, 523; *Bell v. S.*, 48 Ala. 684, 2 Green C. R. 628; *S. v. Spayde*, 110 Iowa 726, 80 N. W. 1058.

⁴¹ *Adams v. S.*, 99 Ind. 244, 4 Am. C. R. 310, 311. See *Helm v. S.*, 66 Miss. 537, 6 So. 322; *S. v. Robinson*, 46 La. 769, 15 So. 146.

§ 2616. **Jury unlawfully discharged.**—The withdrawal or discharge of a competent juror after the jury had been sworn to try the case terminated the legal existence of the jury. That a juror who was discharged had been a member of the grand jury that returned the indictment into court did not disqualify him and was no legal grounds for so discharging him.⁴² The jury in a case were discharged (after delivering their verdict of guilty in the absence of the prisoner) and dispersed among the audience in the court room and persons outside. It would be a dangerous precedent to hold that after this the persons who composed that jury could be reassembled as such to render a verdict in a case of which they had been thus discharged. The defendant must be released from further prosecution.⁴³ The jury had been deliberating upon their verdict in a capital case five days, the fifth day being the last day of the term, and failing to agree upon a verdict, were discharged by the court, against the objection of the defendants. The court caused the following order to be entered: "Now, to wit, 5th February, 1887, the jury in this case having come into court repeatedly and affirmed that they could not agree and that they had made every possible effort to agree, and that they still can not agree, the term of the court now expiring, the court being satisfied that it is useless to detain the jury longer, the jury are discharged from further consideration of the case, to which order and discharge the defendants excepted. Held a bar to a second trial, the record failing to show a lawful cause for discharging the jury."⁴⁴ In a homicide case, after the jury had been out deliberating thirty-two hours, they were discharged by the court in the absence of the defendant because of their inability to agree: Held a bar to a second trial, even though the discharge of the jury would have been proper had the defendant been present in court.⁴⁵

§ 2617. **Void verdict—Jury discharged.**—The reception of a verdict which proves to be a nullity, and the discharge of the jury, are equivalent to an acquittal, and the defendant can not again be put on

⁴² *O'Brian v. Com.*, 9 Bush (Ky.) 333, 1 Am. C. R. 520-523; *Dobbins v. S.*, 14 Ohio St. 493; *Jones v. S.*, 97 Ala. 77, 12 So. 274, 38 Am. R. 150. *Contra*, *Roberts v. S.*, 72 Miss. 728, 18 So. 481.

⁴³ *Cook v. S.*, 60 Ala. 39, 3 Am. C. R. 306. See *S. v. Hays*, 2 Lea (Tenn.) 156, 2 Am. C. R. 630.

⁴⁴ *Com. v. Fitzpatrick*, 121 Pa. St.

109, 15 Atl. 466, 7 Am. C. R. 199. See *Hilands v. Com.*, 111 Pa. St. 1, 2 Atl. 70, 6 Am. C. R. 342. See "Verdict."

⁴⁵ *S. v. Wilson*, 50 Ind. 487, 19 Am. R. 719, 1 Am. C. R. 529; *S. v. Sommers*, 60 Minn. 90, 61 N. W. 907. *Contra*, *S. v. White*, 19 Kan. 445, 27 Am. R. 137.

trial for the same offense; for it would be putting him twice in jeopardy.⁴⁶

ARTICLE XX. DISMISSING CAUSE.

§ 2618. **Court dismissing after trial commenced.**—If a defendant is put on his trial, on what is called an included offense, and before verdict the court dismisses the case for the purpose of holding him to answer a charge of a greater offense in the same transaction, he can not be again tried for the same or greater offense, having been once in jeopardy.⁴⁷

§ 2619. **Dismissing after plea of guilty.**—A defendant, having pleaded guilty to an indictment in a court of competent jurisdiction, and nothing remaining to be done except to sentence him and render judgment, he is in jeopardy; and the prosecution will not be permitted to then dismiss the case and procure another indictment for the same offense.⁴⁸

ARTICLE XXI. VERDICT, UNLAWFUL.

§ 2620. **Verdict unlawfully returned.**—The jury, in the absence of the defendant and his counsel, returned a verdict convicting the defendant, and were discharged. Neither the defendant nor his counsel had given consent to this action of the court in receiving a verdict while he was absent in jail. The verdict, on motion of the defendant, was afterwards set aside. Held to be a bar to any further prosecution for the same offense.⁴⁹

§ 2621. **Indictment, invalid, no bar.**—The defendant was put upon trial on an indictment returned by the grand jury, which had been found by that body upon the minutes of the evidence as returned by the committing magistrate, that none of the state's witnesses had been examined before the grand jury. On discovery of that fact the court, on motion, discharged the jury which had been selected and

⁴⁶ Hayes v. S., 107 Ala. 1, 18 So. 172; Jackson v. S., 102 Ala. 76, 15 So. 351. *Contra*, Gibson v. Com., 2 Va. Cas. 111.

⁴⁷ P. v. Ny Sam Chung, 94 Cal. 304, 29 Pac. 642; P. v. Hunckeler, 48 Cal. 331.

⁴⁸ Boswell v. S., 111 Ind. 47, 11 N. E. 788; P. v. Goldstein, 32 Cal. 432. See Ledgerwood v. S., 134 Ind. 81, 33 N. E. 631.

⁴⁹ Nolan v. S., 55 Ga. 521, 1 Am. C. R. 532; Jackson v. S., 102 Ala. 76, 15 So. 351. See "Verdict."

sworn to try the cause. Held to be a mistrial and no bar to a second trial.⁵⁰

ARTICLE XXII. NOLLE PROS. OF INDICTMENT.

§ 2622. *Nolle pros.*—Of good indictment.—A case having gone to the jury on a good indictment, it could not be withdrawn without the consent of the defendant, by the state's attorney entering a *nolle pros.* Such withdrawal is equivalent to an acquittal.⁵¹

ARTICLE XXIII. PRELIMINARY EXAMINATION.

2623. *Examination and discharge, no bar.*—The examination and discharge of a person by one magistrate is no bar to an examination for the same offense before some other magistrate in case the proper complaint is made. Such examination is in no sense a trial.⁵²

ARTICLE XXIV. SICKNESS STOPPING TRIAL.

§ 2624. *Sickness of juror or other officer.*—In the event the jury or court or prisoner, in the progress of the trial, becomes unable to proceed with the trial, by reason of sickness, his jeopardy, which had commenced, at once ceases.⁵³

ARTICLE XXV. ILLEGAL VERDICT.

§ 2625. *Illegal verdict, effect.*—An informal, and with greater reason an illegal verdict, may be rejected by the court, and will not operate as an acquittal unless plainly intended.⁵⁴

⁵⁰ S. v. Parker, 66 Iowa 586, 24 N. W. 225, 5 Am. C. R. 340.

⁵¹ Jones v. S., 55 Ga. 625, 1 Am. C. R. 510; Cooley Const. Lim. (2d ed.), 327; P. y. Hunkeler, 48 Cal. 331, 1 Am. C. R. 507; Grogan v. S., 44 Ala. 9; S. v. Champeau, 52 Vt. 313, 36 Am. R. 754; S. v. Patterson, 116 Mo. 505, 22 S. W. 696; Franklin v. S., 85 Ga. 570, 11 S. E. 876. See generally S. v. Child, 44 Kan. 420, 24 Pac. 952; Com. v. Galligan, 156 Mass. 270, 30 N. E. 1142; P. v. Kuhn, 67 Mich. 463, 35 N. W. 88.

⁵² Ex parte Garst, 10 Neb. 78, 2 Am. C. R. 618; Bulson v. P., 31 Ill. 415; In re McIntyre, 5 Gilm. (Ill.) 422; S. v. Vaughan, 121 Ala. 41, 25 So. 727; Ex parte Robinson, 108 Ala. 161, 18 So. 729; Ex parte Fenton, 77

Cal. 183, 19 Pac. 267; Jambor v. S., 75 Wis. 664, 44 N. W. 963.

⁵³ S. v. Emery, 59 Vt. 84, 7 Atl. 129, 7 Am. C. R. 205; S. v. Hazledahl, 2 N. D. 521, 52 N. W. 315; S. v. Tatman, 59 Iowa 471, 13 N. W. 632; P. v. Ross, 85 Cal. 383, 24 Pac. 789; Ex parte Ulrich, 42 Fed. 587; Hilbert v. Com., 21 Ky. L. 537, 51 S. W. 817; Woodward v. S. (Tex. Cr.), 58 S. W. 135. See Yarbrough v. S., 105 Ala. 43, 10 Am. C. R. 62, 16 So. 758.

⁵⁴ Robinson v. S., 23 Tex. App. 315, 4 S. W. 904, 7 Am. C. R. 209; Allen v. S., 26 Ark. 333; Murphy v. S., 7 Colo. 516; Townley v. Cady, 10 Neb. 388, 6 N. W. 464; Fitts v. S., 102 Tenn. 141, 50 S. W. 756.

ARTICLE XXVI. CONVICTION BY DEFENDANT'S FRAUD.

§ 2626. **Conviction procured by fraud of defendant.**—A conviction procured by the defendant by fraud or by collusion with the prosecuting witness is not a bar to another prosecution for the same offense.⁵⁵

§ 2627. **Conviction before justice of peace on complaint of defendant.**—A former conviction before a justice of the peace on the complaint of the defendant himself is no bar to a prosecution for the same offense, commenced in another court of competent jurisdiction.⁵⁶

ARTICLE XXVII. INCREASING PENALTY.

§ 2628. **Increasing penalty for second offense.**—A statute which provides for a longer term of imprisonment or increase of penalty for a second or subsequent offense does not put the accused twice in jeopardy for the same offense. Such statute is valid.⁵⁷

⁵⁵ *McFarland v. S.*, 68 Wis. 400, 32 N. W. 226, 60 Am. R. 867; *Watkins v. S.*, 68 Ind. 427, 34 Am. R. 273; *S. v. Swepson*, 79 N. C. 632; *Com. v. Jackson*, 2 Va. Cas. 501.

⁵⁶ *S. v. Wakefield*, 60 Vt. 618, 15 Atl. 181; *S. v. Simpson*, 28 Minn. 66, 9 N. W. 78, 41 Am. R. 269; *Hal-loran v. S.*, 80 Ind. 586; *Bradley v. S.*, 32 Ark. 722; *Warriner v. S.*, 3

Tex. App. 104, 30 Am. R. 124; *De Bord v. P.* (Colo.), 61 Pac. 599.

⁵⁷ *Kelly v. P.*, 115 Ill. 583, 4 N. E. 644; *Chenowith v. Com.*, 11 Ky. L. 561, 12 S. W. 585; *P. v. Bosworth*, 64 Hun (N. Y.) 72, 19 N. Y. Supp. 114; *S. v. Moore*, 121 Mo. 514, 26 S. W. 345, 42 Am. R. 542; *S. v. Stevens*, 103 Ind. 55, 2 N. E. 214, 53 Am. R. 482; *Moore v. Missouri*, 159 U. S. 673, 16 S. Ct. 179.

DIVISION TWO

PART NINE

PROCEDURE AND PRACTICE

CHAPTER LXXIII.

ARRESTS.

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ARTICLE I. ARREST UNWARRANTED.

§ 2629. **Arrest unwarranted.**—An arrest without a warrant, where one is required, is not due process of law; and arbitrary or despotic power no man possesses under our system of government.¹

¹ *Muscoe v. Com.*, 86 Va. 443, 8 Am. C. R. 607, 10 S. E. 534; *Board of*
(681)

§ 2630. **Warrant based on affidavit.**—"No warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched and the persons or things to be seized."²

ARTICLE II. WARRANT VOID; ESCAPE.

§ 2631. **Void warrant may be resisted.**—An insufficient affidavit—that is, an affidavit which fails to allege that the prisoner committed the offense, or that there is probable cause to suspect that he committed the same—will not confer jurisdiction on the justice who issued it, and a prisoner arrested on a warrant so issued is justified in asserting his right to freedom; and in breaking away from the officer's custody he commits no offense.³ An officer is liable for false imprisonment by making an arrest on a void warrant, no matter what his motives were.⁴

§ 2632. **Warrant signed in blank is void.**—A warrant signed in blank, the name of the person to be arrested being inserted without authority, is a nullity.⁵

§ 2633. **Officer permitting escape.**—It is no offense in an officer to suffer a prisoner to escape where the prisoner has the right to resist an unlawful imprisonment or arrest, and the officer may refuse to serve a warrant unlawfully issued.⁶

ARTICLE III. WARRANT PROTECTS OFFICER.

§ 2634. **Warrant protects officer.**—A warrant regular on its face will protect the officer who makes the arrest from an action for assault and false imprisonment, though issued by a court on a void complaint conferring no jurisdiction.⁷

Trustees v. Schroeder, 58 Ill. 353; S. v. James, 78 N. C. 455; 4 Bl. Com. 292.

² Ill. Const. 1870, Art. II, § 6; Myers v. P., 67 Ill. 510; Carrow v. P., 113 Ill. 558; Housh v. P., 75 Ill. 490.

³ Housh v. P., 75 Ill. 491; S. v. Leach, 7 Conn. 452; S. v. Gleason, 32 Kan. 245, 4 Pac. 363, 5 Am. C. R. 76.

⁴ Shanley v. Wells, 71 Ill. 78; Ryan v. Donnelly, 71 Ill. 100.

⁵ Rafferty v. P., 69 Ill. 116.

⁶ Housh v. P., 75 Ill. 491.

⁷ Housh v. P., 75 Ill. 491; Tuttle v. Wilson, 24 Ill. 561; S. v. James, 80 N. C. 370; Slomer v. P., 25 Ill. 59; Mangold v. Thorpe, 33 N. J. L. 134; Clarke v. May, 2 Gray (Mass.) 410.

ARTICLE IV. SEARCH WARRANT; SEIZING.

§ 2635. **Basis for search warrant.**—A search warrant can only be granted after a showing made before a magistrate, under oath, that a crime has been committed; and the law in requiring a showing of probable cause, supported by affidavit, intends that the facts shall be stated which shall justify the magistrate that suspicion is well founded. The mere expression of opinion under oath is no ground for the warrant except as the facts justify it.⁸

§ 2636. **Warrant to search and seize.**—Laws which provide for the search and seizure of articles and things which it is unlawful for a person to have in his possession, for the purpose of issue or disposition, such as "counterfeit coin, lottery tickets, implements of gaming, etc., are not within the category of unreasonable search and seizure."⁹

§ 2637. **Search warrant—Describing premises.**—A search warrant which described the premises to be searched, as a certain building, the cellar under the same, and the out buildings within the curtilage thereof situate, does not authorize the search of another building situated on an adjoining lot, but connected by a covered passage-way.¹⁰

§ 2638. **Unreasonable search.**—The law providing against unreasonable search and seizure of articles does not include counterfeit coin, lottery tickets, implements of gambling and other things which it is unlawful for a person to have in his possession.¹¹

ARTICLE V. ARRESTS WITHOUT WARRANT.

§ 2639. **Arrest without warrant.**—Arrests made for misdemeanors committed in the presence of the officer making the arrest are warranted by the common law, where there is danger of escape, or where the wrongful act can not be stopped or redressed except by immediate

⁸ Lippman v. P., 175 Ill. 113, 51 N. E. 872; Cooley Const. Lim. (4th ed.) 372.

⁹ Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524; Com. v. Dana, 2 Metc. (Mass.) 329; Glennon v. Britton, 155 Ill. 246, 40 N. E. 594. See Lippman v. P., 175 Ill. 101, 51 N. E. 872; Langdon v. P., 133 Ill. 398, 24 N.

E. 874; Cooley Const. Lim. (5th ed.), 306.

¹⁰ Com. v. Intox. Liquors, 140 Mass. 287, 5 Am. C. R. 627, 3 N. E. 4.

¹¹ Langdon v. P., 133 Ill. 397, 24 N. E. 874; Boyd v. U. S., 116 U. S. 616, 6 S. Ct. 524.

arrest.¹² In some of the states arrests can not be made without a warrant, except in felony cases, even though committed in the presence of the officer making the arrest,¹³ while in other states arrests may be made without a warrant for misdemeanors, if committed in the presence of the officer making the arrest, though the constitutional restrictions in the latter are the same as in the states where such arrests are forbidden.¹⁴

§ 2640. **Arrest without warrant—Officer assaulted.**—If an assault be made on an officer while making a lawful arrest without a warrant, it is no defense that the latter, neglecting his duty, did not afterwards make complaint against the defendant for the offense for which he was arrested.¹⁵

§ 2641. **Arresting for misdemeanor.**—In all cases of misdemeanors not committed in the presence of the officer he has no authority to make arrest without a warrant, and he can not make an arrest upon mere information of others in such cases.¹⁶ In cases of misdemeanors committed in the presence of the officer making the arrest, which can not be stopped or redressed, unless the offender is immediately arrested without a warrant, such arrest may be made by the sheriff, constable, or other like officer, and a law authorizing such arrests is not in conflict with the provision of the constitution that "no person shall be deprived of life, liberty or property, without due process of law."¹⁷

§ 2642. **Arresting without warrant.**—An officer having reasonable grounds for believing a person has committed a crime may arrest without a warrant, and if the offense be committed in the presence of the officer it is his duty to make the arrest.¹⁸ A town marshal or police

¹² North v. P., 139 Ill. 106, 28 N. E. 966; 4 Bl. Com. 292.

¹³ North v. P., 139 Ill. 105, 28 N. E. 966; S. v. Hunter, 106 N. C. 796, 11 S. E. 366; Pinkerton v. Verberg, 78 Mich. 573, 44 N. W. 579.

¹⁴ North v. P., 139 Ill. 105, 28 N. E. 966; White v. Kent, 11 Ohio St. 550.

¹⁵ 2 Bish. Cr. L., § 1011, citing Com. v. Tobin, 108 Mass. 426; Com. v. McGahey, 11 Gray (Mass.) 194.

¹⁶ Main v. McCarty, 15 Ill. 441; Shanley v. Wells, 71 Ill. 82; S. v. Lewis, 50 Ohio St. 179, 9 Am. C. R. 50, 33 N. E. 405; Webb v. S., 51 N.

J. L. 189, 17 Atl. 113, 8 Am. C. R. 41; Muscoe v. Com., 86 Va. 443, 10 S. E. 534, 8 Am. C. R. 605; 1 Bish. Cr. Proc., 183, 184; 2 Hawk. P. C. 81.

¹⁷ North v. P., 139 Ill. 105, 28 N. E. 966.

¹⁸ Cahill v. P., 106 Ill. 621; Shanley v. Wells, 71 Ill. 82; Ryan v. Donnelly, 71 Ill. 100; Simmerman v. S., 16 Neb. 615, 4 Am. C. R. 98, 21 N. W. 387. See P. v. Burt, 51 Mich. 199, 16 N. W. 378; Carr v. S., 43 Ark. 99. See Morris v. Kasling, 79 Tex. 141, 15 S. W. 226; Wright v. Com., 85 Ky. 123, 8 Ky. L. 718, 2 S. W. 904;

officer may lawfully make an arrest without a warrant for violations of city or village ordinances, committed in the presence of such officer.¹⁹

§ 2643. In presence of officer defined.—An officer is justified in making an arrest for an offense as having been committed in his presence, if committed in his sight, though some distance from him, or if he can hear what is said, though too dark to see.²⁰

§ 2644. Breaches of peace in presence.—A peace officer has the right to make an arrest without a warrant for breach of the peace committed in his presence.²¹

§ 2645. Prisoner taken before magistrate.—A person, on being arrested for a breach of the peace or criminal offense, should be taken before a magistrate by the officer or person making the arrest, without unnecessary delay.²²

§ 2646. Arrest for carrying weapons.—An officer acting in good faith may lawfully arrest a person without a warrant for unlawfully carrying concealed weapons in the public streets, where he has reasonable information of such violation, although he may have had no previous knowledge of the fact.²³

Johnson v. S., 30 Ga. 426; *Doering v. S.*, 49 Ind. 56, 19 Am. R. 669; *Warner v. Grace*, 14 Minn. 487; *S. v. Grant*, 79 Mo. 113, 49 Am. R. 218.

¹⁹ *Village of Oran v. Bles*, 52 Mo. App. 509; *Hayes v. Mitchell*, 69 Ala. 452; *Roderick v. Whitson*, 51 Hun 620, 4 N. Y. Supp. 112; *Riggs v. Com.*, 17 Ky. L. 1015, 33 S. W. 413; *P. v. Van Houten*, 35 N. Y. Supp. 186, 69 N. Y. St. 265; *S. v. Freeman*, 86 N. C. 683. See *S. v. Cantieny*, 34 Minn. 1, 24 N. W. 458. *Contra*, *City of Philadelphia v. Campbell*, 11 Phila. (Pa.) 163. See *S. v. Belk*, 76 N. C. 10.

²⁰ *P. v. Bartz*, 53 Mich. 493, 19 N. W. 161. See also *Dilger v. Com.*, 88 Ky. 550, 11 Ky. L. 67, 11 S. W. 651; *S. v. McAfee*, 107 N. C. 812, 12 S. E. 435; *P. v. Johnson*, 86 Mich. 175, 48 N. W. 870, 24 Am. R. 116; *Fry v. Kaessner*, 48 Neb. 133, 66 N. W. 1126.

²¹ *Com. v. Tobin*, 108 Mass. 426, 11 Am. R. 375; *In re Powers*, 25 Vt. 261; *Boutte v. Emmer*, 43 La. 980, 9 So. 921; *S. v. Guy*, 46 La. 1441, 16 So. 404; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644, 10 Am. St. 100; *Fleetwood v. Com.*, 80 Ky. 2; *Beville v. S.*, 16 Tex. App. 70; *Hayes v. Mitchell*, 80 Ala. 183; *Douglas v. Barber*, 18 R. I. 459, 28 Atl. 805; *S. v. Russell*, 1 Houst. Cr. (Del.) 122; *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102.

²² *Simmons v. Vandyke*, 138 Ind. 380, 37 N. E. 973, 46 Am. R. 411; *Judson v. Reardon*, 16 Minn. 431; *Cary v. S.*, 76 Ala. 78; *S. v. Freeman*, 86 N. C. 683.

²³ *Ballard v. S.*, 43 Ohio St. 340, 1 N. E. 76, 5 Am. C. R. 40; *Ex parte Sherwood*, 29 Tex. App. 334, 15 S. W. 812. See *S. v. Holcomb*, 86 Mo. 371.

§ 2647. **Arrest without warrant, for vagrancy.**—An officer may, without a warrant, arrest a person for vagrancy, when committed in the presence of the officer.²⁴

§ 2648. **Arresting street walkers.**—An officer can not, without a warrant, arrest a woman having the reputation of being a street walker while walking along the street doing nothing to indicate that she is plying her vocation.²⁵ But a prostitute may be arrested without a warrant when found soliciting men for immoral purposes.²⁶

§ 2649. **Arresting on telegram—For extradition.**—An officer of one state has no right to arrest a person charged with a crime on a mere telegram from an officer of another state without a warrant.²⁷ An officer can not lawfully arrest a person and hold him for the purpose of extradition.²⁸

ARTICLE VI. SHERIFF'S POSSE ASSISTING.

§ 2650. **Sheriff's posse arresting—Person assisting.**—A member of the sheriff's posse, acting under the orders of the sheriff, may make an arrest, even though the sheriff may not be actually present with the warrant for the arrest of the person charged; if the sheriff is within the county, and is *bona fide* and strictly engaged in the business of the arrest, it is sufficient: the sheriff is constructively present.²⁹ A private person assisting an officer at the request of the latter may lawfully make an arrest, though the warrant is not actually in his possession at the time, but in possession of the officer.³⁰

ARTICLE VII. PRIVATE PERSONS ARRESTING.

§ 2651. **Arrest by private person.**—A felony having in fact been committed, a private person may, without a warrant, arrest one who

²⁴ *Shanley v. Wells*, 71 Ill. 78; *Jones v. S.*, 14 Mo. 409; *Roberts v. S.*, 14 Mo. 138, 55 Am. D. 97.

²⁵ *Pinkerton v. Verberg*, 78 Mich. 573, 44 N. W. 579.

²⁶ *Harft v. McDonald*, 1 City Ct. (N. Y.) 181; *P. v. Pratt*, 22 Hun (N. Y.) 300.

²⁷ *Simmons v. Vandyke*, 138 Ind. 380, 37 N. E. 973, 46 Am. R. 411; *Cunningham v. Baker*, 104 Ala. 160, 16 So. 68.

²⁸ *Malcolmson v. Scott*, 56 Mich. 459, 23 N. W. 166.

²⁹ *Robinson v. S.*, 93 Ga. 77, 9 Am. C. R. 572, 18 S. E. 1018. See *P. v. McLean*, 68 Mich. 480, 36 N. W. 231; *Drennan v. P.*, 10 Mich. 169; *Com. v. Field*, 13 Mass. 321; *Webb v. S.*, 51 N. J. L. 189, 8 Am. C. R. 42, 17 Atl. 113.

³⁰ *Com. v. Black*, 12 Pa. Co. Ct. 31; *Kirbie v. S.*, 5 Tex. App. 60.

he has reasonable grounds to suspect committed such felony.³¹ But before a private person is warranted in making an arrest without a warrant it must appear that a felony was in fact committed.³² Any private person (and *a fortiori*, a peace officer) that is present when a felony is committed is bound by the law to arrest the felon on pain of fine and imprisonment, if he escapes through the negligence of bystanders.³³

ARTICLE VIII. ARREST BY "HUE AND CRY."

§ 2652. Arrest by "hue and cry."—There is another species of arrest wherein both officer and private men are concerned, and that is upon a "hue and cry" raised upon a felony committed. This is the old common law process of pursuing with horn and with voice all felons and such as have dangerously wounded another.³⁴

ARTICLE IX. BREAKING DOORS; KILLING.

§ 2653. Breaking doors to arrest.—An officer may break open doors for the purpose of making an arrest, if necessary, on a criminal charge.³⁵

§ 2654. Killing to prevent escape.—An officer or private person, if resisted by a person charged with felony, may kill to prevent the escape of the person so charged if all reasonable efforts shall have first been used without success to prevent escape.³⁶ An officer has no right to shoot and kill a person whom he seeks to arrest charged with a misdemeanor, even if the person can not otherwise be taken.³⁷ Killing under such circumstances by an officer is murder.³⁸

³¹ Wright v. Com., 85 Ky. 123, 8 Ky. L. 718, 2 S. W. 904; U. S. v. Boyd, 45 Fed. 851; Long v. S., 12 Ga. 293; Brooks v. Com., 61 Pa. St. 352, 100 Am. D. 645; Neal v. Joyner, 89 N. C. 287; Kennedy v. S., 107 Ind. 144, 6 N. E. 305, 57 Am. R. 99; Reuck v. McGregor, 32 N. J. L. 70; S. v. Mowry, 37 Kan. 369, 15 Pac. 282; Simmerman v. S., 16 Neb. 615, 21 N. W. 387.

³² Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. D. 703; Dodds v. Board, 43 Ill. 95.

³³ 4 Bl. Com. 293; Long v. S., 12 Ga. 293.

³⁴ 4 Bl. Com. 293.

³⁵ Shanley v. Wells, 71 Ill. 78; S. v. Smith, 1 N. H. 346; S. v. Mooring, 115 N. C. 709, 20 S. E. 182; S. v.

Oliver, 2 Houst. (Del.) 585; Com. v. Reynolds, 120 Mass. 190, 21 Am. R. 510; Cahill v. P., 106 Ill. 621; 4 Bl. Com. 293.

³⁶ 4 Bl. Com. 293; Renau v. S., 2 Lea (Tenn.) 720, 2 Am. C. R. 624; 1 McClain Cr. L., § 298; 1 Hale P. C. 481; 1 East P. C. 298; Jackson v. S., 66 Miss. 89, 5 So. 690.

³⁷ Tiner v. S., 44 Tex. 128; Wright v. S., 44 Tex. 645; Handley v. S., 96 Ala. 48, 11 So. 322; 2 Hale P. C. 117; Dilger v. Com., 88 Ky. 550, 11 Ky. L. 67, 11 S. W. 651; Com. v. Greer, 20 Pa. Co. Ct. 535.

³⁸ Reneau v. S., 2 Lea (Tenn.) 720, 2 Am. C. R. 624; S. v. Dietz, 59 Kan. 576, 53 Pac. 870; 2 Bish. Cr. L., § 648. See § 35.

§ 2655. **Killing officer in unlawful arrest.**—It is well established that if a public officer be resisted and killed by a person whom he is attempting to arrest illegally and without color of authority, the killing will be manslaughter, unless the evidence show previous or express malice.³⁹

ARTICLE X. OFFICER SHOWING WARRANT.

§ 2656. **Officer showing warrant.**—An officer in making an arrest is not required to show his warrant, provided he states its substance to the party whom he seeks to arrest.⁴⁰

ARTICLE XI. UNLAWFUL ARREST, NO DEFENSE.

§ 2657. **Unlawful arrest is no defense.**—An illegal arrest is no defense to an indictment. No matter how the prisoner was brought before the court, it has jurisdiction to try him on the indictment.⁴¹

ARTICLE XII. ARREST, WHERE MADE.

§ 2658. **Arrest in any county.**—An officer may pursue and apprehend a person charged with an offense in any county in the state and execute the warrant where authorized by statute.⁴² But an officer can not lawfully make an arrest outside the limits of his own county unless authorized by statute.⁴³

³⁹ *Rafferty v. P.*, 72 Ill. 40; *Ballard v. S.*, 43 Ohio St. 340, 1 N. E. 76; *Roberts v. S.*, 14 Mo. 138; *S. v. Symes*, 20 Wash. 484, 55 Pac. 626; *Briggs v. Com.*, 82 Va. 554; *Muscoe v. Com.*, 86 Va. 443, 10 S. E. 534, 8 Am. C. R. 606; *S. v. Davis*, 53 S. C. 150, 31 S. E. 62; *Ross v. S.*, 10 Tex. App. 455; *Harrison v. S.*, 24 Ala. 67; *Croom v. S.*, 85 Ga. 718, 11 S. E. 1035; *Fleetwood v. Com.*, 80 Ky. 1; *Hughes v. Com.*, 19 Ky. L. 497, 41 S. W. 294; 2 *Roscoe Cr. Ev.*, § 791; 1 *Hale P. C.* 465; 1 *East P. C.* 110.

⁴⁰ *Robinson v. S.*, 93 Ga. 77, 18 S. E. 1018, 9 Am. C. R. 575; *Shovlin v. Com.*, 106 Pa. St. 369, 5 Am. C. R. 42.

⁴¹ *Whar. Cr. Pl. & Pr.* (8th ed.), § 27; *Mix v. P.*, 26 Ill. 34; *P. v. Copely*, 4 Cr. L. Mag. 192; *P. v. Rowe*, 4 Park. Cr. (N. Y.) 253; *Ker v. P.*, 110 Ill. 638; *Ex parte Barker*, 87 Ala. 4, 6 So. 7, 8 Am. C. R. 237; *S. v. Day*, 58 Iowa 678, 12 N. W. 733; *In re Durant*, 60 Vt. 176, 12 Atl. 650. *Contra*, *In re Robinson*, 29 Neb. 135, 45 N. W. 267; *S. v. Simmons*, 39 Kan. 262, 18 Pac. 177. See § 2574.

⁴² *Ressler v. Peats*, 86 Ill. 275.

⁴³ *Jones v. S.*, 26 Tex. App. 1, 9 S. W. 53; *Ledbetter v. S.*, 23 Tex. App. 247, 5 S. W. 226; *Copeland v. Islay*, 2 Dev. & Bat. (N. C.) 505. See *Ressler v. Peats*, 86 Ill. 275.

CHAPTER LXXIV.

BAIL.

ART.	I. Refusing Bail,	§ 2659
	II. Bail Bond, Void,	§ 2660
	III. Bail Pending Writ of Error,	§§ 2661-2662
	IV. Surety, When Liable,	§ 2663
	V. Bail in Capital Cases,	§§ 2664-2665
	VI. Application for Bail,	§ 2666

ARTICLE I. REFUSING BAIL.

§ 2659. **Refusal to approve bail.**—Valuable property to a very large amount was conveyed to each of the bail by friends of the defendant to enable the bail to become qualified in the requisite sum. The conveyance was absolute and without any qualification. Held that the bail must be approved.¹

ARTICLE II. BAIL BOND, VOID.

§ 2660. **Bail bond, when void.**—If the sheriff require the accused to give bond in a larger amount than the sum fixed by the court it is void.²

ARTICLE III. BAIL PENDING WRIT OF ERROR.

§ 2661. **Bail, pending writ of error.**—It is the settled law of California that the supreme court will not admit to bail after a verdict of guilty, unless when circumstances of extraordinary character have intervened since the conviction.³

¹ P. v. Ingersoll, 14 Abbott Pr. (N. S.) (N. Y.) 23, 1 Green C. R. 635. ² Ex parte Brown, 68 Cal. 176, 8 Pac. 329, 6 Am. C. R. 60; P. v. Marshall, 59 Cal. 386.

³ Roberts v. S., 34 Kan. 151, 6 Am. C. R. 62, 8 Pac. 246.

§ 2662. **Pending writ of error**—In federal court.—Any justice of the United States Supreme Court, in allowing a writ of error and granting a *supersedeas*, has authority to admit to bail any prisoner, pending the writ of error.⁴

ARTICLE IV. SURETY, WHEN LIABLE.

§ 2663. **When sureties liable**.—If, after bail is given, the principal is imprisoned in another state for the violation of a criminal law of that state, it will not avail to protect him or his sureties. Such is now the settled rule.⁵

ARTICLE V. BAIL IN CAPITAL CASES.

§ 2664. **Bail in murder cases**.—Bail should be allowed in all cases of murder except where the proof is evident or the presumption great.⁶ If the evidence introduced on application for bail would sustain a verdict of conviction, bail should be denied.⁷

§ 2665. **Bail in capital case, when jury disagree**.—A disagreement of the jury in a capital case will not entitle the defendant as a matter of right to be released on bail.⁸ But if two successive juries have failed to agree on a verdict on an indictment for murder, this is a strong circumstance tending to show that the proof of guilt is not “evident nor the presumption great.”⁹

ARTICLE VI. APPLICATION FOR BAIL.

§ 2666. **Application for bail in murder case**.—A person indicted for murder in the first degree is entitled as of right to a hearing on

⁴ *Hudson v. Parker*, 156 U. S. 277, 15 S. Ct. 450, 9 Am. C. R. 91.

⁵ *Taylor v. Taintor*, 16 Wall. (U. S.) 366, 2 Green C. R. 146; *Grant v. Fagan*, 4 East 190; *U. S. v. Van Fossen*, 1 Dill. (U. S.) 406; *U. S. v. French*, 1 Gall. (U. S.) 1; *Devine v. S.*, 5 Sneed (Tenn.) 625; *Withrow v. Com.*, 1 Bush (Ky.) 17.

⁶ *In re Losasso*, 15 Colo. 163, 24 Pac. 1080; *Ex parte Richards*, 102 Ind. 260, 1 N. E. 639; *Ex parte King*, 86 Ala. 620, 5 So. 863; *Ex parte Banks*, 28 Ala. 89; *In re Malison*, 36 Kan. 725, 14 Pac. 144; *Ex parte Ran-*

don, 12 Tex. App. 145; *In re Wilson* (Tex. App.), 13 S. W. 609; *Ex parte Thompson* (Tex. App.), 15 S. W. 912.

⁷ *Ex parte Richardson*, 96 Ala. 110, 11 So. 316; *Ex parte Claunch*, 71 Mo. 233; *Ex parte Sloane*, 95 Ala. 22, 11 So. 14; *In re Troia*, 64 Cal. 152, 28 Pac. 231; *Ex parte Foster*, 5 Tex. App. 625, 32 Am. R. 577.

⁸ *Webb v. S.*, 4 Tex. App. 167; *Ex parte State*, 47 La. 662, 17 So. 296; *S. v. Summons*, 19 Ohio 139.

⁹ *In re Alexander*, 59 Mo. 598, 21 Am. R. 393.

an application to be admitted to bail.¹⁰ The defendant, on a charge of murder, may make his application for bail, either by motion in term time or by *habeas corpus* in term time or vacation.¹¹

¹⁰ S. v. Crocker, 5 Wyo. 385, 40 Pac. 681, 9 Am. C. R. 468, citing Ex parte Banks, 28 Ala. 89; S. v. Summons, 19 Ohio 139; Ex parte Wray, 30 Miss. 673; In re Lossaso, 15 Colo. 163, 24 Pac. 1080; Holley v. S., 15 Fla. 688, 2 Am. C. R. 250.
¹¹ Lynch v. P., 38 Ill. 497. See Ex parte England, 23 Tex. App. 90, 3 S. W. 714.

CHAPTER LXXV.

GRAND JURY.

ART.	I.	Drawing and Summoning,	§ 2667
	II.	Impaneling and Organizing,	§§ 2668-2680
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	IV.	Return of Indictments,	§§ 2684-2687
	V.	Witnesses before Grand Jury,	§§ 2688-2691
	VI.	Others before Grand Jury,	§§ 2692-2695
	VII.	Presenting Matters to Grand Jury, . .	§ 2696
	VIII.	Federal Grand Jury,	§ 2697

ARTICLE I. DRAWING AND SUMMONING.

§ 2667. **What constitutes grand jury.**—At common law a grand jury consists of not over twenty-three persons and not less than twelve, selected from the body of the county.¹ After instructions by a charge from the presiding judge, and after the grand jury withdraw for the purpose of secretly receiving and considering indictments, they are to hear the evidence on behalf of the prosecution only, for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined.² Changes have been made in some if not most of our states as to the number of persons constituting the full panel—in some not to exceed sixteen, but nowhere under twelve. And it is the universal rule that twelve of the grand jurors must concur in order to return a valid indictment.³

ARTICLE II. IMPANELING AND ORGANIZING.

§ 2668. **Organizing with less than twenty-three.**—A full panel of a grand jury under the statute of Illinois consists of twenty-three per-

¹ 4 Bl. Com. 302; 1 Bish. Cr. Proc., § 854.

² 1 Bish. Cr. Proc., § 854; 4 Bl. Com. 305, 306.

³ 4 Bl. Com. 302, 303.

sons, sixteen of whom shall constitute a grand jury. Where, on calling the roll of the twenty-three who were duly selected and summoned, one failed to appear, the court properly organized the grand jury with the twenty-two.⁴

§ 2669. Irregularity in summoning.—If more grand jurors be drawn than the number required by statute, this irregularity can not be urged as a reason to invalidate an indictment.⁵

§ 2670. Unlawful grand jury.—If a greater or less number of jurors be organized to constitute a grand jury than the constitutional or statutory number, as, for instance, sixteen instead of twelve jurors, their proceedings will be void. And an indictment returned by a grand jury so constituted may be quashed.⁶

§ 2671. Indictment by unlawful grand jury.—When a grand jury is not selected as required by law, or a selection is made of such persons as are not qualified to act as grand jurors, an indictment found by them is null and void and should be quashed, and the prisoner indicted *de novo*.⁷ An indictment returned by a grand jury from which men of the negro race had been excluded from acting as grand jurors should, on proper motion, be quashed, although there be no statute making such exclusion ground for quashing indictments.^{7a}

§ 2672. Irregularities, when immaterial.—Mere irregularities in the summoning and impaneling of a grand jury, not injurious to the rights of a person indicted, can not be urged by the accused as grounds for quashing the indictment, as, if the jurors were summoned to appear as "trial jurors" instead of grand jurors.⁸

⁴ Beasley v. P., 89 Ill. 575; Barron v. P., 73 Ill. 256; Gillespie v. P., 176 Ill. 240, 52 N. E. 250; P. v. Simmons, 119 Cal. 1, 50 Pac. 844; P. v. Thompson, 122 Mich. 411, 81 N. W. 344; English v. S., 31 Fla. 340, 12 So. 689; S. v. Cooley, 72 Minn. 476, 75 N. W. 729. See S. v. Brainard, 56 Vt. 532, 48 Am. R. 818; S. v. Bowman, 73 Iowa 110, 34 N. W. 767.

⁵ Turner v. S., 78 Ga. 174; S. v. Watson, 104 N. C. 735, 10 S. E. 705; Anderson v. S., 5 Ark. 444. *Contra*, Leathers v. S., 26 Miss. 73.

⁶ Downs v. Com., 92 Ky. 605, 13 Ky. L. 820, 18 S. W. 526; *Ex parte*

Reynolds, 35 Tex. Cr. 437, 34 S. W. 120, 60 Am. R. 54; Doyle v. S., 17 Ohio 222.

⁷ S. v. Lawrence, 12 Or. 297, 7 Pac. 116, 5 Am. C. R. 165; Couch v. S., 63 Ala. 163; Fitzgerald v. S., 4 Wis. 412; Whitehead v. Com., 19 Gratt. (Va.) 640; Doyle v. S., 17 Ohio 222; Wilburn v. S., 21 Ark. 201; Clare v. S., 30 Md. 165. *Contra*, P. v. Petrea, 92 N. Y. 135.

^{7a} Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687; Carter v. S., 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508; Smith v. S. (Tex. Cr.), 58 S. W. 97. See "Indictments."

⁸ P. v. Earnest, 45 Cal. 29; Ridling

§ 2673. **Irregularity in selecting.**—Under the terms of the statute of Kansas, no objection going merely to the manner of the selection or drawing of the grand jury will be recognized unless it be one that implies corruption.⁹ Where the sheriff, without any authority, struck one name from the venire and substituted another person who served as a grand juror, it was held to be very irregular, yet in a misdemeanor case the irregularity was not sufficient to sustain a motion to quash an indictment.¹⁰

§ 2674. **Objection to unlawful grand jury.**—If the grand jury was not lawfully assembled and organized, that fact should be presented to the court by a motion to quash or by challenging the array.¹¹ An objection to the constitution of the grand jury after the defendant has pleaded to an indictment, and has been tried and convicted, comes too late.¹²

§ 2675. **Record failing to show impaneling.**—The objection that the record did not show that a grand jury was impaneled and sworn comes too late after verdict, and can not be considered.¹³

§ 2676. **Organizing grand jury—When.**—The court may organize the grand jury at any time during the term for which the jurors were summoned to appear.¹⁴

§ 2677. **Organization of grand jury.**—Where it appears from the record that the grand jury was called, impaneled and sworn and a

v. S., 56 Ga. 601. See *Carpenter v. S.*, 62 Ark. 286, 36 S. W. 900.

⁹ *S. v. Skinner*, 34 Kan. 256, 8 Pac. 420, 6 Am. C. R. 313; *S. v. Cooley*, 72 Minn. 476, 75 N. W. 729; *Sage v. S.*, 127 Ind. 15, 26 N. E. 667; *S. v. Swim*, 60 Ark. 587, 31 S. W. 456; *S. v. Champeau*, 52 Vt. 313, 36 Am. R. 754. See *S. v. Wilcox*, 104 N. C. 347, 10 S. E. 453. *Contra*, *Stoneking v. S.*, 118 Ala. 68, 24 So. 47; *Compton v. S.*, 117 Ala. 56, 23 So. 750.

¹⁰ *McElhanon v. P.*, 92 Ill. 369. See *S. v. Witt*, 33 Or. 594, 55 Pac. 1053; *S. v. Furco*, 51 La. 1082, 25 So. 951.

¹¹ *Barrow v. P.*, 73 Ill. 258; *Stone v. P.*, 2 Scam. (Ill.) 332.

¹² *Hagenow v. P.*, 188 Ill. 547, 59 N. E. 242; *Ellis v. S.*, 92 Tenn. 85, 20 S. W. 500; *S. v. Griffin*, 38 La. 502; *Ter. v. Armijo*, 7 N. M. 428, 37 Pac. 1113; *Dailey v. S.* (Tex. Cr.), 55 S. W. 821; *S. v. Corcoran* (Idaho), 61 Pac. 1034.

¹³ *S. v. Smallwood*, 68 Mo. 192, 3 Am. C. R. 100; *P. v. Griffin*, 2 Barb. (N. Y.) 427; *P. v. Robinson*, 2 Park. Cr. (N. Y.) 235, 311; *Brantley v. S.*, 13 S. & M. (Miss.) 468.

¹⁴ *Jackson v. S.*, 102 Ala. 167, 15 So. 344; *Perkins v. S.*, 92 Ala. 66, 9 So. 536; *S. v. Dillard*, 35 La. 1049.

foreman appointed by the court, that is sufficient proof of the organization of the grand jury.¹⁵

§ 2678. Reorganizing grand jury.—Where it appears that the grand jurors have not been legally drawn, the court may discharge them and order the sheriff to summon from the body of the county the required number of persons duly qualified to serve as grand jurors, and for that purpose a venire may issue.¹⁶

§ 2679. Irregularity can not be attacked.—The validity of the organization or the proceedings of a grand jury, though but a grand jury *de facto*, can not be questioned in a collateral proceeding, as, for example, a contempt proceeding against a witness for defying the authority of that body.¹⁷

§ 2680. Grand jury for city court.—In Illinois the same law for the selection of a grand jury for the circuit court applies to the selection of a grand jury to attend city courts. And when a grand jury is selected from the county as provided by law, the court has no authority to discharge it and order one selected from the city.¹⁸

ARTICLE III. QUALIFICATIONS OF GRAND JURORS.

§ 2681. Grand juror disqualified—Age.—By the common law an alien, villein, or one convicted of crime, is disqualified to act as a grand juror and may be challenged for cause by any person held for inquisition; but he must interpose his challenge before his indictment.¹⁹ Under the statute a person over the age of sixty years is exempt from serving as a grand juror, but not disqualified. It is only a privilege which he may claim or waive.²⁰

§ 2682. Appointment of foreman.—It is not necessary that the record should show the appointment of a foreman of a grand jury. If it shows that grand jurors were chosen, selected, impaneled and sworn as a grand jury, and returned an indictment into open court

¹⁵ Williams v. P., 54 Ill. 424; Stout v. S., 93 Ind. 150; S. v. Stuart, 35 La. 1015.

¹⁶ Empson v. P., 78 Ill. 248. See Stone v. P., 2 Scam. (Ill.) 331.

¹⁷ In re Gannon, 69 Cal. 541, 11 Pac. 240. See S. v. Noyes, 87 Wis. 340, 58 N. W. 386, 41 Am. R. 45.

¹⁸ Miller v. P., 183 Ill. 427, 56 N. E. 60.

¹⁹ 2 Hawk. P. C., ch. 25, § 16; Musick v. P., 40 Ill. 271. See Reich v. S., 53 Ga. 73, 1 Am. C. R. 543, 21 Am. R. 265.

²⁰ Davison v. P., 90 Ill. 225; Jackson v. S., 76 Ga. 551. *Contra*, Kitrahl v. S., 9 Fla. 9.

indorsed "a true bill" by one of that body as foreman, that is sufficient.²¹

§ 2683. **Swearing grand jury—And jury commissioner.**—An officer having power to administer oaths generally may swear the grand jury under the direction of the court, the statute not restricting that duty to the clerk of the court.²² An indictment returned by a grand jury selected by a jury commission, one of whose members had not taken the oath of office, will, on motion, be quashed.²³

ARTICLE IV. RETURN OF INDICTMENTS.

§ 2684. **Return of indictment into court.**—Where the record recites that on "this day comes again the grand jury and presents to the court indictments in the following cases," among which was one against the defendant, it sufficiently shows a return into open court.²⁴ Where the record states that the grand jury appeared in open court and duly presented the indictment, a copy of which is set forth, from this we must assume that it was presented according to law. The certificate of the foreman is no part of the indictment, but is the statutory mode of authenticating it.²⁵ The record must affirmatively show the return of the indictment into open court by the grand jury.²⁶

§ 2685. **Return of indictment, not sufficient.**—The record, after giving the convening order of the court, states as follows: "This day being the fourth day of said term of said court, the following indictment was filed in said court, to wit:" This being all the record showed, it did not appear that the indictment was returned into open court by the grand jury.²⁷

§ 2686. **Indorsing—"A true bill"—Foreman indorsing.**—An indictment must be indorsed "a true bill" by the grand jury, verified

²¹ *Yates v. P.*, 38 Ill. 532; *S. v. Gonge*, 12 Lea (Tenn.) 132; *P. v. Roberts*, 6 Cal. 214.

²² *Allen v. P.*, 77 Ill. 485.

²³ *S. v. Flint*, 52 La. 62, 26 So. 913; *S. v. Furco*, 51 La. 1082, 25 So. 951 (juror). *Contra*, *S. v. Russell*, 69 Minn. 502, 72 N. W. 832.

²⁴ *Fitzpatrick v. P.*, 98 Ill. 272; *Hughes v. P.*, 116 Ill. 339, 6 N. E. 55; *Kelly v. P.*, 132 Ill. 369, 24 N. E. 56; *Morton v. P.*, 47 Ill. 468;

Padgett v. S., 103 Ind. 550, 6 Am. C. R. 53, 3 N. E. 377.

²⁵ *Brotherton v. P.*, 75 N. Y. 159, 3 Am. C. R. 219.

²⁶ *Yundt v. P.*, 65 Ill. 373; *Aylesworth v. P.*, 65 Ill. 302, 1 Am. C. R. 604; *Sullivan v. P.*, 156 Ill. 95, 40 N. E. 288; *S. v. Ivey*, 100 N. C. 539, 5 S. E. 407, 7 Am. C. R. 246.

²⁷ *Kelly v. P.*, 39 Ill. 158. See *Rainey v. P.*, 3 Gilm. (Ill.) 72; *Epps v. S.*, 102 Ind. 539, 1 N. E. 491, 5 Am. C. R. 519.

by the signature of the foreman of that body. This is indispensable.²⁸ It is sufficient in law if the foreman merely writes his name on the indictment, with no mention of his official character, as foreman, because the latter appears of record. And it is immaterial on what part of the bill the foreman's signature appears.²⁹ The fact that an indictment is indorsed by a different person than the one appointed as the foreman of the grand jury can not avail. It will be presumed that the first person appointed was discharged by the court and the other appointed.³⁰

§ 2687. **Indorsement of witnesses.**—The statute requiring the foreman of the grand jury to note on the indictment the names of the witnesses upon whose testimony the same was found is mandatory, and if not so noted, the indictment, on motion, will be quashed. The state's attorney may note the names instead of the foreman.³¹

ARTICLE V. WITNESSES BEFORE GRAND JURY.

§ 2688. **Witnesses before grand jury—Subpenas.**—Subpenas for witnesses to appear before the grand jury may be lawfully issued by the clerk of the court in vacation, at the request of the prosecuting or state's attorney, although not expressly authorized by statute.³²

§ 2689. **Witnesses before grand jury—Defendant.**—The defendant can not produce witnesses before the grand jury nor present any evidence to that body, because the grand jury proceedings are absolutely *ex parte*.³³ Where the defendant was taken from the jail, before the grand jury, and was there compelled to testify regarding his guilt or innocence touching the very matter on which the grand jury indicted him, the indictment should be quashed on motion, without any inquiry as to whether the indictment was found on his testimony alone,

²⁸ *Nomaque v. P.*, Breese (Ill.) 148; *Alden v. S.*, 18 Fla. 187; *Benson v. S.*, 68 Ala. 544; *S. v. Bowman*, 103 Ind. 69, 2 N. E. 289, 6 Am. C. R. 296. See *Gardner v. P.*, 3 Scam. (Ill.) 84. *Contra*, *S. v. Magrath*, 44 N. J. L. 227, 4 Am. C. R. 279.

²⁹ *S. v. Bowman*, 103 Ind. 69, 2 N. E. 289, 6 Am. C. R. 297; *Blume v. S.*, 154 Ind. 343, 56 N. E. 771. See also *S. v. Fulford*, 33 La. 679, 4 Am. C. R. 46; 1 Bish. Cr. Proc. (3d ed.), § 698.

³⁰ *Mohler v. P.*, 24 Ill. 27.

³¹ *Andrews v. P.*, 117 Ill. 199, 7 N. E. 265; *McKinney v. P.*, 2 Gilman (Ill.) 552; *Bartley v. P.*, 156 Ill. 236, 40 N. E. 831; *Parks v. S.*, 20 Neb. 519, 31 N. W. 5. *Contra*, *S. v. Hines*, 84 N. C. 810.

³² *Baldwin v. S.*, 126 Ind. 24, 25 N. E. 820; *O'Hair v. P.*, 32 Ill. App. 277.

³³ *U. S. v. Edgerton*, 80 Fed. 374; *U. S. v. Blodgett*, 35 Ga. 336; *S. v. Hamlin*, 47 Conn. 95, 105; *P. v. Goldenson*, 76 Cal. 328, 19 Pac. 161.

or whether the testimony of the defendant influenced the finding under the circumstances. It is sufficient that so important a right has been violated to sustain the motion to quash.³⁴

§ 2690. Grand juror, competent witness.—A grand juror may be called as a witness on the trial of a case to show that a witness told a different story before the grand jury than on the trial.³⁵

§ 2691. Grand juror as witness.—A grand juror can not be compelled to disclose how he or any other juror voted upon an indictment, but he may be required to give the testimony of persons who testified before the grand jury.³⁶ On motion to impeach or set aside an indictment a grand juror can not be compelled to tell how any member of the grand jury voted upon the indictment.³⁷

ARTICLE VI. OTHERS BEFORE GRAND JURY.

§ 2692. States attorney attending grand jury.—The district or state's attorney or his assistant may attend the sittings of the grand jury and assist in the examination of witnesses; but he can not lawfully take part in the deliberations of that body.³⁸

§ 2693. Stenographer before grand jury.—The fact that a stenographer, in the employ of the attorney for the state, appeared before the grand jury and took down the evidence of witnesses upon whose testimony an indictment was found is no good reason for quashing the indictment, in the absence of anything showing that the defendant was thereby prejudiced.³⁹

³⁴ Boone v. P., 148 Ill. 440, 449, 36 N. E. 99; S. v. Froiseth, 16 Minn. 296. Compare S. v. Trauger (Iowa, 1898), 77 N. W. 336; P. v. Willis, 52 N. Y. Supp. 808, 23 Misc. 568. See § 2759.

³⁵ 1 Roscoe Cr. Ev. 130, note 1; Ex parte Sontag, 64 Cal. 525, 4 Am. C. R. 523, 2 Pac. 402; Rapalje Law of Witnesses, § 62.

³⁶ Ex parte Sontag, 64 Cal. 525, 4 Am. C. R. 523, 2 Pac. 402.

³⁷ Ex parte Sontag, 64 Cal. 525, 2 Pac. 402, 4 Am. C. R. 523; S. v.

Johnson, 115 Mo. 480, 22 S. W. 463, 9 Am. C. R. 12.

³⁸ S. v. Aleck, 41 La. 83, 5 So. 639; Miller v. S. (Fla.), 28 So. 208; Shattuck v. S., 11 Ind. 473; Com. v. Bradney, 126 Pa. St. 199, 17 Atl. 600; Shoop v. P., 45 Ill. App. 110; S. v. Baker, 33 W. Va. 319, 10 S. E. 639; S. v. Whitney, 7 Or. 386.

³⁹ S. v. Bates, 148 Ind. 610, 48 N. E. 2; S. v. Brewster, 70 Vt. 341, 40 Atl. 1037, 42 L. R. A. 444. See Wilson v. S. (Tex. Cr.), 51 S. W. 916. *Contra*, S. v. Bowman, 90 Me. 363, 38 Atl. 331.

§ 2694. **Unauthorized person before grand jury.**—Where a stranger or unauthorized person appears before the grand jury and takes part in their proceedings or in any manner influences that body in their deliberations in the finding of an indictment, such indictment will, on motion, be quashed.⁴⁰

§ 2695. **Incompetent evidence, with competent.**—The fact that one of the witnesses upon whose testimony an indictment was found was not sworn before the grand jury is no ground for quashing the indictment unless it further appears that his testimony was the only evidence in support of the indictment.⁴¹

ARTICLE VII. PRESENTING MATTERS TO GRAND JURY.

§ 2696. **Presenting matters to grand jury.**—The usual method of presenting criminal matters to the grand jury is by binding the accused over or by committing him, by a magistrate or justice of the peace. To this method there are some exceptions: (1) Matters of general public import, to which the attention of the grand jury is directed by the court. (2) Matters presented by the state's attorney without a previous binding over. (3) Matters which originate by the presentment of a grand jury within their own knowledge.⁴²

ARTICLE VIII. FEDERAL GRAND JURY.

§ 2697. **Congress adopting state laws.**—The provision of the revised statutes of the state of New York prescribing objections that may be taken to the organization of the grand jury are by the act of congress made applicable to the federal courts, congress having adopted the laws of the respective states as to the mode of selecting jurors.⁴³

⁴⁰ S. v. Clough, 49 Me. 573; P. v. Sellick, 4 N. Y. Cr. 329; Nixon v. S., 68 Ala. 535; S. v. Fertig, 98 Iowa 139, 67 N. W. 87. See P. v. Shea, 147 N. Y. 78, 41 N. E. 505; S. v. Bacon, 77 Miss. 366, 27 So. 563.

⁴¹ Lennard v. S., 104 Ga. 546, 30 S. E. 780; P. v. Molineux, 58 N. Y. Supp. 155, 27 Misc. 79. See P. v. Winant, 53 N. Y. Supp. 695, 24 Misc. 361; P. v. Metropolitan Traction Co., 50 N. Y. Supp. 117, 12 N. Y. Cr.

405; P. v. Hays, 59 N. Y. Supp. 761, 28 Misc. 93. See "Indictments."

⁴² Com. v. Green, 126 Pa. St. 531, 17 Atl. 878, 8 Am. C. R. 393; S. v. Skinner, 34 Kan. 256, 8 Pac. 420, 6 Am. C. R. 315; 1 Bish. Cr. Proc., § 864; Blaney v. S., 74 Md. 153, 21 Atl. 547; S. v. Terry, 30 Mo. 368; Groves v. S., 73 Ga. 205.

⁴³ U. S. v. Tallman, 10 Blatchf. (U. S.) 21, 1 Green C. 419.

CHAPTER LXXVI.

INDICTMENTS.

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ARTICLE I. INDICTMENT DEFINED.

§ 2698. **Indictment defined**—When a record.—An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury.¹ On the return of an indictment into court by the grand jury it passes into the record of the court, and becomes effectual. It requires no further authentication.²

§ 2699. **Every material fact to be alleged**.—It is an elementary and fundamental principle that every material fact essential to the commission of a criminal offense must be distinctly alleged in the indictment.³

ARTICLE II. AVERMENTS TO BE POSITIVE.

§ 2700. **Averments to be positive**—Not inferential.—The allegations of fact should be direct and positive, and not argumentative or inferential.⁴ An indictment, in alleging that the defendant, at the time of his second marriage, knew that his first wife was living, is not an allegation that his first wife was in fact living. This is merely inference and is argumentative.⁵ An indictment alleging that the defendants “did stand by, aid, abet, assist, advise, counsel and encourage” two persons, naming them, “to feloniously, unlawfully, deliberately, premeditatedly and of their malice aforethought to kill and murder one Chee Long Tong,” is fatally defective. It does not allege that any person was actually murdered.⁶

ARTICLE III. DEFENDANT'S CONSTITUTIONAL RIGHT.

§ 2701. **Apprising the accused**.—The purpose of the constitutional provision giving the accused the right “to demand the nature

¹ 4 Bl. Com. 302. See “Indictment” generally under each criminal offense.

² S. v. Ivey, 100 N. C. 539, 5 S. E. 407, 7 Am. C. R. 246; S. v. Cox, 6 Ired. (N. C.) 440; 4 Bl. Com. 301.

³ Williams v. P., 101 Ill. 385.

⁴ Prichard v. P., 149 Ill. 50, 36 N. E. 103; Com. v. Dean, 110 Mass. 64, 2 Green C. R. 260; S. v. La Bore, 26 Vt. 765; Dreyer v. P., 176 Ill. 597, 52 N. E. 372; Maynard v. P., 135 Ill. 416, 25 N. E. 740; P. v. Crenshaw,

46 Cal. 65, 2 Green C. R. 426. See Keller v. S., 51 Ind. 111, 1 Am. C. R. 217; 1 Bish. Cr. Proc., §§ 508, 555; S. v. Nelson, 79 Minn. 373, 82 N. W. 650.

⁵ Prichard v. P., 149 Ill. 54, 36 N. E. 103; Anderson v. S., 38 Fla. 3, 20 So. 765; S. v. Paul, 69 Me. 215; Dreyer v. P., 176 Ill. 597, 52 N. E. 372.

⁶ P. v. Crenshaw, 46 Cal. 65, 2 Green C. R. 426; Anderson v. S., 38 Fla. 3, 20 So. 765 (receiving).

and cause of the accusation against him" is to secure the accused such specific designation of the offense charged as will enable him to prepare fully for his defense, and plead the judgment in bar of a subsequent prosecution for the same offense.⁷ To charge in the indictment that the defendant, "a record, to wit, the collector's book of Bloomington township, McLean county and state of Illinois, then and there, feloniously, willfully and maliciously, did deface and falsify, contrary, etc.," sufficiently identified the offense, and stated the facts apprising the accused with reasonable certainty of the nature and cause of the accusation against him.⁸ An indictment charged that the defendant, at a certain time and place named, committed "the infamous crime against nature upon and with L. K., a man then and there being." Held sufficient to apprise the defendant of the nature of the charge against him, being in the terms and language of the statute.⁹

§ 2702. **Apprising defendant—Defective.**—The indictment charged that the accused, "on the 23d day of February, A. D. 1871, in the county and state aforesaid, "did feloniously, willfully, premeditatedly, and with malice aforethought, in and upon one Daniel Jackson, with a shotgun, make an assault, and him, the said Daniel Jackson, with the shotgun aforesaid, did then and there, feloniously, willfully, premeditatedly, and with malice aforethought, kill and murder, against the peace and dignity of the state of Arkansas." Held defective, in that it does not state the manner and circumstances attending the use of the gun with such certainty as would ordinarily enable a defendant to make a complete defense, if innocent.¹¹

ARTICLE IV. EXTRINSIC FACTS NECESSARY.

§ 2703. **Averment of extrinsic facts, when.**—When the subject-matter of the indictment can not be brought within the meaning of

⁷ West v. P., 137 Ill. 196, 27 N. E. 34, 34 N. E. 254; U. S. v. Simmons, 96 U. S. 362; Murphy v. S., 28 Miss. 637; Evans v. U. S., 153 U. S. 584, 14 S. Ct. 934, 939, 9 Am. C. R. 668; S. v. Mace, 76 Me. 64; Landringham v. S., 49 Ind. 186; Pettibone v. U. S., 148 U. S. 197, 13 S. Ct. 542; In re Greene, 52 Fed. 104.

⁸ Loehr v. P., 132 Ill. 508, 24 N. E. 68; Miller v. P., 2 Scam. (Ill.) 233; Cannady v. P., 17 Ill. 158; Lyons v. P., 68 Ill. 273; Cole v. P., 84 Ill. 216; Fuller v. P., 92 Ill. 182; West

v. P., 137 Ill. 198, 27 N. E. 34, 34 N. E. 254.

⁹ Honselman v. P., 168 Ill. 174, 48 N. E. 304. The statute relating to the crime against nature is not limited to the act of sodomy, but includes within its meaning, all forms of bestial or unnatural copulation, as, by using the mouth: Honselman v. P., 168 Ill. 174, 48 N. E. 304.

¹¹ Edwards v. S., 27 Ark. 493, 1 Green C. R. 742-3. See "Homicide." But *contra*, P. v. Sanford, 43 Cal. 29, 1 Green C. R. 683.

the statute without the aid of extrinsic evidence, it is necessary, besides charging the offense in the words of the statute, to aver such facts and circumstances as may be necessary to bring the matter within the meaning of it, so as to characterize the crime alleged and to make it judicially appear, in order that the accused may be informed of the true nature and cause of the accusation against him.¹² In an indictment on a statute—when the language of the statute creating the offense does not describe it—the pleader may be bound to set forth the acts specifically, to apprise the defendant of the offense with which he is charged.¹³

ARTICLE V. IN STATUTORY WORDS.

§ 2704. **Words of statute not sufficient.**—In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless those words, of themselves, fully, directly and expressly, without any uncertainty, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question (relating to the uttering and publishing forged documents), read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent.¹⁴

§ 2705. **Statutory words insufficient—Bank insolvent.**—An indictment charging that the defendant, the cashier of a certain bank, received from a person named a certain sum of money on deposit, “then and there knowing and having good reason to believe that said bank was then and there insolvent, without then and there or at any other

¹² *S. v. West*, 10 Tex. 555; *Williams v. S.*, 42 Miss. 328; *Davis v. Com.*, 13 Bush (Ky.) 318, 2 Am. C. R. 164; *Jesse v. S.*, 28 Miss. 109; *Huntsman v. S.*, 12 Tex. App. 646; *S. v. Fiske*, 66 Vt. 434, 29 Atl. 633, 10 Am. C. R. 11. See *Evans v. U. S.*, 153 U. S. 584, 14 S. Ct. 934, 939, 9 Am. C. R. 668; *Cochran v. P.*, 175 Ill. 34, 51 N. E. 845.

¹³ *West v. P.*, 137 Ill. 196, 27 N. E. 34, 34 N. E. 254; *Johnson v. P.*, 113 Ill. 99; *Cochran v. P.*, 175 Ill. 34, 51 N. E. 845; *Sullivan v. S.*, 67 Miss. 346, 7 So. 275, 8 Am. C. R. 658; *McNair v. P.*, 89 Ill. 443; *Kibs*

v. P., 81 Ill. 600; *P. v. Wilber*, 4 Park. Cr. (N. Y.) 19; *Clark v. S.*, 19 Ala. 552. See *Titus v. S.*, 49 N. J. L. 36, 7 Atl. 621, 7 Am. C. R. 255; *U. S. v. Simmons*, 96 U. S. 362; *S. v. Fiske*, 66 Vt. 434, 29 Atl. 633, 10 Am. C. R. 11; *S. v. Smith*, 17 R. I. 371, 22 Atl. 282; *S. v. Bruce*, 5 Or. 68.

¹⁴ *U. S. v. Carll*, 105 U. S. 611, 4 Am. C. R. 246, citing *Com. v. Filburn*, 119 Mass. 297. The indictment failed to allege that the defendant knew the document to be forged and counterfeit and was for that reason defective.

time previously informing said depositor of such insolvent condition of said bank," is defective in not alleging the insolvency of the bank, though the indictment is in the language of the statute.¹⁵

§ 2706. Statutory words not sufficient—Embezzlement.—Charging the defendant with the crime of embezzlement in the language of the statute is not sufficient. The defendant's fiduciary character must be alleged.¹⁶

§ 2707. Statutory words not sufficient—Hiring horse.—Cases occur where, from the nature of the offense, greater particularity is necessary than to describe a statutory offense in the words of the statute.¹⁷ The statute provides that "every person who shall hire any horse or team, or use any horse or team hired by others, and shall willfully make any false statement or misrepresentation relative to the distance, time, place or manner of using or driving the same, with intent to defraud the owner thereof, or any other person, shall be punished." Alleging the offense in the language of this statute is not sufficient. It is absolutely necessary that the misrepresentation and the person to whom made should be alleged with particularity.¹⁸

§ 2708. Words of statute sufficient.—Where the offense is purely statutory, having no reference to the common law, and specifically sets out what acts shall constitute the offense, it is, as a general rule, sufficient in an indictment to charge the defendant with the acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.¹⁹ If the

¹⁵ *S. v. Bardwell*, 72 Miss. 535, 18 So. 377, 10 Am. C. R. 71.

¹⁶ *Moore v. U. S.*, 160 U. S. 268, 10 Am. C. R. 284, 16 S. Ct. 294. The statute in this case provides that "any person who shall embezzle, steal or purloin any money, property, record, voucher, or valuable thing whatever," of the United States, shall be punished. See "Embezzlement."

¹⁷ *S. v. Jackson*, 39 Conn. 229, 1 Green C. R. 294; *S. v. Mitchell* (W. Va.), 35 S. E. 845.

¹⁸ *S. v. Jackson*, 39 Conn. 229, 1 Green C. R. 294.

¹⁹ *Loehr v. P.*, 132 Ill. 509, 24 N. E. 68; *S. v. Agee*, 68 Mo. 264, 3 Am. C. R. 9; *Com. v. Grinstead*, 21 Ky.

L. 1444, 55 S. W. 720; *Sparrenberger v. S.*, 53 Ala. 481, 2 Am. C. R. 470; *Bolen v. P.*, 184 Ill. 339, 56 N. E. 408; *Graham v. P.*, 181 Ill. 477, 55 N. E. 179; *West v. P.*, 137 Ill. 200, 27 N. E. 34, 34 N. E. 254; *Fuller v. P.*, 92 Ill. 184; *McCutcheon v. P.*, 69 Ill. 602; *Cole v. P.*, 84 Ill. 216; *Wariner v. P.*, 74 Ill. 346; *Lyons v. P.*, 68 Ill. 274; *S. v. Trolson*, 21 Nev. 419, 32 Pac. 930, 9 Am. C. R. 245; *S. v. Mohr*, 68 Mo. 303, 3 Am. C. R. 64; *P. v. Tomlinson*, 66 Cal. 345, 5 Pac. 509; *Com. v. Bennett*, 118 Mass. 451; *S. v. Guiton*, 51 La. 155, 24 So. 784; *P. v. Knowlton*, 122 Cal. 357, 55 Pac. 141; *Paynter v. Com.*, 21 Ky. L. 1562, 55 S. W. 687.

indictment states the offense in the language of the statute which created the offense, that, under section 468 of the Criminal Code of Illinois, is ordinarily sufficient.²⁰

§ 2709. Words of statute—Statutory rule.—Section 6 of Division 11 of the Criminal Code of Illinois is a general rule of pleading (stating the offense in the language of the statute), applicable to all cases within its terms, without regard to the date of the enactment of the statute under which the cases shall arise.²¹

§ 2710. Words equivalent to statute.—It is not necessary to use the words of the statute, provided words of equivalent meaning are used, in stating the offense in the indictment.²²

ARTICLE VI. JOINING OFFENSES.

§ 2711. Distinct felonies can not be joined.—Separate and distinct felonies can not be joined in different counts in the same indictment.²³ Felonies and misdemeanors may be joined in the same indictment, though based on different statutes, but all the counts must relate to one and the same transaction.²⁴ Forging three different receipts of three different persons to the same document, to wit, a fee bill, constitutes three different offenses, and they can not be joined in the same indictment, being felonies.²⁵

²⁰ *Mettler v. P.*, 135 Ill. 413, 25 N. E. 748; *Loehr v. P.*, 132 Ill. 509, 24 N. E. 68; *P. v. West*, 106 N. Y. 293, 12 N. E. 610; *Seacord v. P.*, 121 Ill. 629, 13 N. E. 194; *S. v. Sutton*, 116 Ind. 527, 19 N. E. 602, 8 Am. C. R. 452.

²¹ *Lyons v. P.*, 68 Ill. 274.

²² *Riggs v. S.*, 104 Ind. 261, 3 N. E. 886, 6 Am. C. R. 395; *S. v. Guiton*, 51 La. 155, 24 So. 784. "Personal injury" is equivalent to "bodily injury:" *S. v. Clayborne*, 14 Wash. 622, 45 Pac. 303.

²³ *Kotter v. P.*, 150 Ill. 441, 445, 37 N. E. 932; *Glover v. S.*, 109 Ind. 391, 10 N. E. 282, 7 Am. C. R. 118; *P. v. Aiken*, 66 Mich. 400, 33 N. W. 821, 7 Am. C. R. 345; *Bennett v. P.*, 96 Ill. 602; *Lyons v. P.*, 68 Ill. 273; *Langford v. P.*, 134 Ill. 450, 25 N. E. 1009.

²⁴ *Herman v. P.*, 131 Ill. 594, 22 N. E. 471; *Thompson v. P.*, 125 Ill. 256, 17 N. E. 749; *Lyons v. P.*, 68 Ill. 271; *George v. P.*, 167 Ill. 417, 47 N. E. 741; *Glover v. S.*, 109 Ind. 391, 10 N. E. 282, 7 Am. C. R. 117; *Thomas v. P.*, 113 Ill. 531; *S. v. Fitzsimon*, 18 R. I. 236, 27 Atl. 446, 9 Am. C. R. 345; *Cawley v. S.*, 37 Ala. 152; *S. v. Stewart*, 59 Vt. 273, 9 Atl. 559; *Staeger v. Com.*, 103 Pa. St. 469, 472; *Stevick v. Com.*, 78 Pa. St. 460; *Stevens v. S.*, 66 Md. 202, 7 Atl. 254; *S. v. Lincoln*, 49 N. H. 464; *Beasley v. P.*, 89 Ill. 573. See *West v. P.*, 137 Ill. 202, 27 N. E. 34, 34 N. E. 254.

²⁵ *Kotter v. P.*, 150 Ill. 441, 37 N. E. 932; *Tobin v. P.*, 104 Ill. 567. See "Indictments" generally, under "Burglary" and each of the other crimes.

§ 2712. Joining offenses—One offense part of another.—Where one felony is introductory to and forms part of another felony (as the same person forging an instrument and passing it), they may be joined in the same indictment, though but one conviction can be had on the indictment.²⁶

§ 2713. Joining cognate offenses.—It has always been recognized as proper practice to unite cognate offenses in the same indictment, and, indeed, the court will, in a proper case, require a consolidation of separate indictments and treat them as counts in one indictment, where the accused will suffer no oppression by such practice.²⁷ The offense of burglary and an assault with intent to commit rape are not cognate offenses which may be joined in the same indictment.²⁸

§ 2714. Joining distinct misdemeanors.—Separate and distinct offenses, where they are all misdemeanors of a kindred character and charged against the same person, such as several distinct, unlawful sales of intoxicating liquors, may be joined in separate counts in one indictment or information.²⁹

§ 2715. One crime element of another.—Where one crime becomes a constituent element of another, such crime must be pleaded with the same formality as is required when it forms the sole basis of the indictment.³⁰

ARTICLE VII. PRINCIPAL AND ACCESSORY.

§ 2716. Accessory is principal.—Under the statute of Illinois, an accessory at or before the fact is a principal, and must be indicted as principal, and not otherwise.³¹ Charging in the indictment that the defendants did aid, counsel, advise and abet another person, naming him, to commit the crime of murder, as alleged against the perpe-

²⁶ *Parker v. P.*, 97 Ill. 37.

²⁷ *S. v. Toole*, 106 N. C. 736, 11 S. E. 168, 8 Am. C. R. 611; *Whar. Cr. Pl. & Pr.* (9th ed.), § 910; *S. v. McNeill*, 93 N. C. 552; *Com. v. Miller*, 107 Pa. St. 276, 5 Am. C. R. 301. See 2 *McClain Cr. L.*, § 1275.

²⁸ *S. v. Fitzsimon*, 18 R. I. 236, 9 Am. C. R. 343, 27 Atl. 446.

²⁹ *S. v. Skinner*, 34 Kan. 256, 8 Pac. 420, 6 Am. C. R. 214; 2 *McClain Cr. L.*, § 1275.

³⁰ *Titus v. S.*, 49 N. J. L. 36, 7 Atl. 621, 9 Cr. L. Mag. 354. See *Johnson v. P.*, 22 Ill. 316; *Landringham v. P.*, 49 Ind. 186, 1 Am. C. R. 106.

³¹ *Coates v. P.*, 72 Ill. 303; *Usseltown v. P.*, 149 Ill. 614, 36 N. E. 952; *Fixmer v. P.*, 153 Ill. 129, 38 N. E. 667; *Dempsey v. P.*, 47 Ill. 326; *Baxter v. P.*, 3 Gilm. (Ill.) 383. See "Principal and Accessory." *Contra*, *P. v. Rozelle*, 78 Cal. 86, 20 Pac. 36; *P. v. Campbell*, 40 Cal. 129.

trator, is not sufficient.³² Two persons were indicted jointly for murder, the indictment containing two counts. The first count charged one of them as principal and the other as accessory; and the second count charged the latter as principal and the former as accessory. Held proper pleading.³³

ARTICLE VIII. DUPLICITY, WHEN.

§ 2717. **Duplicity—Several offenses in one count.**—The statute of Maine subjects traveling dealers and peddlers in intoxicating and fermented liquors to a penalty of not less than twenty nor more than one hundred dollars “for each offer to take an order, and for each order taken and for each sale so made.” This statute defines three substantive offenses, each complete in itself, and to join them in the same count would make the indictment bad for duplicity.³⁴

§ 2718. **Duplicity—Two felonies.**—A count in the information charged that a female was taken away by the accused for prostitution and concubinage. This is a joinder of two distinct felonies in the same count. Two or more offenses may, under proper circumstances, be joined in one information or indictment, but they must be in separate counts. There are exceptions to this rule.³⁵ An indictment which alleged that the defendant made a forcible entry into two closes of meadow or pasture was held bad.³⁶

§ 2719. **Duplicity—Nuisance by sale of liquors.**—An indictment charging the accused of the crime of nuisance, by keeping a place for the unlawful sale of liquors and allowing gambling and drunkenness therein, and of selling intoxicating liquor to minors, habitual drunkards and to intoxicated persons, to the disturbance of others and contrary to law, is not bad for duplicity.³⁷

³² *Usselson v. P.*, 149 Ill. 612, 36 N. E. 952; *Fixmer v. P.*, 153 Ill. 128, 38 N. E. 667.

³³ *P. v. Valencia*, 43 Cal. 552, 1 Green C. R. 745.

³⁴ *S. v. Smith*, 61 Me. 386, 2 Green C. R. 463; *S. v. Burgess*, 40 Me. 592-4.

³⁵ *S. v. Goodwin*, 33 Kan. 538, 6 Pac. 899, 5 Am. C. R. 4.

³⁶ *S. v. Dyer*, 67 Vt. 690, 32 Atl. 814, 10 Am. C. R. 234 (citing

Speart's Case, 2 Rolle Abr. 81; *King v. North*, 6 Dowl. & R. 143; *Rex v. Stoughton*, 2 Strange 900; *Com. v. Grey*, 2 Gray (Mass.) 501; *P. v. Hood*, 6 Cal. 236; *Whiteside v. S.*, 4 Coldw. (Tenn.) 175; *Slover v. Ter.*, 5 Okl. 506, 49 Pac. 1009.

³⁷ *S. v. Winebrenner*, 67 Iowa 230, 6 Am. C. R. 290, 25 N. W. 146. See *P. v. Van Alstine*, 57 Mich. 69, 6 Am. C. R. 276, 23 N. W. 594.

§ 2720. **Duplicity—Poisoning several by one act.**—Administering poison to three persons at the same time by the same act, or assaulting several persons by the same act, or murdering two or more persons by the same act, may be alleged in the same count.³⁸

§ 2721. **Duplicity—Several acts enumerated.**—Where the statute enumerates several things or acts in the alternative it is usually construed as creating but a single offense, and all the acts may be alleged in the same count of the indictment by using the word “and” to connect the several acts enumerated in the statute.³⁹

ARTICLE IX. DESCRIPTIVE AVERMENTS.

§ 2722. **Description, when surplusage.**—Whenever a description or averment can be stricken out without affecting the charge against the prisoner, and without vitiating the indictment, it may, on the trial, be treated as surplusage and rejected.⁴⁰ Any words used in describing the offense which are not part of the statutory description of the offense may be treated as surplusage.⁴¹ An indictment charged that the defendant committed a forgery by the alteration of an order drawn by one Grubb “on John Irwin, Robert Irwin and John Williams, composing the firm of J. Irwin & Co.,” with the intent to defraud “John Irwin, Robert Irwin and John Williams, composing the firm of Irwin & Co.” Another indictment was found against the defendant precisely like the first, with the exception that John Irwin, Robert Irwin and John Williams were described as “composing the firm of John Irwin & Co.” Held that the indictments were the same, the

³⁸ *Ben v. S.*, 22 Ala. 9; *Chivarrio v. S.*, 15 Tex. App. 330; *Wilkinson v. S.*, 77 Miss. 705, 27 So. 639; *Whar. Cr. Ev.*, § 589. *Contra*, *P. v. Warren*, 1 Park. Cr. (N. Y.) 338.

³⁹ *Blemer v. P.*, 76 Ill. 271; *Bradley v. S.*, 20 Fla. 738, 5 Am. C. R. 620; *Seacord v. P.*, 121 Ill. 629, 13 N. E. 194; *Rosenbarger v. S.*, 154 Ind. 425, 56 N. E. 914; *Com. v. Kolb*, 13 Pa. Sup. Ct. 347; *Howard v. P.* (Colo.), 61 Pac. 595; *Thompson v. S.*, 105 Tenn. 177, 58 S. W. 213; *S. v. Hastings*, 53 N. H. 452; *S. v. Biell*, 21 Wis. 204; *Adams v. P.*, 25 Colo. 532, 55 Pac. 806; *Marshall v. S.*, 123 Ind. 128, 23 N. E. 1141; *S. v. Townsend*, 7 Wash. 462, 35 Pac.

367. See *S. v. June* (Kan.), 61 Pac. 804 (false pretense).

⁴⁰ 1 *Chitty Cr. L.*, 211-216; 2 *Russell Cr.* 707; *Durham v. P.*, 4 *Scam.* (Ill.) 172; *Sutton v. P.*, 145 Ill. 286, 34 N. E. 420; *Morgenstern v. Com.*, 27 *Gratt. (Va.)* 1018, 2 *Am. C. R.* 479; 1 *McClain Cr. L.*, § 607. See *Childress v. S.*, 86 Ala. 77, 5 So. 775; *Paine v. S.*, 89 Ala. 26, 8 So. 133; *Com. v. Lamb*, 67 *Mass.* 493; *Kollenberger v. P.*, 9 *Colo.* 233, 11 *Pac.* 101; *S. v. Lee Ping Bow*, 10 *Or.* 27; *S. v. Reece*, 27 *W. Va.* 375.

⁴¹ *S. v. Shenton*, 22 *Minn.* 311; *S. v. Garvey*, 11 *Minn.* 154; *S. v. Hatch*, 94 *Me.* 58, 46 *Atl.* 796.

description being surplusage.⁴² Under a statute which provides that "if any person shall unlawfully know and abuse any female child under the age of ten years he shall be punished by imprisonment in the state prison for life," an information charging that the defendant, "with force and against her will, did ravish and carnally know" the child, instead of charging in the language of the statute, "did unlawfully know and abuse," sufficiently states the offense. The words "with force and against her will," may be treated as surplusage.⁴³

ARTICLE X. IMPLIED AVERMENTS.

§ 2723. **Implied averments—When not implied.**—Whatever is included or necessarily implied from an express allegation need not be otherwise averred: as, to allege in the indictment the detention of a record from the office to which it belongs necessarily implies a detention of it from the officer or lawful custodian of the same.⁴⁴ On a charge of breaking and entering a railroad car, with intent to steal, the ownership of the car will not be implied from an allegation in the indictment that the car was on a certain named railway located in the county.⁴⁵

ARTICLE XI. TIME AND PLACE AVERMENTS.

§ 2724. **Place, when material.**—Where an act becomes a crime when done in a particular place the indictment or complaint should set out the act as done in that particular place, otherwise it will be defective.⁴⁶

§ 2725. **Time, "on or about."**—Charging that the offense was committed "on or about" a certain day has been uniformly held to be indefinite and fatal upon demurrer or motion to quash.⁴⁷

⁴² *Durham v. P.*, 4 Scam. (Ill.) 173.

⁴³ *S. v. Erickson*, 45 Wis. 86, 3 Am. C. R. 339; *Eggart v. S.*, 40 Fla. 527, 25 So. 144.

⁴⁴ *Baysinger v. P.*, 115 Ill. 419, 5 N. E. 375; *Scott v. P.*, 141 Ill. 204, 30 N. E. 329; *Maynard v. P.*, 135 Ill. 427, 25 N. E. 740; *Halleck v. S.*, 11 Ohio 400; *P. v. Ah Bean*, 77 Cal. 12, 18 Pac. 815; *Com. v. Butland*, 119

Mass. 320; *S. v. Cunningham*, 66 Iowa 97, 23 N. W. 280.

⁴⁵ *Cooper v. S.*, 89 Ga. 222, 15 S. E. 291.

⁴⁶ *S. v. Turnbull*, 78 Me. 392, 6 Atl. 1, 6 Am. C. R. 108.

⁴⁷ *Morgan v. S.*, 13 Fla. 671, 1 Green C. R. 362. See *P. v. Schatz*, 15 N. Y. Cr. 38, 64 N. Y. Supp. 127, 50 App. Div. 544. *Contra*, *Scott v. S.* (Tex. Cr.), 56 S. W. 61.

§ 2726. **Time**—"Then and there."—If the words "then and there" precede every material allegation (after the time and place have been stated at the beginning of the count) it is sufficient.⁴⁸ Time and place ought in general to be mentioned, not merely at the beginning of the indictment or count, but must be repeated to every issuable and triable fact.⁴⁹

ARTICLE XII. NEGATIVE AVERMENTS.

§ 2727. **Exceptions, when to negative, when not.**—Where the same clause defining a crime contains an exception it is necessary to negative such exception in the indictment.⁵⁰ In alleging an exception when required to do so, it need not be done by using the exact words of the proviso; equivalent words may be used.⁵¹ Where the exception is not incorporated with the clause defining the offense, nor connected with it in any manner by words of reference, it need not be negated, as, in such cases, it is not a constituent part of the offense, but is a matter of defense and must be plead or given in evidence by the accused.⁵²

§ 2728. **Words indicating negative.**—The word "except" is not necessary in order to constitute an exception within the rule. The words "unless," "other than," "not being," "not having," etc., have the same legal effect and require the same form of pleading.⁵³

§ 2729. **The word "or" meaning "to wit."**—When "or" in a statute is used in the sense of "to wit," that is, explaining what precedes,

⁴⁸ *Palmer v. P.*, 138 Ill. 362, 28 N. E. 130; *S. v. Hurley*, 71 Me. 354; 10 Am. & Eng. Encyc. Law 588. See *S. v. Taylor*, 21 Mo. 480; *S. v. Bailey*, 21 Mo. 488; *S. v. Cherry*, 3 Murph. (N. C.) 7.

⁴⁹ *Wiedemann v. P.*, 92 Ill. 314; *Jackson v. P.*, 18 Ill. 269; 1 Bish. Cr. Proc., § 408; 1 Bish. Cr. L., §§ 219, 222. But see *Bobel v. P.*, 173 Ill. 26, 50 N. E. 322. *Contra*, *S. v. Willis*, 78 Me. 70, 2 Atl. 848, 6 Am. C. R. 287; *Fisk v. S.*, 9 Neb. 62, 2 N. W. 381; *Com. v. Keyon*, 83 Mass. 6; *Com. v. Langley*, 80 Mass. 21; *S. v. Marchant*, 15 R. I. 539, 9 Atl. 902; *S. v. Sparrow*, 2 Tayl. (N. C.) 93; *Welch v. S.*, 104 Ind. 347, 3 N. E. 850, 5 Am. C. R. 450.

⁵⁰ *Beasley v. P.*, 89 Ill. 577; *Metzker v. P.*, 14 Ill. 102; *Lequat v. P.*, 11 Ill. 331; *S. v. Marks* (N. J. L.),

46 Atl. 757; *U. S. v. Cook*, 17 Wall. (U. S.) 168, 2 Green C. R. 90; *Com. v. Hart*, 11 Cush. (Mass.) 132, 2 Green C. R. 248. See also *S. v. O'Donnell*, 10 R. I. 472, 2 Green C. R. 378; *S. v. Williams*, 20 Iowa 98; *S. v. Cassidy*, 52 N. H. 500, 1 Green C. R. 163.

⁵¹ *Beasley v. P.*, 89 Ill. 577.

⁵² *U. S. v. Cook*, 17 Wall. (U. S.) 168, 2 Green C. R. 95; *Com. v. Hart*, 11 Cush. (Mass.) 130, 2 Green C. R. 250; *S. v. Abbey*, 29 Vt. 66; *Rex v. Baxter*, 2 East P. C. 781; *Dreyer v. P.*, 188 Ill. 44, 58 N. E. 620. See *S. v. Knowles*, 90 Md. 646, 45 Atl. 877, 49 L. R. A. 695.

⁵³ *Com. v. Hart*, 11 Cush. (Mass.) 130, 2 Green C. R. 251; 1 East P. C. 166, 167; *S. v. Butler*, 17 Vt. 145; *Com. v. Maxwell*, 2 Pick. (Mass.) 139.

making it signify the same thing, an indictment will be well framed which adopts the words of the statute.⁵⁴

§ 2730. **Date, to be positive—Impossible date.**—The indictment must aver the date positively: it can not be determined by inference; and it must set forth some particular day within the statute of limitations.⁵⁵ An indictment which states an impossible date, as “the 16th day of August, 18184,” should, on motion, be quashed.⁵⁶

§ 2731. **Date alleged presumed true.**—In determining the sufficiency of an indictment the court is to take the date alleged as the true date.⁵⁷

ARTICLE XIII. OFFENSE, WHEN BARRED.

§ 2732. **Offense, barred by limitation—Averments.**—Accused persons may avail themselves of the statute of limitations by special plea or by evidence under the general issue, but courts of justice, if the statute contains exceptions, will not quash an indictment because it appears upon its face that it was not found within the period prescribed in the limitation, as such a proceeding would deprive the prosecutor of the right to reply or give evidence, as the case may be, that the defendant fled from justice and was within the exception contained in the statute.⁵⁸ But on the contrary, other courts have held that if, from the face of the indictment, the offense is shown to have been barred by the statute of limitation, the indictment should be quashed.⁵⁹

§ 2733. **“Tenor”—Strict accuracy—“As follows.”**—The word tenor binds the pleader to the strictest accuracy.⁶⁰ “As follows” is quite

⁵⁴ *Blemer v. P.*, 76 Ill. 271. See *Cunningham v. S.*, 5 W. Va. 508, 2 Green C. R. 669. But *contra*, *S. v. Green*, 3 Heisk. (Tenn.) 131, 1 Green C. R. 460.

⁵⁵ *Whitesides v. P.*, Breese (Ill.) 21; *S. v. Fenlason*, 79 Me. 117, 8 Atl. 459, 7 Am. C. R. 495. *Contra*, *S. v. Brooks*, 33 Kan. 708, 7 Pac. 591, 6 Am. C. R. 302.

⁵⁶ *Murphy v. S.*, 106 Ind. 96, 7 Am. C. R. 264, 5 N. E. 767; *Com. v. Doyle*, 110 Mass. 103, 2 Green C. R. 261.

⁵⁷ *Dreyer v. P.*, 176 Ill. 590, 598, 52 N. E. 372.

⁵⁸ *U. S. v. Cook*, 17 Wall. (U. S.)

168, 2 Green C. R. 94; *Hatwood v. S.*, 18 Ind. 492; *Com. v. Ruffner*, 28 Pa. St. 260; *S. v. Hussey*, 7 Iowa 409; *S. v. Howard*, 15 Rich. (S. C.) 282. *Contra*, *McLane v. S.*, 4 Ga. 340; *P. v. Miller*, 12 Cal. 294; *S. v. Bryan*, 19 La. 435.

⁵⁹ *Garrison v. P.*, 87 Ill. 97; *Lamkin v. P.*, 94 Ill. 503; *Rosenberger v. Com.*, 118 Pa. St. 77, 11 Atl. 782; *S. v. Hoke*, 84 Ind. 137. See *S. v. Robinson*, 29 N. H. 274; *P. v. Miller*, 12 Cal. 29.

⁶⁰ *Brown v. P.*, 66 Ill. 346, citing *Rex v. Powell*, 2 East P. C. 976.

as certain as the words, "in the words and figures as follows," in setting out and introducing a document into an indictment.⁶¹

ARTICLE XIV. AVERMENTS OF OWNERSHIP.

§ 2734. **Stating ownership—"Belonging to."**—In alleging the ownership of a house it is sufficient to designate it as the house "of," or "belonging to," the owner.⁶²

§ 2735. **Averment of specific ownership.**—Alleging in the indictment that a car broken into was in the possession, care, control and custody of the company, sufficiently alleges a special ownership of the car.⁶³

§ 2736. **Averment relating to company.**—If the charge is an intent to injure a body of persons by a company name, all the persons named should be stated, unless such company is incorporated.⁶⁴

§ 2737. **Ownership—Corporation owner.**—Alleging the property to be that of the American Merchants' Union Express Company, without stating it to be a corporation, is defective pleading.⁶⁵ It is not necessary to the sufficiency of an indictment that it should allege either that the owner of the property is a corporation, or that as such it is capable of owning property.⁶⁶

ARTICLE XV. INDICTING CORPORATIONS.

§ 2738. **Indicting corporations.**—Corporations may be indicted at common law, and it necessarily follows that they may be brought into court by compulsion.⁶⁷ At common law the proper mode of bringing into court a corporation charged by indictment with a criminal offense was done by the issue of a summons and its service upon the principal

⁶¹ Clay v. P., 86 Ill. 150.

⁶² S. v. Fox, 80 Iowa 312, 45 N. W. 874; Com. v. Williams, 56 Mass. 582; S. v. Tyrrell, 98 Mo. 354, 11 S. W. 734.

⁶³ S. v. McIntyre, 59 Iowa 264, 13 N. W. 286. See Darter v. Com., 9 Ky. L. 277, 5 S. W. 48.

⁶⁴ Staaden v. P., 82 Ill. 434; Wallace v. P., 63 Ill. 452.

⁶⁵ Wallace v. P., 63 Ill. 452; Pells v. S., 20 Fla. 774, 5 Am. C. R. 97.

⁶⁶ S. v. Shields, 89 Mo. 259, 1 S. W. 336, 6 Am. C. R. 99, citing P. v. McCloskey, 5 Park. Cr. (N. Y.) 57; Com. v. Williams, 2 Cush. (Mass.) 582; S. v. Scripture, 42 N. H. 485.

⁶⁷ Com. v. Lehigh Valley R. Co., 165 Pa. St. 162, 9 Am. C. R. 370, 30 Atl. 836; S. v. Security Bank, 2 S. D. 538, 51 N. W. 337; Boston, etc., R. R. v. S., 32 N. H. 215; S. v. Baltimore, etc., R. Co., 15 W. Va. 362; 3 Greenl. Ev., § 9a.

or head of the company, and if it did not appear, as it only could appear, by a duly constituted attorney, a *distringas* was awarded under which its goods and lands were seized to compel an appearance. But under statutory law a summons seems to be the only process that can issue in criminal and civil actions alike.⁶⁸

ARTICLE XVI. VENUE, ALLEGATION OF.

§ 2739. **Venue, county sufficient**—"County aforesaid."—Alleging the offense in the indictment to have been committed in the county where it is found is sufficient, without any particular designation of the precise locality.⁶⁹ The venue in a second count is sufficiently alleged by the use of the words "county aforesaid."⁷⁰ If the indictment be preceded by the proper venue clause in the margin, "state of Illinois, Lee county," then if in the body of the indictment Lee county be alleged without the use of "said" or "aforesaid," it is sufficient.⁷¹

ARTICLE XVII. INTENT, WHEN ESSENTIAL.

§ 2740. **Intent, statutory words**.—Where intent is made an essential element of an offense as defined by statute, by using the words "with intent," an indictment omitting these words will be defective.⁷²

§ 2741. **Knowledge, when essential**.—In an indictment against an officer for corrupt misbehavior in office it is necessary that an act imputed as misbehavior be distinctly and substantially charged to have been done corruptly and with knowledge that it was wrong.⁷³

§ 2742. **Intent**—"Willfully and corruptly"—"Feloniously."—An indictment charging a justice of the peace with malfeasance in office was held defective in that it did not allege that the accused "willfully and corruptly" refused to issue subpenas.⁷⁴ Where the offense is cre-

⁶⁸ S. v. Western, etc., R. Co., 89 N. C. 584, 4 Am. C. R. 138, citing Boston, etc., R. R. v. S., 32 N. H. 215.

⁶⁹ S. v. Sneed, 16 Lea (Tenn.) 450, 6 Am. C. R. 298, 1 S. W. 282.

⁷⁰ Noe v. P., 39 Ill. 97.

⁷¹ Hanrahan v. P., 91 Ill. 144. See Noe v. P., 39 Ill. 97.

⁷² S. v. Child, 42 Kan. 611, 22 Pac. 721; Hess v. S., 45 N. J. L. 445, 4

Am. C. R. 180; S. v. Harris, 34 Mo. 347; Grayson v. S., 37 Tex. 228. But see S. v. Hays, 41 Tex. 526.

⁷³ Boyd v. Com., 77 Va. 52, 4 Am. C. R. 145, citing S. v. Buxton, 2 Swan (Tenn.) 57; Jacobs v. Com., 2 Leigh (Va.) 709; P. v. Coon, 15 Wend. (N. Y.) 277.

⁷⁴ Jones v. P., 2 Scam. (Ill.) 477; Wickersham v. P., 1 Scam. (Ill.) 129.

ated by statute, and the statute does not use the word "feloniously," there is a difference of opinion among the state courts whether the word must be put in the indictment.⁷⁵

§ 2743. "Unlawfully," "willfully," essential.—Where the word "unlawfully" is used in the description of the offense as defined by statute an indictment will be bad in omitting to describe the act as having been unlawfully done.⁷⁶ Where a statute reads, that "if any person shall willfully kill" certain named animals without the consent of the owner, he shall be punished by fine or imprisonment, and the indictment charged that the defendant did unlawfully shoot and kill, it is defective in not using the word "willfully."⁷⁷

ARTICLE XVIII. TECHNICAL AVERMENTS.

§ 2744. Ornaments or devices on documents.—In setting out an instrument in the indictment, it has never been held necessary to set out the marks and cyphers, ornaments, devices or mottoes on the document.⁷⁸

§ 2745. Agent's authority—Immaterial.—Where an indictment purports to have been drawn by an agent signing the principal's name it is not necessary that the indictment should aver the authority of the agent, or aver that it was so drawn.⁷⁹

§ 2746. Keeping open store—"Shop" or "store."—An instrument was intended to be founded on the clause of the statute to punish Sabbath breaking, which is in these words: "or who, being a merchant or shop-keeper (druggists excepted), keeps open store on that day." The count of an indictment following the words of the statute, except that it substituted the word "shop" for the word "store," alleging, not that the defendant did keep open store, but that he did keep open shop on the Sabbath day, was held defective and held to charge no offense.⁸⁰

⁷⁵ *Bannon v. U. S.*, 156 U. S. 464, 9 Am. C. R. 340, 15 S. Ct. 467; 1 Bish. Cr. Proc., § 535. See Bl. Com. 307.

⁷⁶ *Ter. v. Miera*, 1 N. M. 387; *Ter. v. Armijo*, 7 N. M. 571, 37 Pac. 1117; *S. v. Lutterloh*, 22 Tex. 210.

⁷⁷ *Com. v. Turner*, 8 Bush (Ky.) 1, 1 Green C. R. 293.

⁷⁸ *Cross v. P.*, 47 Ill. 157.

⁷⁹ *Cross v. P.*, 47 Ill. 156; *Whar. Cr. Ev.* (8th ed.), § 696.

⁸⁰ *Sparrenberger v. S.*, 53 Ala. 481, 2 Am. C. R. 471; *Canney v. S.*, 19 N. H. 135. See *Com. v. Wise*, 110 Mass. 181, 2 Green C. R. 264.

§ 2747. **Indictment bad—"Tenement" not house.**—Charging in the indictment that the defendant did keep and maintain a certain common, ill governed and "disorderly tenement," does not state the common law offense of keeping a "disorderly house." The word "tenement," though it includes a house or building, has a much more enlarged signification.⁸¹

ARTICLE XIX. VERBAL INACCURACIES.

§ 2748. **Verbal inaccuracies immaterial.**—The law is well settled that verbal or grammatical inaccuracies which do not affect the sense are not fatal, nor is mere misspelling fatal. And even where the sense or the word may be ambiguous this will not be fatal if it is sufficiently shown by the context in what sense the phrase or word was intended to be used.⁸² But the omission of a letter in spelling a word which is essential to the description of the offense will render the indictment fatally defective, as "larcey" for larceny.⁸³

§ 2749. **Description by initials.**—The name of the person assaulted may be described by his initials when he is as well known by that as by his full name.⁸⁴

ARTICLE XX. CHARGING AN ATTEMPT.

§ 2750. **Attempt—Some act must be alleged.**—An allegation of an attempt to commit an offense is not sufficient without alleging some physical act done by the accused towards its accomplishment, under the statute that "whoever attempts to commit any offense and does any act towards it, but fails," is guilty of an attempt.⁸⁵

⁸¹ Com. v. Wise, 110 Mass. 181, 2 Green C. R. 264.

⁸² S. v. Halida, 28 W. Va. 499, 6 Am. C. R. 408; Shay v. P., 22 N. Y. 317; King v. Stevens, 5 East 244; 2 Hale P. C. 193; Sample v. S., 104 Ind. 289, 6 Am. C. R. 417, 4 N. E. 40; S. v. Lucas, 147 Mo. 70, 47 S. W. 1067.

⁸³ P. v. St. Clair, 56 Cal. 406. See Scroggins v. S., 36 Tex. Cr. 117, 35 S. W. 968.

⁸⁴ Vandermark v. P., 47 Ill. 124; Willis v. P., 1 Scam. (Ill.) 401; S. v.

Wall, 39 Mo. 532; S. v. Seely, 30 Ark. 162; S. v. Skinner, 76 Iowa 147, 40 N. W. 144.

⁸⁵ Thompson v. P., 96 Ill. 161; Cox v. P., 82 Ill. 191; Davis v. S., 87 Ala. 10, 6 So. 266; S. v. Brown, 95 N. C. 685; S. v. Wilson, 30 Conn. 500; Hicks v. Com., 86 Va. 223, 9 S. E. 1024; S. v. Frazier, 53 Kan. 87, 36 Pac. 58; S. v. Frazier, 54 Kan. 719, 39 Pac. 819; 3 Greenl. Ev. (Redf. ed.), § 2; White v. P., 179 Ill. 358, 53 N. E. 570.

§ 2751. "**Attempt**" implies intent.—"It seems impossible to doubt that the only distinction between an intent and an attempt to do a thing is that the former implies purpose only, while the latter implies both the purpose and an actual effort to carry that purpose into execution."⁸⁶

ARTICLE XXI. EXHIBITS: FOREIGN LANGUAGE.

§ 2752. **Foreign language.**—A document in a foreign language must be set out in the original and then the translation set out in the English language.⁸⁷

ARTICLE XXII. CAPTION; CONCLUSION.

§ 2753. "**In name of people.**"—"All indictments shall be carried on in the name and by the authority of the people of the state of Illinois," is the constitutional form given and which must be followed, otherwise the indictment will be bad.⁸⁸

§ 2754. **Caption of indictment.**—The commencement or caption of an indictment can not be considered as the count or any portion thereof. It is but the caption. The caption stands for each count, and a mistake in the time therein stated does not vitiate the indictment.⁸⁹

§ 2755. **Concluding contra statute.**—An indictment concluding "contrary to the form of the statute" clearly indicates a prosecution under a statute, and not the common law, and if there be no statute to cover the facts in the indictment, it should on motion be quashed.⁹⁰ An indictment which does not conclude "against the peace and dignity of the state" is a nullity. The constitution requires that such shall be the conclusion of every indictment.⁹¹ The conclusion of

⁸⁶ 1 Bish. Cr. L., § 728; Scott v. P., 141 Ill. 205, 30 N. E. 329; Gray v. S., 63 Ala. 73. See Atkinson v. S., 34 Tex. Cr. 424, 30 S. W. 1064; Johnson v. S., 14 Ga. 55; Hart v. S., 38 Tex. 382; Jackson v. S., 91 Ala. 55, 8 So. 773; Patrick v. P., 132 Ill. 534, 24 N. E. 619; Graham v. P., 181 Ill. 488, 55 N. E. 179.

⁸⁷ Whar. Cr. Pl. & Pr. (8th ed.), § 181. See "Forgery."

⁸⁸ Whitesides v. P., Breese (Ill.) 21.

⁸⁹ Duncan v. P., 1 Scam. (Ill.) 457; George v. P., 167 Ill. 417, 47 N. E. 741; 1 Bish. Cr. Proc., § 661; 1 Chitty Cr. L. 326.

⁹⁰ Town of Paris v. P., 27 Ill. 75. *Contra*, Heard Cr. Pl. 258. Compare S. v. McDonald, 73 N. C. 346, 1 Am. C. R. 378.

⁹¹ Rice v. S., 3 Heisk. (Tenn.) 215, 1 Green C. R. 369. See Lemons v.

an indictment summing up the offense unnecessarily may be regarded as surplusage.⁹²

ARTICLE XXIII. QUASHING INDICTMENTS.

§ 2756. **Motion to quash indictment.**—A general motion to quash an indictment will be overruled if any of the counts be good. One good count will sustain an indictment.⁹³ Where an indictment for felony contains several counts substantially identical, any one of which is sufficient to receive the evidence, it is error to refuse to quash the unnecessary counts.⁹⁴

§ 2757. **Motion to quash, supported by affidavit.**—Where an affidavit in support of a motion to quash an indictment alleges the facts on information and belief, to show the irregularity of the finding of the indictment, and if the facts so alleged be within the knowledge of the state's attorney, and set out in the affidavit to be within his knowledge, it may be sufficient to call upon him to dispute the correctness of the facts so set forth in the moving affidavit.⁹⁵

§ 2758. **Motion to quash—On evidence of grand juror.**—The testimony of grand jurors is not admissible to impeach their acts in finding an indictment, nor to show that twelve of their number did not concur in the finding.⁹⁶

§ 2759. **Defendant before grand jury.**—Compelling the defendant to testify in his own case before the grand jury is violative of his constitutional right, and is grounds to quash the indictment.⁹⁷

S., 4 W. Va. 755, 1 Green C. R. 666; S. v. Mason, 54 S. C. 240, 32 S. E. 357; Hardin v. S., 106 Ga. 384, 32 S. E. 365; S. v. Wade, 147 Mo. 73, 47 S. W. 1070; S. v. McKettrick, 14 S. C. 346. *Contra*, Snodgrass v. S., 13 Ind. 292; S. v. Burt, 25 Vt. 373; S. v. Berry, 9 N. J. L. 374.

⁹² Hawley v. Com., 78 Va. 847, 850; Henderson v. P., 117 Ill. 268, 7 N. E. 677. See Palmer v. P., 138 Ill. 363, 28 N. E. 130.

⁹³ Thomas v. P., 113 Ill. 535; Hutchison v. Com., 82 Pa. St. 472, 2 Am. C. R. 371; Holliday v. P., 4 Gilm. (Ill.) 111; Townsend v. P., 3 Scam. (Ill.) 329; S. v. Burke, 54 N. H. 92, 2 Green C. R. 368; Hazen v. Com., 11 Harris (Pa.) 355; Com. v. McKisson, 8 S. & R. (Pa.) 420;

Greer v. S., 50 Ind. 267, 19 Am. R. 709; McGuire v. S., 50 Ind. 284; Rasch v. S., 89 Md. 755, 43 Atl. 931.

⁹⁴ West v. P., 137 Ill. 201, 27 N. E. 34, 34 N. E. 254.

⁹⁵ P. v. Briggs, 60 How. Pr. (N. Y.) 17, 2 Cr. L. Mag. 428. See Bonardo v. P., 182 Ill. 422, 55 N. E. 519.

⁹⁶ S. v. Hamilton, 13 Nev. 386, 1 Cr. L. Mag. 414; Spigener v. S., 62 Ala. 383, 2 Cr. L. Mag. 123; S. v. Johnson, 115 Mo. 480, 9 Am. C. R. 12, 22 S. W. 463; Gilmore v. P., 87 Ill. App. 128. *Contra*, P. v. Shattuck, 6 Abb. N. Cas. (N. Y.) 33, 1 Cr. L. Mag. 274; *Ex parte* Schmidt, 71 Cal. 212, 12 Pac. 55, 7 Am. C. R. 224.

⁹⁷ Boone v. P., 148 Ill. 440, 36 N. E. 99; S. v. Froiseth, 16 Minn. 296;

§ 2760. **Indicting without evidence.**—An indictment should be quashed where the same was found upon the evidence of witnesses not sworn, or upon the testimony of incompetent witnesses.⁹⁸ An indictment found without the hearing of any testimony or upon inadequate or illegal evidence may be quashed on motion; and the defendant may show by the state's attorney that no witnesses were brought before the grand jury to give testimony in reference to the subject-matter of the indictment.⁹⁹ When some of the evidence is competent and some incompetent, upon which an indictment was found, the indictment will not be quashed.¹⁰⁰

ARTICLE XXIV. AMENDING INDICTMENTS.

§ 2761. **Amendments of indictments.**—By the common law indictments can not be amended. Mr. Blackstone says: "And we may take notice that none of the statutes of jeofails for amendments of error extend to indictments or proceedings in criminal cases."¹ The state's attorney has no authority to amend an indictment. The statutes allowing amendments do not apply to criminal cases. The defendant should be tried upon the indictment as it was presented by the grand jury.² But in some states amendments to indictments as to matters of form are allowed by statute.³

§ 2762. **New indictment on same evidence.**—A defective indictment may be dismissed while pending on demurrer or motion to quash, and the case may be resubmitted to the same grand jury for the return of a second indictment on the same evidence.⁴ But the witnesses must be recalled and examined before the grand jury.⁵

U. S. v. Edgerton, 80 Fed. 374; Underhill Cr. Ev., § 27. See § 2689.

⁹⁸ S. v. Ivey, 100 N. C. 539, 5 S. E. 407, 7 Am. C. R. 247; S. v. Logan, 1 Nev. 509, 516; Sparrenberger v. S., 53 Ala. 481; Royce v. Ter., 5 Okl. 61, 47 Pac. 1083; U. S. v. Farrington, 5 Fed. 343.

⁹⁹ S. v. Grady, 12 Mo. App. 361, 7 Cr. L. Mag. 396; P. v. Moore, 65 How. Pr. (N. Y.) 177. See In re Gardiner, 64 N. Y. Supp. 760, 31 Misc. 364; S. v. Lanier, 90 N. C. 714, 6 Cr. L. Mag. 913; S. v. Froiseth, 16 Minn. 296, 4 Cr. L. Mag. 184; S. v. Grady, 84 Mo. 224, 9 Am. C. R. 13; Sparrenberger v. S., 53 Ala. 481, 2 Am. C. R. 473.

¹⁰⁰ S. v. Fassett, 16 Conn. 458, 471; Hope v. P., 83 N. Y. 418; Com. v.

Knapp, 9 Pick. (Mass.) 496. See Wadley v. Com., 98 Va. 803, 35 S. E. 452; Carl v. S., 125 Ala. 89, 28 So. 505. See "Grand Jury" generally.

¹ 4 Bl. Com. 376.

² Patrick v. P., 132 Ill. 533, 24 N. E. 619.

³ S. v. McCarty, 17 R. I. 370, 22 Atl. 282; S. v. Minford, 64 N. J. L. 518, 45 Atl. 817.

⁴ S. v. Peterson, 61 Minn. 73, 63 N. W. 171; 10 Am. C. R. 426; Creek v. S., 24 Ind. 151; 1 Bish. Cr. Proc., § 870; Com. v. Clemmer, 190 Pa. St. 202, 42 Atl. 675. See Smith v. S., 40 Fla. 203, 27 So. 868.

⁵ S. v. Ivey, 100 N. C. 539, 5 S. E. 407, 7 Am. C. R. 248; Underhill Cr. Ev., § 26.

§ 2763. **Statute of limitations—When begins.**—Where an indictment has been procured (and it seems whether good or bad), the statute of limitations will not begin to run until such indictment is in some manner set aside by a *nolle pros.*, by quashing or by being reversed by a court of review.⁶

ARTICLE XXV. SPECIAL PLEAS.

§ 2764. **Special plea—General issue.**—*Autre fois convict* and *acquit* and all pleas to the merits, by statutory provision of Illinois, may be shown under the general issue of “not guilty.”⁷

§ 2765. **Special pleas, autre fois convict.**—The plea of *autre fois convict* and *acquit* must set out the record of the former conviction or acquittal, including the caption and indictment, and allege that the two offenses are the same and that the defendant in the former is the same person who is the defendant in the latter.⁸

§ 2766. **Waiving defects by pleading.**—By pleading generally to the indictment the defendant admits its genuineness and waives all matters that should have been pleaded in abatement.⁹

ARTICLE XXVI. DEMURRER TO INDICTMENTS.

§ 2767. **Demurrer to indictment.**—Under the common law, “a demurrer is incident to criminal cases, as well as civil, when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason or whatever the crime is alleged to be.”¹⁰ “Some have held that if, on demurrer, the point of law be adjudged against the prisoner, he shall have judgment and execution, as if convicted by verdict. But this is denied by others, who hold that in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him.”¹¹

⁶ *Swalley v. P.*, 116 Ill. 249, 4 N. E. 379; Div. IV, Sec. 6, Ill. Crim. Code.

⁷ *Hankins v. P.*, 106 Ill. 636; *Gannon v. P.*, 127 Ill. 522, 21 N. E. 525; *Clem v. S.*, 42 Ind. 420, 13 Am. R. 369, 2 Green C. R. 694. See *S. v. Ward*, 49 Conn. 429; *F. v. Durrin*, 2 N. Y. Cr. 328.

⁸ *Wilson v. S.*, 45 Tex. 77; 1 Bish. Cr. Proc., §§ 814–816.

⁹ *S. v. Justus*, 11 Or. 178, 8 Pac. 337, 6 Am. C. R. 513; *P. v. Robinson*, 2 Park. Cr. (N. Y.) 235, 309.

¹⁰ 4 Bl. Com. 334.

¹¹ 4 Bl. Com. 334. See § 2880.

§ 2768. **Demurrer, seldom used.**—"Demurrers to indictments are seldom used, since the same advantages may be taken upon a plea of not guilty, or afterwards in arrest of judgment."¹²

ARTICLE XXVII. PLEAS IN ABATEMENT.

§ 2769. **Plea in abatement.**—The defect of duplicity can be taken advantage of by general demurrer to a plea in abatement.¹³

§ 2770. **Plea in abatement, defective.**—A plea that "the grand jury that found said indictment was not legally chosen and impaneled" was held bad on demurrer. The plea should have pointed out wherein the grand jury were not legally chosen and impaneled.¹⁴

§ 2771. **Plea in abatement, certainty required.**—The certainty required of pleas in abatement is extreme; they must be certain "to a certain intent in every particular."¹⁵

ARTICLE XXVIII. INFORMATIONS, COMPLAINTS.

§ 2772. **Informations, same as indictments.**—Informations, the same as indictments, must be carried on in the name of the people, and conclude, against the peace and dignity of the same.¹⁶

§ 2773. **Informations, two kinds.**—"Informations are of two sorts: First, those which are partly at the suit of the king, and partly at that of the subject, and, secondly, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king and another to the use of the informer, and are a sort of *qui tam* actions."¹⁷

¹² 4 Bl. Com. 334.

¹³ S. v. Emery, 59 Vt. 84, 7 Atl. 129, 7 Am. C. R. 204.

¹⁴ Priest v. S., 10 Neb. 393, 6 N. W. 468; S. v. Duggan, 15 R. I. 412, 6 Atl. 597, 7 Am. C. R. 223; Brennan v. P., 15 Ill. 511; Dyer v. S., 11 Lea (Tenn.) 509; S. v. Skinner, 34 Kan. 256, 6 Am. C. R. 313, 8 Pac. 420; Blair v. S., 5 Ohio C. C. 496.

¹⁵ S. v. Duggan, 15 R. I. 412, 6 Atl. 597, 7 Am. C. R. 223; S. v. Emery, 59

Vt. 84, 7 Atl. 129, 7 Am. C. R. 203; Miller v. S. (Fla.), 28 So. 208; S. v. Ward, 64 Me. 545; Ward v. S., 48 Ind. 289; Tervin v. S., 37 Fla. 396, 20 So. 551; S. v. Skinner, 34 Kan. 256, 8 Pac. 420, 6 Am. C. R. 313; Reeves v. S., 29 Fla. 527, 10 So. 901. See S. v. Bryant, 10 Yerg. (Tenn.) 527.

¹⁶ Gould v. P., 89 Ill. 217; Parris v. P., 76 Ill. 277.

¹⁷ 4 Bl. Com. 308.

§ 2774. **Informations for misdemeanors.**—"Informations of every ind are confined by the constitutional law to mere misdemeanors only."¹⁸

ARTICLE XXIX. SAME ACCURACY AS INDICTMENTS.

§ 2775. **Informations require same accuracy as indictments.**—Informations filed in the county court, under the statute, require the same accuracy in pleadings as indictments.¹⁹

ARTICLE XXX. INFORMATIONS AMENDABLE.

§ 2776. **Informations may be amended by common law.**—Under the common law, informations and complaints may be amended on application by the public officer by whom presented. In Illinois the common law in this respect is repealed.²⁰

§ 2777. **Information by states attorney.**—An information filed by the state's attorney is to be treated as the information of that officer, though sworn to by the prosecuting witness. The affidavit attached is no part of the information.²¹

§ 2778. **Information for murder, defective.**—The information charges that the accused, on a day and year and at a place named, 'one Mary A. Bowers, feloniously, willfully and wickedly did kill and slay, contrary, etc.," being based on a statute which dispenses with the means or manner of causing death, and declares it sufficient "to charge that the defendant did kill and slay the deceased." Held not sufficient on a charge of homicide by attempting abortion.²²

§ 2779. **Complaint, for violation of ordinance.**—A complaint for a violation of a city ordinance is sufficient if it refer to the number and section and subject of the ordinance, without setting forth the ordinance, and if it state the acts alleged to have been in violation of it.²³

¹⁸ 4 Bl. Com. 310; *Ex parte Wilson*, 14 U. S. 417, 5 S. Ct. 935.

¹⁹ *Gould v. P.*, 89 Ill. 217.

²⁰ *Long v. P.*, 135 Ill. 441, 25 N. E. 851; *Truitt v. P.*, 88 Ill. 518; *S. v. Hubbard*, 71 Vt. 405, 45 Atl. 751; 1 *Wash. Cr. Proc.* (2d ed.), § 1215; *S. v. Stebbins*, 29 Conn. 463. See § 3385.

²¹ *Long v. P.*, 135 Ill. 440, 25 N. E. 851; *Gallagher v. P.*, 120 Ill. 182, 11 N. E. 335.

²² *P. v. Olmstead*, 30 Mich. 431; 1 *Am. C. R.* 307-8.

²³ *City of Faribault v. Wilson*, 34 Minn. 254, 6 *Am. C. R.* 546, 25 N. W. 449.

§ 2780. **Complaint, sufficiency.**—The same technical precision is not required in prosecutions on complaint in justice courts as is required in courts of record; still, there should be enough to show with reasonable certainty that an offense is charged under the law, of which a justice of the peace has jurisdiction.²⁴

§ 2781. **Affidavit on "belief and information."**—Informations must be based on affidavits which show probable cause arising from the facts within the knowledge of the parties making them; mere belief is not sufficient.²⁵ A complaint charging an offense upon mere information and belief—that is, that the "affiant has good reason to believe and does believe" that the offense was committed—though otherwise technically correct, is not sufficient to confer jurisdiction upon the justice or court to issue a warrant for the arrest of a person.²⁶

§ 2782. **Complaint, when must be made.**—When an arrest is made without a warrant, though authorized by law, a complaint in writing must be made, stating the offense for which the party was arrested, before the justice or court will have jurisdiction to try or inquire into the charge. It is the filing of a proper complaint that gives the court jurisdiction; and without the making of such complaint there is no cause to be disposed of by the court.²⁷

§ 2783. **Indorsing witnesses.**—If the names of the witnesses upon whose testimony an indictment is found be not indorsed on the indictment, it is defective and may be quashed.²⁸

ARTICLE XXXI. ELECTION OF COUNTS

§ 2784. **Election of counts, when required.**—The right of demanding an election and the limitation of the prosecution to one offense is confined to charges alleged in the indictment, which are actually dis-

²⁴ *Truitt v. P.*, 88 Ill. 521; *Moore Cr. L.* (2d ed.), § 44. The same rules of criminal pleading applied to indictments govern as to informations and complaints. See "Indictments."

²⁵ *U. S. v. Polite*, 35 Fed. 59; *Johnson v. U. S.*, 85 Fed. 187; *U. S. v. Tureaud*, 20 Fed. 621; *S. v. Brooks*, 33 Kan. 708, 7 Pac. 591, 6 Am. C. R. 303. *Contra*, *S. v. Cronin*, 20 Wash. 512, 56 Pac. 26.

²⁶ *P. v. Heffron*, 53 Mich. 529, 19 N. W. 170; *Shaw v. Ashford*, 110 Mich. 534, 68 N. W. 281; *Ex parte Spears*, 88 Cal. 642, 26 Pac. 608; *U. S. v. Collins*, 79 Fed. 65; *Mulkins v. U. S. (Okl.)*, 61 Pac. 925.

²⁷ *Bigham v. S.*, 59 Miss. 530; *Tracy v. Williams*, 4 Conn. 107; *Prell v. McDonald*, 7 Kan. 426, 450.

²⁸ See "Grand Jury."

ting from each other, and do not form parts of one and the same transaction.²⁹ But the rule requiring an election of counts to some one offense does not apply to misdemeanors joined in the same indictment.^{29a} An indictment will not be quashed, nor will the prosecutor be put to his election as to which count he will proceed under, when the court may be doubtful if the intention be not to charge the same as cognate offenses growing out of the same transaction, but will postpone action until it is developed by the evidence that it is sought to convict of two or more offenses growing out of separate and different transactions, before compelling the state to elect on which count the prosecution will proceed.³⁰ Where the evidence disclosed at least three separate and distinct felonies charged as having been committed by the defendants, then in that case the court erred in not compelling the prosecution to elect on which count it would ask a conviction.³¹

§ 2785. Abandonment of counts by election.—Where an election between two or more counts is made, this is an abandonment of all the other counts.³²

ARTICLE XXXII. NUMBERING COUNTS; EXHIBITS.

§ 2786. Numbering counts—Indorsing indictment.—In making reference to the several different counts in an indictment, as the first count, second count, etc., each count shall be numbered in the order in which it appears without reference to numerals placed before the counts.³³ Indorsing an indictment by a wrong description will not invalidate it, as robbery instead of larceny.³⁴

§ 2787. Attaching exhibits, improper.—The practice of attaching a copy of an instrument as an exhibit, instead of incorporating it into

²⁹ Goodhue v. P., 94 Ill. 51; U. S. v. Nye, 4 Fed. 888; S. v. Moore, 2 Pen. (Del.) 299, 46 Atl. 669.

^{29a} McArthur v. S. (Neb.), 83 N. W. 196; Newsom v. S. (Tex. Cr.), 57 S. W. 670. See S. v. Feldman, 80 Minn. 314, 83 N. W. 182.

³⁰ West v. P., 137 Ill. 199, 27 N. E. 34, 34 N. E. 254; McGregg v. S., 4 Blackf. (Ind.) 101; Mayo v. S., 30 Ala. 32; 1 Bish. Cr. Proc., § 457; Glover v. S., 109 Ind. 391, 10 N. E. 282, 7 Am. C. R. 118; Schintz v. P.,

178 Ill. 323, 52 N. E. 903. See § 2883.

³¹ West v. P., 137 Ill. 204, 27 N. E. 34, 34 N. E. 254; Goodhue v. P., 94 Ill. 37; Lyon v. P., 68 Ill. 275; Andrews v. P., 117 Ill. 200, 7 N. E. 265; Bennett v. P., 96 Ill. 605; 1 Bish. Cr. Proc. (3d ed.), § 457.

³² S. v. Smalley, 50 Vt. 736.

³³ Teerney v. P., 81 Ill. 412.

³⁴ Collins v. P., 39 Ill. 238; Com. v. Phipps (Pa.), 4 Cr. Law Mag. 549.

the body of the indictment, is a very loose and dangerous practice, and certainly not to be encouraged, and ought not to obtain in criminal pleading.³⁵

³⁵ *S. v. Williams*, 32 Minn. 537, 5 Am. C. R. 243, 21 N. W. 746.

CHAPTER LXXVII.

CONTINUANCE.

ART.	I. Affidavit for Continuance,	§ 2788
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ARTICLE I. AFFIDAVIT FOR CONTINUANCE.

§ 2788. **Facts to be taken as true.**—As a rule, the statements of fact contained in an affidavit for continuance must for the purposes of the motion be taken as true; but the court may consider inconsistent statements.¹ An application for a continuance of a cause must be supported by an affidavit stating the grounds for a continuance.²

ARTICLE II. CONTINUANCE DISCRETIONARY.

§ 2789. **Continuance not matter of right.**—The defendant in a criminal cause is not entitled to a continuance as a matter of right. It

¹ Dacey v. P., 116 Ill. 565, 6 Am. C. R. 461, 6 N. E. 165; Baker v. Com., 10 Ky. L. 746, 10 S. W. 386; S. v. Abshire, 47 La. 542, 17 So. 141, 10 Am. C. R. 457; Cutler v. S., 42 Ind. 244; Welch v. Com., 90 Va. 318, 18 S. E. 273.

² S. v. Perique, 42 La. 403, 7 So. 599; P. v. Symonds, 22 Cal. 348; Mitchell v. S., 92 Tenn. 668, 23 S. W. 68; P. v. Ward, 105 Cal. 335, 38 Pac. 945.

is discretionary with the court, and a refusal can not ordinarily be assigned for error.³

ARTICLE III. SUFFICIENCY OF APPLICATION.

§ 2790. **Affidavit must contain facts.**—An affidavit should not be too general in stating what can be proven by the absent witnesses, but should set out the facts, that the court can see that the evidence will be material to the issues.⁴ And the affidavit must also state that such facts are true.^{4a} An affidavit for a continuance must not only state the facts expected to be shown by the absent witness, but must also show wherein or how the facts are material to the issues.⁵

§ 2791. **Facts essential to continuance.**—The essential requisites of an affidavit for continuance are: First, the name and residence of the witness; that he is really material and shown to the court by the affidavit to be so. Second, that the party who applies has been guilty of no neglect, or, in other words, shows the exercise of proper diligence. Third, that the witness can be had at the next term, to which it is sought to have the trial of the cause deferred.⁶

³ Holmes v. P., 5 Gilm. (Ill.) 478; Baxter v. P., 3 Gilm. (Ill.) 368; S. v. Burns, 148 Mo. 167, 49 S. W. 1005; S. v. Reid, 20 Iowa 413; Com. v. Brothers, 158 Mass. 200, 33 N. E. 386; Ballard v. P., 31 Fla. 266, 12 So. 865; S. v. Howe, 27 Or. 138, 44 Pac. 672; S. v. Green, 43 La. 402, 9 So. 42; Walker v. S., 91 Ala. 76, 9 So. 87; Clark v. S., 41 Neb. 370, 9 Am. C. R. 119, 59 N. W. 785; S. v. Pankey, 104 N. C. 840, 10 S. E. 315; P. v. Burwell, 106 Mich. 27, 63 N. W. 986; Walker v. S., 136 Ind. 663, 36 N. E. 356; Morris v. S., 104 Ind. 457, 4 N. E. 148; S. v. Dettmer, 124 Mo. 426, 27 S. W. 1117; S. v. Rigsby, 6 Lea (Tenn.) 554; Long v. S., 38 Ga. 491; Holt v. S., 11 Ohio St. 691; S. v. Rodrigues, 45 La. 1040, 13 So. 802; S. v. Abshire, 47 La. 542, 17 So. 141. *Contra*, Jenks v. S., 39 Ind. 1; P. v. McCrory, 41 Cal. 458.

⁴ Eubanks v. P., 41 Ill. 488; Moody v. P., 20 Ill. 318; Williams v. S., 10 Tex. App. 114; S. v. McCoy, 29 La. 593; Ransbottom v. S., 144 Ind. 250, 43 N. E. 218; S. v. Strattman, 100 Mo. 540, 13 S. W. 814; Stevens v. S., 93 Ga. 307, 20 S. E. 331;

Hoover v. S., 48 Neb. 184, 66 N. W. 1117; S. v. Wilson, 9 Wash. 218, 37 Pac. 424; Holloway v. S. (Tex. Cr.), 24 S. W. 649.

^{4a} Moody v. P., 20 Ill. 316; P. v. Burwell, 106 Mich. 27, 63 N. W. 986; S. v. Bassenger, 39 La. 918, 3 So. 55; White v. S., 86 Ala. 69, 5 So. 674; Boyd v. S., 33 Fla. 316, 14 So. 836.

⁵ Ter. v. Barth (Ariz.), 15 Pac. 673; S. v. Pagels, 92 Mo. 300, 4 S. W. 931; Shirwin v. P., 69 Ill. 55; S. v. Bennett, 52 Iowa 724, 2 N. W. 1103; S. v. Smith, 56 S. C. 378, 34 S. E. 657. See S. v. Nathaniel, 52 La. 558, 26 So. 1008; Pettit v. S., 135 Ind. 393, 34 N. E. 1118; P. v. Anderson, 53 Mich. 60, 18 N. W. 561; North v. P., 139 Ill. 81, 28 N. E. 966; Little v. S., 39 Tex. Cr. 654, 47 S. W. 984; S. v. Rice, 149 Mo. 461, 51 S. W. 78.

⁶ Shirwin v. P., 69 Ill. 55, 1 Am. C. R. 650; S. v. Primeaux, 39 La. 673, 2 So. 423; Moody v. P., 20 Ill. 315; Beavers v. S., 58 Ind. 530; Whar. Cr. Pl. & Pr., § 591; Steele v. P., 45 Ill. 152. See Anderson v. S., 72 Ga. 98, 5 Am. C. R. 443.

ARTICLE IV. DILIGENCE REQUIRED.

§ 2792. **Diligence in securing attendance.**—In an application for a continuance the affidavit must show that the defendant and his counsel have been diligent in attempting to secure the attendance of the witnesses, and should show in what the diligence consisted, whether by procuring subpoena or otherwise.⁷ The affidavit for a continuance must show diligence in procuring the attendance of the witnesses by proper process of court, usually a subpoena, delivered to the proper officer or other competent person, in due time, for service before the case is called for trial; and the officer or person should be informed where the witnesses reside or can be found.⁸

§ 2793. **Diligence not shown.**—An affidavit is defective in not showing diligence and in not showing that the accused expects to procure the attendance of the absent witness by some future term, and in not stating where the witnesses resided or could be found.⁹

§ 2794. **Witness leaving court.**—When the defendant is surprised by the unauthorized withdrawal of his witnesses after the trial has commenced, the practice is to apply for a continuance or postponement.¹⁰

ARTICLE V. CERTAIN AVERMENTS ESSENTIAL.

§ 2795. **Application uncertain.**—If the showing made in an application for the continuance is equivocal or uncertain, the intendment must be taken against it.¹¹

⁷ P. v. Thompson, 4 Cal. 238; P. v. Winters, 125 Cal. 325, 57 Pac. 1067; Conrad v. S., 144 Ind. 290, 43 N. E. 221; Barkman v. S. (Tex. Cr.), 52 S. W. 73; Trask v. P., 151 Ill. 523, 38 N. E. 248; S. v. Wilson, 85 Mo. 134; S. v. Bassenger, 39 La. 918, 3 So. 55; Weaver v. S., 154 Ind. 1, 55 N. E. 858; Tatum v. S. (Neb.), 85 N. W. 40.

⁸ Abbott's Cr. Brief, § 183, citing S. v. Burns, 54 Mo. 274; Henderson v. S., 22 Tex. 593.

⁹ Richardson v. P., 31 Ill. 171. See also Jamison v. P., 145 Ill. 357, 34 N. E. 486; Dacey v. P., 116 Ill. 555, 6 N. E. 165; Bishop v. S. (Tex. Cr.), 35 S. W. 170; S. v. McCoy, 111 Mo. 517, 20 S. W. 240; S. v. Lewis, 56 Kan. 374, 43 Pac. 265; S. v. Brooks, 4 Wash. 328, 30 Pac. 147; S. v. Mc-

Clain, 49 Kan. 730, 31 Pac. 790; P. v. Ah Lee Doon, 97 Cal. 171, 31 Pac. 933; S. v. Hutchinson, 14 Wash. 580, 45 Pac. 156; Hudson v. S. (Tex. Cr.), 36 S. W. 452; Pettit v. S., 135 Ind. 393, 34 N. E. 1118; S. v. Thompson, 132 Mo. 301, 34 S. W. 31; Childers v. S., 37 Tex. Cr. 392, 35 S. W. 654; P. v. Lampson, 70 Cal. 204, 11 Pac. 593.

¹⁰ Price v. P., 131 Ill. 232, 23 N. E. 639; Cotton v. S., 4 Tex. 260; Joseph v. Com., 8 Ky. L. 53, 1 S. W. 4.

¹¹ Dacey v. P., 116 Ill. 565, 6 N. E. 165; S. v. Eisenmeyer, 94 Ill. 101; Steele v. P., 45 Ill. 156; Baw v. S., 33 Tex. Cr. 24, 24 S. W. 293; Thompson v. S., 33 Tex. Cr. 217, 26 S. W. 198.

§ 2796. Facts to be alleged as true.—If it is not stated in the affidavit that the facts expected to be proved by the absent witness are true, or that he was actually present at the time and an observer of the transaction, the application is not sufficient.¹²

§ 2797. No other witness than absent one.—The affidavit for continuance should state that the defendant can not prove the facts on which he relies for continuance by any other witnesses.¹³ But where the affidavit for continuance shows there will be a conflict in the evidence on material matters, expected to be proved by the absent witness, then the affidavit is not fatally defective in failing to allege that the defense has or knows of no other witness by whom he can prove such facts.¹⁴

§ 2798. Procuring witness to be absent—Not for delay.—The affidavit should negative the fact that the absent witness was absent by the procurement of defendant.¹⁵ And the affidavit for a continuance should state the fact that the application is not made for delay.¹⁶

ARTICLE VI. CONTINUANCE FOR PREPARATION.

§ 2799. Time to prepare for trial.—A defendant is entitled, under the law, to a reasonable time and full opportunity to prepare for his trial, and that right should be guaranteed him.¹⁷ The refusal of request of counsel for time to prepare and file defendant's affidavit, in support of his motion for a continuance, is reversible error; it is in effect refusing to entertain the motion.¹⁸

¹² *Wilhelm v. P.*, 72 Ill. 468.

¹³ *Dunn v. P.*, 109 Ill. 642, 4 Am. C. R. 52; *Wall v. S.*, 18 Tex. 682; *Hyde v. Ter.*, 8 Okl. 69, 56 Pac. 851; *S. v. Simms*, 68 Mo. 305; *Smith v. S.*, 58 Miss. 868; *P. v. Garns*, 2 Utah Ter. 260; *S. v. Marshall*, 19 Nev. 240, 8 Pac. 672; *Thompson v. Com.*, 88 Va. 45, 13 S. E. 304; *S. v. Heinze*, 45 Mo. App. 403; *Anderson v. S.*, 72 Ga. 98; *S. v. Brooks*, 4 Wash. 328, 30 Pac. 147; *S. v. Murphy*, 9 Wash. 204, 37 Pac. 420; *S. v. Alred*, 115 Mo. 471, 22 S. W. 363.

¹⁴ *North v. P.*, 139 Ill. 98, 28 N. E. 966.

¹⁵ *Crews v. P.*, 120 Ill. 317, 11 N.

E. 404; *P. v. Hildebrandt*, 38 N. Y. Supp. 958, 16 Misc. 195; *S. v. Bryant*, 93 Mo. 273, 6 S. W. 102; *Blackmore v. S. (Ark.)*, 8 S. W. 940.

¹⁶ *Polite v. S.*, 78 Ga. 347; *S. v. Heinze*, 45 Mo. App. 403; *Farmer v. S.*, 95 Ga. 498, 20 S. E. 494.

¹⁷ *Price v. P.*, 131 Ill. 231, 23 N. E. 639; *Conley v. P.*, 80 Ill. 237; *Dacey v. P.*, 116 Ill. 562, 6 N. E. 165; *Steele v. P.*, 45 Ill. 153; *Hamilton v. S.*, 62 Ark. 543, 36 S. W. 1054; *Brooks v. Com.*, 100 Ky. 194, 18 Ky. L. 702, 37 S. W. 1043.

¹⁸ *Price v. P.*, 131 Ill. 233, 23 N. E. 639.

§ 2800. **Application for time to prepare.**—Where the affidavits show diligence and good grounds for continuance, because of not sufficient time in which counsel may prepare for trial, it is error to refuse a continuance.¹⁹ If counsel desires time to prepare for the trial of a cause, he should move the court for a continuance or postponement; otherwise the assignment of error on the ground of such refusal will be of no avail.²⁰

ARTICLE VII. SEVERAL CONTINUANCES, WHEN.

§ 2801. **Several continuances—When allowed.**—The witnesses having secreted themselves to avoid the service of an attachment, the applicant, by his application showing diligence, is entitled to a continuance, notwithstanding five continuances have been granted.²¹ A second or several continuances of a cause will be allowed or denied in the discretion of the court, considering the circumstances upon which the application for a continuance is made.²² To entitle a party to a second continuance, on account of absent witnesses, he should have had them recognized to appear.²³

§ 2802. **Compulsory process essential.**—The defendant, having gone to trial in the absence of a witness whom he had subpoenaed, is guilty of negligence in not having applied to the court for compulsory process to enforce attendance of the witness, and failing in that, he should have applied to the court for a continuance.²⁴

ARTICLE VIII. ADMITTING FACTS; STATUTE.

§ 2803. **Admitting facts in affidavit.**—The court may permit the prosecution to admit the absolute truth of the facts set out in the affidavit and require the defendant to go to trial.²⁵ If the prosecution

¹⁹ *North v. P.*, 139 Ill. 98, 28 N. E. 966. See *Dunn v. P.*, 109 Ill. 635, 4 Am. C. R. 52; *S. v. Dakin*, 52 Iowa 395, 3 N. W. 411.

²⁰ *Williams v. P.*, 164 Ill. 482, 45 N. E. 987.

²¹ *S. v. Walker*, 69 Mo. 274. See *Johnson v. S.*, 58 Ga. 491.

²² *P. v. Leyshon*, 108 Cal. 440, 41 Pac. 480; *Burnett v. S.*, 87 Ga. 622, 13 S. E. 552; *Scott v. S. (Tex.)*, 25 S. W. 783; *Mixon v. S.*, 85 Ga. 455, 11 S. E. 874; *Walkup v. Com.*, 14

Ky. L. 337, 20 S. W. 221; *Withers v. S.*, 30 Tex. App. 383, 17 S. W. 936.

²³ *Radford v. Com.*, 10 Ky. L. 877, 11 S. W. 12.

²⁴ *Spann v. P.*, 137 Ill. 544, 27 N. E. 688.

²⁵ *Van Meter v. P.*, 60 Ill. 168; *Whar. Cr. Pl. & Pr.* (8th ed.), § 595. See *Powers v. S.*, 80 Ind. 77; *Baker v. S.*, 58 Ark. 513, 25 S. W. 603; *Phipps v. S.*, 36 Tex. Cr. 216, 36 S. W. 753.

admits that the absent witnesses mentioned in the application of the defendant for a continuance, if present, would testify to the facts set out in the application, then the court may properly refuse a continuance.²⁶

§ 2804. Statute on admitting facts.—A statute providing that when an affidavit is made for continuance in behalf of the people, or any defendant in a criminal case, on the grounds of the absence of a material witness, the state's attorney or the defendant shall not be required to admit the absolute truth of the matter set up in the affidavit, but may admit that such absent witness would testify as alleged in the affidavit, is not unconstitutional.²⁷

ARTICLE IX. NON-RESIDENT WITNESSES.

§ 2805. Non-resident witness—Promise to attend.—When the absent witness is beyond the limits of the state, the party applying for a continuance should state the grounds of his expectation in having such witness present.²⁸ Where application is made for a continuance because of the absence of a material witness who is a non-resident, the affidavit must show that such witness can be procured and will attend the trial at the term to which continued.²⁹ Where a material witness residing out of the state has promised that he will attend the trial, and these facts are shown by affidavit, a continuance should be allowed.³⁰ A promise by the non-resident witness, on which the defendant in good faith relied, is sufficient.³¹

²⁶ *Adkins v. Com.*, 98 Ky. 539, 17 Ky. L. 1091, 33 S. W. 948; *S. v. Bartley*, 48 Kan. 421, 29 Pac. 701; *S. v. Stickney*, 53 Kan. 308, 36 Pac. 714, 42 Am. R. 284; *Evans v. S.* (Tex. Cr.), 31 S. W. 648; *S. v. Warden*, 94 Mo. 648, 8 S. W. 233.

²⁷ *Hoyt v. P.*, 140 Ill. 592, 30 N. E. 315; *Hickam v. P.*, 137 Ill. 79, 27 N. E. 88; *Keating v. P.*, 160 Ill. 482, 43 N. E. 724. *Contra*, *S. v. Dyke*, 96 Mo. 298, 9 S. W. 925.

²⁸ *Dacey v. P.*, 116 Ill. 568, 6 Am. C. R. 461, 6 N. E. 165; *Perteet v. P.*, 70 Ill. 175; *Eubanks v. P.*, 41 Ill. 487; *Wilhelm v. P.*, 72 Ill. 471; *P.*

v. Ah Yute, 53 Cal. 613; *Collins v. S.*, 78 Ga. 87; *Faulkner v. Ter.*, 6 N. M. 464, 30 Pac. 905; *S. v. Alred*, 115 Mo. 471, 22 S. W. 363; *Wilson v. P.*, 3 Colo. 325; *Polin v. S.*, 14 Neb. 540, 16 N. W. 898; *S. v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 18 L. R. A. 224, 9 Am. C. R. 631; *S. v. Gray*, 19 Nev. 212, 8 Pac. 456.

²⁹ *Perteet v. P.*, 70 Ill. 171, 175; *Owens v. S.*, 110 Ga. 292, 34 S. E. 1015.

³⁰ *Corbin v. P.*, 131 Ill. 619, 23 N. E. 613; *Perteet v. P.*, 70 Ill. 171.

³¹ *P. v. Brown*, 46 Cal. 102. See *White v. Com.*, 80 Ky. 480.

ARTICLE X. COUNTER AFFIDAVITS.

§ 2806. **Counter affidavits improper.**—There is no authority of law for filing counter affidavits on a motion for a continuance, and it is error to permit the prosecution to do so.³²

ARTICLE XI. COUNSEL ABANDONING CASE.

§ 2807. **Counsel abandoning case, or absent.**—If counsel abandons defendant's case the day before the same is set for trial, taking the defendant by surprise, it is error to refuse a continuance if the defendant caused subpoena to issue for his witnesses at once, but could not find them.³³ The absence of the attorney having charge, and who had always been consulted in the preparation of the cause, and was better informed about it than the other attorneys on short notice, is not sufficient reason for a continuance in the absence of anything in the application for such continuance or the showing of any intricacies of law or fact that any competent attorney could not properly present the defense, even on short notice.³⁴

ARTICLE XII. CUMULATIVE AND CHARACTER EVIDENCE.

§ 2808. **Evidence only cumulative—On character.**—A continuance will not be allowed to enable a party to produce evidence that is merely cumulative unless there be some necessity shown therefor, such as that there will be a conflict in the evidence.³⁵ A continuance will not be allowed on account of the absence of witnesses by whom to prove the good character of the defendant or bad character of any person involved.³⁶

³² Price v. P., 131 Ill. 231, 23 N. E. 639; S. v. Abshire, 47 La. 542, 10 Am. C. R. 459, 17 So. 141; Hair v. S., 14 Neb. 503, 16 N. W. 829; Hair v. S., 16 Neb. 604, 21 N. W. 464; S. v. Dakin, 52 Iowa 395, 3 N. W. 411. But see Horn v. S., 62 Ga. 362; P. v. Cleveland, 49 Cal. 577; Gandy v. S., 27 Neb. 707, 43 N. W. 747, 44 N. W. 108; Lane v. S. (Tex. Cr.), 28 S. W. 202.

³³ Wray v. P., 73 Ill. 213; Whar. Cr. Pl. & Pr. (8th ed.), § 597. See also Claxon v. Com., 17 Ky. L. 284, 30 S. W. 998.

³⁴ Long v. P., 135 Ill. 435, 439, 25 N. E. 851, 11 L. R. A. 48. See Hat-

field v. Com., 21 Ky. L. 1461, 55 S. W. 679; S. v. Frost, 103 Tenn. 685, 54 S. W. 986; Newberry v. S., 26 Fla. 334, 8 So. 445; Marshall v. S., 94 Ga. 589, 20 S. E. 432; Charlton v. S., 106 Ga. 400, 32 S. E. 347. See also Van Horn v. S., 5 Wyo. 501, 40 Pac. 964; Bates v. Com., 13 Ky. L. 132, 16 S. W. 528; Daugherty v. S., 33 Tex. Cr. 173, 26 S. W. 60.

³⁵ Dacey v. P., 116 Ill. 566, 6 N. E. 165; Wiggins v. S., 84 Ga. 488, 10 S. E. 1089; Varnadoe v. S., 67 Ga. 768; Nelms v. S., 58 Miss. 362.

³⁶ Steele v. P., 45 Ill. 157; McNealy v. S., 17 Fla. 198; Johnson v. S., 31 Tex. Cr. 456, 20 S. W. 985; Ballard

ARTICLE XIII. AFFIDAVIT SUFFICIENT.

§ 2809. **Affidavits sufficient.**—In the following cases the facts set out in the affidavits for a continuance are reviewed, and it was held error to refuse a continuance:³⁷

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| v. S., 31 Fla. 266, 12 So. 865; Parks | 34 N. E. 1118; Van Meter v. P., 60 |
| v. S., 35 Tex. Cr. 378, 33 S. W. 872; | Ill. 170; Corbin v. P., 131 Ill. 615, 23 |
| S. v. Hilsabeck, 132 Mo. 348, 34 S. | N. E. 613; Conley v. P., 80 Ill. 237, |
| W. 38. | 2 Am. C. R. 445; Murphy v. Com., 92 |
| ³⁷ Sutton v. P., 119 Ill. 251, 10 N. | Ky. 485, 13 Ky. L. 695, 18 S. W. 163. |
| E. 376; Richards v. S., 34 Tex. Cr. | Not error: Adams v. P., 109 Ill. 444, |
| 277, 30 S. W. 229; Austine v. P., 110 | 4 Am. C. R. 351; Anderson v. S., |
| Ill. 250; Pettit v. S., 135 Ind. 393, | 72 Ga. 98, 5 Am. C. R. 443. |

CHAPTER LXXVIII.

CHANGE OF VENUE.

ART.	I. Counter Affidavits,	§ 2810
	II. Reputable Persons,	§ 2811
	III. Verification of Petition,	§ 2812
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	V. Change Discretionary,	§§ 2815-2816
	VI. Prejudice of Inhabitants,	§ 2817
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	XII. Civil and Criminal Case, Alike,	§§ 2826
	XIII. Plea Required First,	§ 2827
	XIV. Second Change,	§§ 2828-2829

ARTICLE I. COUNTER AFFIDAVITS.

§ 2810. **Counter affidavits improper.**—An application for a change of venue because of the prejudice of the judge of the court can not be contradicted by counter affidavits.¹

ARTICLE II. REPUTABLE PERSONS.

§ 2811. **Proof as to reputable persons.**—Where the statute requires that the affidavits of two reputable persons shall accompany the petition for a change of venue, the persons making the affidavits may state in their affidavits that they are persons of repute. This will be sufficient proof of that fact, and is conclusive.² If the affidavit support-

¹ *Cantwell v. P.*, 138 Ill. 602, 28 N. E. 964.

² *Hanna v. P.*, 86 Ill. 245; *Cantwell v. P.*, 138 Ill. 604, 28 N. E. 964.

ing the petition for a change of venue, showing the affiants to be "reputable or credible" citizens, fails to show they are residents of the county where the cause is pending for trial, it is defective.³

ARTICLE III. VERIFICATION OF PETITION.

§ 2812. **Petition to be verified.**—The petition for a change of venue must be signed and sworn to by the defendant, and not by another person for him.⁴

ARTICLE IV. PREJUDICE OF JUDGE.

§ 2813. **Prejudice of judge.**—When the petition shows prejudice of the judge, and it is in due form, it is mandatory to grant the change. The matter is *ex parte* and mandatory—there is no discretion.⁵ The defendant stating in his affidavit that he did not have *full* knowledge of the prejudice of the judge until the day he made his application for a change of venue rendered it too indefinite.⁶

§ 2814. **Refusal of affidavits.**—If the defendant be unable to get affidavits from residents of the county he may state the facts and reasons given for refusal, and to whom he applied.⁷

ARTICLE V. CHANGE DISCRETIONARY.

§ 2815. **When granting change is discretionary.**—Where a large number of affidavits have been filed in support of a motion for a change of venue, detailing facts of an attempted mob and prejudicial newspaper statements, but contradicted in most material matters by counter affidavits, it has been frequently held not to be error to deny such application.⁸ Where the defendant shows prejudice of the in-

³ *S. v. Callaway*, 154 Mo. 91, 55 S. W. 444.

⁴ *McCauley v. P.*, 88 Ill. 579. A statute permitting the prosecution to take a change of venue is valid: *Smith v. Com.*, 21 Ky. L. 1470, 55 S. W. 718.

⁵ *Cantwell v. P.*, 138 Ill. 602, 28 N. E. 964; *Knickerbocker Ins. Co. v. Tolman*, 80 Ill. 107; *Barrows v. P.*, 11 Ill. 121; *Perteet v. P.*, 65 Ill. 230; *Freleigh v. S.*, 8 Mo. 606; *Rafferty v. P.*, 72 Ill. 37.

⁶ *McCann v. P.*, 88 Ill. 105.

⁷ *Simmerman v. S.*, 16 Neb. 615, 4 Am. C. R. 91, 21 N. W. 387. See *S. v. Turlington*, 102 Mo. 642, 15 S. W. 141; *Blanks v. Com.*, 20 Ky. L. 1031, 48 S. W. 161.

⁸ *Jamison v. P.*, 145 Ill. 365, 34 N. E. 486; *Hickam v. P.*, 137 Ill. 77, 27 N. E. 88; *Gitchell v. P.*, 146 Ill. 178, 33 N. E. 757, 37 Am. R. 147; *Power v. P.*, 17 Colo. 178, 28 Pac. 1121; *Parker v. Ter. (Ariz., 1898)*, 52 Pac. 361; *Smith v. S.*, 145 Ind. 176, 42 N. E. 1019; *S. v. Clevenger*, 156 Mo. 190, 56 S. W. 1078; *S. v. White*, 98

habitants and the law permits the people to file counter affidavits, it then becomes discretionary with the court in granting or refusing the change.⁹

§ 2816. When not discretionary, but a right.—When the affidavit states all that is required by the law, as reasons for a change of venue, the accused is entitled to a change as a matter of right; but where the court is authorized to exercise a discretion a refusal can not be assigned as error.¹⁰ If the accused, by his application for a change of venue, brings himself within the statute, and no counter evidence be offered, he is entitled to the change, even where the court is authorized to exercise a discretion.¹¹

ARTICLE VI. PREJUDICE OF INHABITANTS.

§ 2817. Prejudice of inhabitants.—Opinions and facts were given by a number of creditable witnesses that the defendant could not have a fair trial in the county where the offense was committed, and the witnesses for the people merely expressed a contrary opinion without giving facts to sustain it. Held that a change of venue should have been granted.¹² Where leading citizens make affidavits showing bias and prejudice against the defendant, a change of venue should be allowed, unless counter affidavits make denial by clear and direct language.¹³ An affidavit as to the prejudice of the inhabitants should state the facts, and not the mere conclusions of the witnesses, so that

Iowa 346, 67 N. W. 267; Thompson v. S., 122 Ala. 12, 26 So. 141; S. v. Belvel, 89 Iowa 405, 56 N. W. 545; Mott v. S. (Tex. Cr.), 51 S. W. 368; S. v. Headrick, 149 Mo. 396, 51 S. W. 99; Welsh v. S. (Neb.), 82 N. W. 368. *Contra*, Bowman v. Com., 96 Ky. 8, 16 Ky. L. 186, 27 S. W. 870; Gallaher v. S., 40 Tex. Cr. 296, 50 S. W. 388; Saffold v. S., 76 Miss. 258, 24 So. 314; S. v. Crafton, 89 Iowa 109, 56 N. W. 257; S. v. Olds, 19 Or. 397, 24 Pac. 394; Garcia v. S., 34 Fla. 311, 16 So. 223; Thompson v. S., 117 Ala. 67, 23 So. 676. See Renfro v. S. (Tex. Cr.), 56 S. W. 1013; S. v. Savage, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128.

⁹ Dunn v. P., 109 Ill. 635, 4 Am. C. R. 52; Droneberger v. S., 112 Ind.

105, 13 N. E. 259; Ransbottom v. S., 144 Ind. 250, 43 N. E. 218; S. v. Hudspeth, 150 Mo. 12, 51 S. W. 483.

¹⁰ Gray v. P., 26 Ill. 345; Clark v. P., 1 Scam. (Ill.) 119; S. v. Westfall, 49 Iowa 328, 3 Am. C. R. 349; Edwards v. S., 25 Ark. 444.

¹¹ Higgins v. Com., 94 Ky. 54, 14 Ky. L. 729, 21 S. W. 231, 9 Am. C. R. 21; S. v. Goddard, 146 Mo. 177, 48 S. W. 82; S. v. Henning, 3 S. D. 492, 54 N. W. 536; Duggins v. S., 66 Ind. 350.

¹² Johnson v. Com., 5 Ky. L. 877, 5 Cr. L. Mag. 763; S. v. Billings, 77 Iowa 417, 42 N. W. 456.

¹³ Richmond v. S., 16 Neb. 388, 6 Cr. L. Mag. 923, 20 N. W. 282.

the court may determine whether the community is or is not prejudiced. The court is to make a finding from the facts.¹⁴

ARTICLE VII. CHANGE, WHERE.

§ 2818. **To what court or county.**—The venue may be changed from the circuit to county court, but not from the county to the circuit court, under the statute of Illinois.¹⁵ When a change of venue is granted, the case may be lawfully sent out of the judicial circuit to another circuit.¹⁶ Where the statute provides for a change of venue to any convenient county, and the court did not send the case to the nearest where the objection did not exist, but sent it to a county not adjoining the one from which taken, it was held error.¹⁷

ARTICLE VIII. CHANGE BY CONSENT.

§ 2819. **Change by consent of parties.**—A change of venue may be had by consent of the parties to a cause.¹⁸ If the defendant consents that a change of venue may be taken to some county other than that designated by law, he can not question the jurisdiction of the court to which the cause was transferred, or, if the cause be sent to the wrong county, he waives the error by not excepting in the court making the transfer.¹⁹

§ 2820. **Trial in county of offense.**—The defendant, by procuring a change of venue on his application, waives the right to be tried in the county or district where the offense is alleged to have been committed.²⁰

ARTICLE IX. WHEN SEVERAL DEFENDANTS.

§ 2821. **Change for one severs from other defendants.**—Change of venue for one defendant effects a severance from his co-defendant, who does not desire a change.²¹

¹⁴ *Ter. v. Manton*, 8 Mont. 95, 19 Pac. 389, 8 Am. C. R. 526; *P. v. Yoakum*, 53 Cal. 567; *S. v. Douglass*, 41 W. Va. 537; 23 S. E. 724.

¹⁵ *Barr v. P.*, 103 Ill. 110; *Swanson v. P.*, 89 Ill. 589.

¹⁶ *Weyrich v. P.*, 89 Ill. 94. Compare *S. v. Kindig*, 55 Kan. 113, 39 Pac. 1028.

¹⁷ *Baxter v. P.*, 2 Gilm. (Ill.) 580.

¹⁸ *Brennan v. P.*, 15 Ill. 611; *S. v. Peterson*, 2 La. 921; *P. v. Scates*, 3

Scam. (Ill.) 353. Compare *S. v. Potter*, 16 Kan. 80. *Contra*, *Purvis v. S.*, 71 Miss. 706, 14 So. 268. See *Grooms v. S.*, 40 Tex. Cr. 319, 50 S. W. 370.

¹⁹ *S. v. Jennings*, 134 Mo. 277, 35 S. W. 614; *S. v. Gamble*, 119 Mo. 427, 24 S. W. 1030; *S. v. Kent*, 5 N. D. 516, 67 N. W. 1052.

²⁰ *S. v. Crinklaw*, 40 Neb. 759, 59 N. W. 370.

²¹ *Hunter v. P.*, 1 *Scam. (Ill.)* 455;

§ 2822. **Application may be withdrawn.**—A defendant may withdraw his application for a change of venue.²²

ARTICLE X. CERTIFYING THE CAUSE.

§ 2823. **Improperly certified—Error waived.**—The venue having been changed at the request of and upon the application of the defendant, he can not be heard to complain, in the court of review, if the certificate of the clerk was irregular or defective, in transferring the case. It was the duty of the defendant, before the trial began, to point out the defects of the certificate.²³ An indictment as returned by the grand jury was against seven persons. Five of the defendants obtained a change of venue from Coles to Edgar county. The indictment, as certified to the Edgar circuit court, contained the names of six persons only, the name of one of the seven being omitted. Held error to try the defendants on this indictment. The state's attorney, on perceiving the defect in the indictment, should have suggested a diminution of the record, and obtained a full and correct copy from Coles county.^{23a}

§ 2824. **Transmitting original papers, without certificate.**—By the law of the state of Nebraska, and perhaps most of the states, the original indictment must be sent to the clerk of the court to which the cause is transferred.²⁴ Sending the original indictment to the court to which the change is granted, without a certificate of the clerk, will not vitiate the proceedings after verdict.²⁵

ARTICLE XI. SAME IN MISDEMEANOR AS FELONY.

§ 2825. **Law—Same in felony and misdemeanor.**—Under the present law, and since the revision of the Illinois statutes of 1874, there is no distinction between capital and other offenses as to the right to a change of venue.²⁶

Shular v. S., 105 Ind. 289, 7 Am. C. R. 509, 4 N. E. 870, 55 Am. R. 211; S. v. Carothers, 1 Greene (Iowa) 464; S. v. Martin, 2 Ired. (N. C.) 101; S. v. Wetherford, 25 Mo. 439; John v. S., 2 Ala. 290; Whar. Cr. Pl. & Pr. (8th ed.), § 602; 1 Bish. Cr. Proc., § 75; Brown v. S., 18 Ohio St. 496.

²² P. v. Zane, 105 Ill. 662, 5 Cr. L. Mag. 795.

²³ Tucker v. P., 122 Ill. 589, 13 N. E. 809; Gardner v. P., 3 Scam. (Ill.) 86; Perteet v. P., 70 Ill. 180. See S. v. Dusenberry, 112 Mo. 277, 20 S. W. 461 (seal). *Contra*, Hudley v. S., 36 Ark. 237 (seal).

^{23a} Smith v. P., 36 Ill. 292.

²⁴ Preuit v. S., 5 Neb. 377.

²⁵ Holliday v. P., 4 Gilm. (Ill.) 111.

²⁶ Price v. P., 131 Ill. 232, 23 N. E. 639.

ARTICLE XII. CIVIL AND CRIMINAL CASE, ALIKE.

§ 2826. **Law—Same as in civil cases.**—The principles governing the application for a change of venue are the same in civil and in criminal cases.²⁷

ARTICLE XIII. PLEA REQUIRED FIRST.

§ 2827. **Plea before granting change.**—A plea should be entered by the defendant before a change of venue can be granted.²⁸ But if a change of venue is granted on the application of the accused before arraignment, and he has the benefit of arraignment in the court to which the cause is transferred, he can not be heard to complain.²⁹

ARTICLE XIV. SECOND CHANGE.

§ 2828. **Granting second change.**—Although by statute in no case shall a second removal of any cause be allowed, yet a second change may be granted where the judge has been counsel in the cause, notwithstanding the statutory provision.³⁰

§ 2829. **Taking recognizance after change.**—The defendant having applied for and obtained a change of venue from Pike county, the court was authorized by common law to take his recognizance, requiring him to appear at the circuit court in Adams county, where the case was sent.³¹

²⁷ P. v. Scates, 3 Scam. (Ill.) 353.

²⁸ Gardiner v. P., 3 Scam. (Ill.) 188; Gilson v. Powers, 16 Ill. 355.

²⁹ S. v. Kindig, 55 Kan. 113, 39 Pac. 1028.

³⁰ S. v. Underwood, 57 Mo. 40, 1 Am. C. R. 257. Compare S. v. Anderson, 96 Mo. 241, 9 S. W. 636. See Webb v. S., 9 Tex. App. 490.

³¹ Stebbins v. P., 27 Ill. 240.

CHAPTER LXXIX.

ARRAIGNMENT.

ART.	I. Arraignment and Plea,	§ 2830
	II. On Former Conviction,	§ 2831
	III. Withdrawing Plea,	§§ 2832-2833
	IV. Arraignment, When Presumed,	§ 2834
	V. Copy of Indictment,	§ 2835
	VI. Standing Mute,	§ 2836
	VII. Arraignment Waived,	§ 2837
	VIII. Pleading Guilty,	§ 2838

ARTICLE I. ARRAIGNMENT AND PLEA.

§ 2830. **Plea essential—Arraignment defined.**—The arraignment and plea of the defendant should be the first step in the progress of a trial upon an indictment for a felony, as essential to the formation of an issue.¹ “To arraign is nothing else but to call the prisoner to the bar of the court to answer the matter charged upon him in the indictment.” One arraignment is sufficient, though tried a second time.²

ARTICLE II. ON FORMER CONVICTION.

§ 2831. **Former conviction—Indictment.**—A plea of “not guilty” to an indictment containing a count or charge of a prior conviction puts in issue such prior conviction together with the subsequent offense. The accused should be arraigned on such an indictment in the same manner as if it did not contain a charge of a former conviction.³

¹ *Parkinson v. P.*, 135 Ill. 402, 25 N. E. 764; *Minich v. P.*, 8 Colo. 440, 9 Pac. 4, 5 Am. C. R. 22.

² *P. v. Gutierrez*, 74 Cal. 81, 15 Pac. 444; *Thomas v. Com.*, 22 Gratt. (Va.) 912; *Ex parte Young Ah Gow*,

³ 4 Bl. Com. 322; *Fitzpatrick v. P.*, 98 Ill. 260; *S. v. Tate*, 156 Mo. 119, 56 S. W. 1099 (second trial).

73 Cal. 438, 15 Pac. 76.

ARTICLE III. WITHDRAWING PLEA.

§ 2832. **Withdrawing plea, discretionary.**—It is discretionary with the court to permit the defendant to withdraw his plea of not guilty for the purpose of entering his motion to quash the indictment.⁴

§ 2833. **Plea withdrawn—Must plead again.**—Where the defendant, after having entered his plea of not guilty, withdraws it for the purpose of moving the court to quash the indictment, and his motion to quash is overruled, he must again plead to the indictment. The overruling of the motion to quash is not a reinstatement of the plea nor a waiver.⁵

ARTICLE IV. ARRAIGNMENT, WHEN PRESUMED.

§ 2834. **Arraignment presumed.**—If the record is silent as to arraignment and plea, it will be presumed that the defendant was properly arraigned and entered his plea, unless there is something to show affirmatively that he was not arraigned and did not plead.⁶

ARTICLE V. COPY OF INDICTMENT.

§ 2835. **Furnishing copy of indictment—Waived.**—The furnishing of a copy of the indictment will answer the purpose of reading the same to the defendant. The common law formality is disused.⁷ If the accused pleads to the indictment, without having been first provided with a copy of the indictment, or list of witnesses or petit jurors, as provided by statute, he waives the right to the same.⁸

ARTICLE VI. STANDING MUTE.

§ 2836. **Standing mute.**—Under the common law, in the highest crimes as well as in the lowest species of felony, namely, petit larceny,

⁴ *P. v. Lewis*, 64 Cal. 401, 1 Pac. 490; *Adams v. S.*, 28 Fla. 511, 10 So. 106; *Ter. v. Barrett*, 8 N. M. 70, 42 Pac. 66; *S. v. Van Nice*, 7 S. D. 104, 63 N. W. 537.

⁵ *Hatfield v. S.*, 9 Ind. App. 296, 36 N. E. 664; *P. v. Monaghan*, 102 Cal. 229, 36 Pac. 511; *S. v. Hunter*, 43 La. 157, 8 So. 624. *Contra*, *Morton v. P.*, 47 Ill. 468. See also *Hensche v. P.*, 16 Mich. 46.

⁶ *Ter. v. Shipley*, 4 Mont. 468, 2 Pac. 313, 4 Am. C. R. 491. *Contra*,

Grigg v. P., 31 Mich. 471, 1 Am. C. R. 602; *Davis v. S.*, 38 Wis. 487, 1 Am. C. R. 606.

⁷ *Minich v. P.*, 8 Colo. 440, 9 Pac. 4, 5 Am. C. R. 24; *Goodin v. S.*, 16 Ohio St. 344.

⁸ *Kelly v. P.*, 132 Ill. 371, 24 N. E. 56; *McKinney v. P.*, 2 Gilm. (Ill.) 553; *S. v. Fuller*, 14 La. 667; *Loper v. S.*, 3 How. (Miss.) 429; *Hicks v. S.*, 111 Ind. 402, 12 N. E. 522; *Minich v. P.*, 8 Colo. 440, 9 Pac. 4; *Bartley v. P.*, 156 Ill. 234, 40 N. E. 831.

and in all misdemeanors, standing mute hath always been equivalent to conviction.⁹

ARTICLE VII. ARRAIGNMENT WAIVED.

§ 2837. **Arraignment waived.**—The formal arraignment may be waived by the defendant appearing and pleading to the indictment.¹⁰

ARTICLE VIII. PLEADING GUILTY.

§ 2838. **Pleading guilty.**—By a plea of guilty the defendant confesses the indictment to be wholly true as charged.¹¹ But the plea of guilty does not admit that the facts alleged in the indictment amount to an offense.¹²

⁹ 4 Bl. Com. 325.

¹⁰ S. v. Weeden, 133 Mo. 70, 34 S. W. 473; Ransom v. S., 49 Ark. 176, 4 S. W. 658; S. v. Grate, 68 Mo. 22, 3 Am. C. R. 324.

¹¹ Ter. v. Miller (Dak. Ter.), 8

Cr. L. Mag. 286; P. v. Cignarale, 110 N. Y. 32, 17 N. E. 135; S. v. Queen, 91 N. C. 659.

¹² Fletcher v. S., 12 Ark. 169; Crow v. S., 6 Tex. 334. See P. v. Delany, 49 Cal. 395.

CHAPTER LXXX.

TRIAL AND INCIDENTS.

ART.	I. Arraignment and Plea,	§ 2839
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	III. Presence of Defendant,	§§ 2843-2846
	IV. Objections and Exceptions,	§§ 2847-2858
	V. Arguments and Remarks,	§§ 2859-2871
	VI. Waiving Rights,	§§ 2872-2876
	VII. Matters of Practice,	§§ 2877-2889

ARTICLE I. ARRAIGNMENT AND PLEA.

§ 2839. **Arraignment and plea—Plea nunc pro tunc.**—There must be an arraignment and plea of the defendant entered before the jury is sworn to try the issues; and entering the plea after the case is in progress, and a witness sworn and examined, will not cure the error. A plea can not be entered *nunc pro tunc* after verdict.¹ But where the defendant went to trial without entering his plea, and after the trial a plea of not guilty was entered *nunc pro tunc* by the court, in open court in his presence, and he made no objection, he is bound by such order.²

¹Parkinson v. P., 135 Ill. 403, 25 N. E. 764; S. v. Hughes, 1 Ala. 655; P. v. Gaines, 52 Cal. 479; S. v. Montgomery, 63 Mo. 296; Gould v. P., 89 Ill. 217; S. v. Epps, 27 La. 227; S. v. Saunders, 53 Mo. 234, 2 Green C. R. 596; S. v. Wilson, 42 Kan. 587, 22 Pac. 622. But see S. v. Hayes, 67 Iowa 27, 24 N. W. 575, 6 Am. C. R. 335; P. v. Tower, 63 Hun 624, 17 N. Y. Supp. 395; S. v. Thompson, 95 Iowa 464, 64 N. W. 419; P. v. Bradner, 10 N. Y. St. 667; Shaw v. S., 17 Tex. App. 225; Ray v. P., 6 Colo. 231; P. v. Gaines, 52 Cal. 479; S. v. West, 84 Mo. 440; Jackson

v. S., 91 Ala. 55, 8 So. 773; Hoskins v. P., 84 Ill. 88; S. v. Williams, 117 Mo. 379, 22 S. W. 1104; Johnson v. P., 22 Ill. 317; Link v. S., 3 Heisk. (Tenn.) 252; Aylesworth v. P., 65 Ill. 302; S. v. Cunningham, 94 N. C. 824; Yundt v. P., 65 Ill. 374; Bowen v. S., 108 Ind. 411, 9 N. E. 378; Billings v. S., 107 Ind. 54, 6 N. E. 914, 7 N. E. 763, 7 Am. C. R. 188.

²Long v. P., 102 Ill. 336; Spicer v. P., 11 Ill. App. 294. See S. v. Hayes, 67 Iowa 27, 24 N. W. 575; S. v. Glave, 51 Kan. 330, 33 Pac. 8.

ARTICLE II. SEPARATE TRIAL, WHEN.

§ 2840. **Separate trial discretionary.**—The granting of a separate trial is addressed to the sound discretion of the court and will not be reviewed unless it appears there was an abuse of that discretion.³ Error can not ordinarily be assigned upon the court's refusal to give the accused separate trials.⁴

§ 2841. **Separate trial—When should be allowed.**—On a joint indictment, if it appears that evidence competent against one defendant is incompetent and damaging as to others, a separate trial should be granted: as, for example, a confession made by one of the defendants in a capital case.⁵ Or that the wife of one defendant is a material witness for the other is a sufficient ground for a separate trial.⁶

§ 2842. **Result if separate trial is allowed.**—In cases where a separate trial is awarded, there being no provision of law by which a part of the cause may be transferred to another branch of the same court, it must be tried in the branch of the court which has jurisdiction of the cause and where the indictment is pending.⁷

ARTICLE III. PRESENCE OF DEFENDANT.

§ 2843. **Presence of defendant essential.**—The better opinion is that the rule that the accused in cases of felony must be present in person pending the trial should be adhered to from the arraignment to the final sentence.⁸ It is not within the authority of the prisoner's

³ Doyle v. P., 147 Ill. 397, 35 N. E. 172; Johnson v. P., 22 Ill. 317; U. S. v. Marchant, 12 Wheat. (U. S.) 180; S. v. Soper, 16 Me. 293; Bixbee v. S., 6 Ohio 86; S. v. Smith, 2 Fed. (N. C.) 402; U. S. v. Gilbert, 2 Sum. (U. S.) 19; Hawkins v. S., 9 Ala. 137; S. v. Fournier, 68 Vt. 162, 35 Atl. 178; S. v. Desroche, 47 La. 651, 17 So. 209; Ballard v. S., 31 Fla. 266, 12 So. 865; Spies v. P., 122 Ill. 265, 12 N. E. 865, 17 N. E. 898; S. v. Finley, 118 N. C. 1161, 24 S. E. 195; Gillespie v. P., 176 Ill. 242, 52 N. E. 250; Stewart v. S., 64 Miss. 126, 2 So. 73; Givens v. S., 109 Ala. 19, 19 So. 974; Com. v. James, 99 Mass. 438; P. v. Alviso, 55 Cal. 230; Com. v. Seeley, 167 Mass. 163, 45 N. E. 91; P. v. Fuhrmann, 103 Mich.

593, 61 N. W. 865; U. S. v. Ball, 163 U. S. 662, 16 S. Ct. 1192.

⁴ Maton v. P., 15 Ill. 539; Com. v. Thompson, 108 Mass. 461; Com. v. Robinson, 67 Mass. 555; Com. v. Lewis, 25 Gratt. (Va.) 938; S. v. Meaker, 54 Vt. 112; S. v. Doolittle, 58 N. H. 92.

⁵ White v. P., 81 Ill. 336; Com. v. James, 99 Mass. 438.

⁶ 1 Roscoe Cr. Ev. 127; Com. v. Eastland, 1 Mass. 15.

⁷ P. v. Matson, 129 Ill. 596, 22 N. E. 456. The fact that a co-defendant opposes an application for a separate trial is no ground for refusal: Kelley v. P., 55 N. Y. 565, 14 Am. R. 342.

⁸ Stubbs v. S., 49 Miss. 716, 1 Am. C. R. 611; Rolls v. S., 52 Miss. 391;

counsel to waive for him his right to be present when the verdict of the jury in a felony case is delivered.⁹

§ 2844. **Presence of defendant—When not essential.**—The presence of the defendant is not required during the arguments of a motion merely preliminary to or preceding the trial.¹⁰

§ 2845. **Defendant absconding during trial.**—In all criminal cases, if the defendant voluntarily absents himself during the trial, the court may proceed to final judgment against him in his absence.¹¹

§ 2846. **Trial where two indictments.**—Compelling a defendant to proceed to trial on a second indictment for the same offense before the first is disposed of is not error.¹²

ARTICLE IV. OBJECTIONS AND EXCEPTIONS.

§ 2847. **Bill of exceptions essential.**—A court of review will not be authorized to consider or pass upon the rulings of the trial court on the admission of evidence, the giving or refusing of instructions, motion for a new trial, or other matters or proceedings which are not a part of the record proper, unless exceptions be taken to such rulings at the proper time and embodied in a bill of exceptions.¹³ And the rulings of the trial court on constitutional questions must likewise be preserved in a bill of exceptions, for they can not be raised for the first time in a court of review.^{13a} But where it appears that the trial

S. v. Smith, 44 Kan. 75, 24 Pac. 84; *Lovett v. S.*, 29 Fla. 356, 11 So. 172; *S. v. Jenkins*, 84 N. C. 812, 37 Am. R. 643; *Sewell v. P.*, 189 Ill. 175, 59 N. E. 583. See *Schirmer v. P.*, 33 Ill. 276, 284. See "Sentence."

⁹ *Cook v. S.*, 60 Ala. 39, 3 Am. C. R. 305.

¹⁰ *Epps v. S.*, 102 Ind. 539, 1 N. E. 491, 5 Am. C. R. 520; *Miller v. S.*, 29 Neb. 437, 45 N. W. 451; *S. v. Atkinson*, 40 S. C. 363, 18 S. E. 1021, 42 Am. R. 877; *Ward v. Ter.*, 8 Okl. 12, 56 Pac. 704. *Contra, S. v. Clifton*, 57 Kan. 448, 46 Pac. 715.

¹¹ *Harris v. P.*, 130 Ill. 457, 22 N. E. 326; *Sahlinger v. P.*, 102 Ill. 245; *S. v. Guinness*, 16 R. I. 401, 16 Atl. 910; *Com. v. McCarthy*, 163 Mass. 458, 40 N. E. 766; *S. v. Kelly*, 97 N. C. 404, 2 S. E. 185; *S. v. Perkins*, 40 La. 210, 3 So. 647; *Frey v. Calhoun* Circuit Judge, 107 Mich. 130, 64 N. W. 1047. See "Sentence."

¹² *Gannon v. P.*, 127 Ill. 523, 21 N. E. 525; *Com. v. Drew*, 3 Cush. (Mass.) 279; *S. v. McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. C. R. 540.

¹³ *Gill v. P.*, 42 Ill. 323; *Bergdahl v. P.* (Colo.), 61 Pac. 228; *S. v. Morrow*, 40 S. C. 221, 18 S. E. 853, 9 Am. C. R. 37. See *S. v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 211; *P. v. Guidici*, 100 N. Y. 503, 3 N. E. 493, 5 Am. C. R. 456; 2 *Thompson Trials*, § 2804; *McKee v. Calvert*, 80 Mo. 348; *S. v. Moore*, 156 Mo. 135, 56 S. W. 900; *Harris v. S.* (Tex. Cr.), 56 S. W. 622. See "Records" generally. See §§ 2847, 2852, 2856, 3396, 3397.

^{13a} *S. v. Raymond*, 156 Mo. 117, 56 S. W. 894; *S. v. Pitts*, 156 Mo. 247, 56 S. W. 887 (evidence); *Shenkenberger v. S.*, 154 Ind. 630, 57 N. E. 519 (evidence); *S. v. Moore*, 156 Mo. 135, 56 S. W. 900. See *S. v. Schuman*, 36 Or. 16, 58 Pac. 661; *Craw-*

court was without jurisdiction of the subject-matter, then such jurisdictional question may be raised for the first time in a court of review. The court will, in such case, *ex mero motu*, take notice of such defect.^{13b}

§ 2848. **Exception to ruling on motion to quash.**—The indictment being a part of the record without a bill of exceptions, there is no necessity of excepting to the ruling of the court upon the motion to quash.¹⁴ And a motion in arrest of judgment saves itself without the necessity of a bill of exceptions.¹⁵

§ 2849. **Objection, when to be made.**—Objection to incompetent evidence should be made at the time and the ground of objection stated. It will not do to state the reasons for objection, for the first time, on the motion for a new trial.¹⁶

§ 2850. **Objection too general.**—When the objection to evidence is general, and it is overruled, and the evidence is received, the ruling will not be held erroneous, unless there be some grounds which could not have been obviated had they been specified, or unless the evidence in its essential nature be incompetent.¹⁷

§ 2851. **Objection to be specific.**—If a witness gives testimony, a part of which is competent and a part not, a general objection and exception will be overruled. The objection should be made specifically to the objectionable portion at the time before the witness answers.¹⁸ When an objection is made to testimony apparently relevant and competent the objection should be specifically set forth, so that it may not only be brought to the notice of the presiding judge, but be met by the opposite party. Otherwise it will be considered as waived.¹⁹

ford v. S., 155 Ind. 692, 57 N. E. 931; S. v. Edwards, 126 N. C. 1051, 35 S. E. 540 (new evidence).

^{13b} Lowery v. State Life Ins. Co., 153 Ind. 102, 54 N. E. 442; Doctor v. Hartman, 74 Ind. 221; Campbell v. Porter, 162 U. S. 478, 482; 12 Encyc. Pl. & Pr. 190.

¹⁴ Baker v. P., 105 Ill. 454; Gallimore v. Dazey, 12 Ill. 143; Safford v. Vail, 22 Ill. 327. See Keedy v. P., 84 Ill. 569; Raines v. S. (Fla.), 28 So. 57.

¹⁵ Nichols v. P., 40 Ill. 396; Harris v. S., 155 Ind. 265, 56 N. W. 916. See Brown v. S. (Fla.), 27 So. 869.

¹⁶ Harvey v. S., 40 Ind. 516, 1 Green C. R. 747; 2 Thomp. Trials, § 2786; McClellan v. Bond, 92 Ind.

424; Camden v. Doremus, 3 How. (U. S.) 515-530; Phelps v. Mayer, 15 How. (U. S.) 160. See Hobbs v. P., 183 Ill. 336, 55 N. E. 692.

¹⁷ Sparf v. U. S., 156 U. S. 51, 15 S. Ct. 273, 10 Am. C. R. 174; Castlin v. S. (Tex. Cr.), 57 S. W. 827; Tozer v. New York, etc., Co., 105 N. Y. 659, 11 N. E. 846; Wright v. S. (Fla.), 27 So. 863; Alcorn v. Chicago, etc., R. Co., 108 Mo. 81, 18 S. W. 188; Lowenstein v. McCadden, 92 Tenn. 614, 22 S. W. 426; Ward v. Wilms, 16 Colo. 86, 27 Pac. 247.

¹⁸ Myers v. P., 26 Ill. 173. See Sparf v. U. S., 156 U. S. 51, 15 S. Ct. 273, 10 Am. C. R. 173.

¹⁹ S. v. Bowe, 61 Me. 171, 2 Green C. R. 460.

§ 2852. No exceptions taken—Irregularity waived.—No exceptions having been taken on the trial as to the giving of certain prejudicial testimony, the point can not be considered in the court of review.²⁰ A prisoner has no right to stand by and suffer irregular or prejudicial proceedings to take place without objection and exception; and if he does so he waives his rights as to such irregularities. This rule applies to capital as well as other cases.²¹

§ 2853. Ruling on rejected evidence.—It is a general rule that an exception to the admission or rejection of evidence must be so framed as to disclose the nature of the evidence admitted or rejected, otherwise the reviewing court can not intelligently pass judgment upon it. Error can not be assigned in the ruling out of evidence, unless it is distinctly shown what was the evidence so ruled out, in order that its relevancy may appear and that prejudice has arisen from its rejection.²² Where the exception is to the exclusion of evidence it must be so framed as to inform the reviewing court what answer the witness was expected to give; counsel should inform the court what he proposes to prove.²³ Several questions were asked a witness by the defense, to which answers were not permitted. As it does not appear from the record what evidence was expected to be elicited, it can not be determined that the rulings of the court were wrong.²⁴

§ 2854. Evidence competent against one, but not as to others.—Where the evidence offered is clearly incompetent as to one of two defendants, on general objection it should be rejected by the court, though competent against the other, even though the objection be made for each defendant.²⁵

§ 2855. Exception to instructions—Too general.—A general exception to the whole charge of the court, and to each part of it, when

²⁰ Hughes v. P., 116 Ill. 337, 6 N. E. 55; Graham v. P., 115 Ill. 568, 4 N. E. 790; Moeck v. P., 100 Ill. 244.

²¹ Graham v. P., 115 Ill. 568, 4 N. E. 790; Bulliner v. P., 95 Ill. 401; Perteet v. P., 70 Ill. 179; Mayes v. P., 106 Ill. 314; Bradshaw v. S., 17 Neb. 147, 22 N. W. 361, 5 Am. C. R. 503; Brotherton v. P., 75 N. Y. 159, 3 Am. C. R. 219. See §§ 2847, 2856.

²² 2 Thomp. Trials, § 2805, citing Summer v. Candler, 92 N. C. 634.

²³ 2 Thomp. Trials, §§ 678, 2805; Whitney v. S., 154 Ind. 573, 57 N. E. 398; Allen v. S., 73 Ala. 23; Jackson v. Com., 98 Va. 845, 36 S. E. 487;

Jackson v. Hardin, 83 Mo. 175, 187; Haynes v. S. (Tex. Cr.), 56 S. W. 923; Roberts v. Roberts, 85 N. C. 9; Mergentheim v. S., 107 Ind. 567, 8 N. E. 567. See Carter v. Texas, 177 U. S. 442, 20 S. Ct. 687; Carter v. S., 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508; City of St. Louis v. Babcock, 156 Mo. 148, 56 S. W. 732.

²⁴ S. v. Montgomery, 65 Iowa 483, 22 N. W. 639, 5 Am. C. R. 56; Burns v. S., 49 Ala. 370, 1 Am. C. R. 327.

²⁵ Sparf v. U. S., 156 U. S. 51, 15 S. Ct. 273, 10 Am. C. R. 174. See "Evidence."

the charge contains more than a single proposition of law and is not in all respects erroneous, presents no question for review on error or appeal.²⁶

§ 2856. Exception to instructions, when.—It must appear by the transcript or bill of exceptions not only that the instructions were given or refused at the trial but also that the party who complains of them excepted to the giving or refusing of them at the time they were given or refused in open court.²⁷

§ 2857. Exception to instructions should be specific.—A party, in excepting to the giving or refusing of instructions, should point out definitely the instructions or part of the charge complained of and state the grounds upon which he excepts; otherwise a court of review is not bound to take notice of the exception. Referring to the instructions collectively in taking exceptions is not sufficient.²⁸

§ 2858. Instruction in capital case.—It has been held that a court of review will consider an objectionable instruction in a capital case, though no exception was taken to it in the trial court.²⁹

ARTICLE V. ARGUMENTS AND REMARKS.

§ 2859. Improper remarks by court.—Remarks of the trial judge and questions to the witnesses in reference to the issues on trial and comments on the evidence, or seeking to sustain the witness by the judge, will, in a case at all doubtful, reverse.³⁰ The court addressing counsel for the defendant, said: "Do you mean to say, sir, that there is no evidence here to show the guilt of the defendant? I say there is evidence." Held prejudicial error.³¹ The court, in stating to the jury, when they requested to be discharged because they could not agree, that "before the next term of the court the witnesses may be

²⁶ Jones v. Osgood, 2 Seld. (N. Y.) 233, cited in Adams v. S., 25 Ohio St. 584.

²⁷ 2 Thomp. Trials, § 2802; Phelps v. Mayer, 15 How. (U. S.) 161; S. v. Waters, 156 Mo. 132, 56 S. W. 734; S. v. West, 157 Mo. 309, 57 S. W. 1071; P. v. Shirlock (N. E.), 59 N. E. 830. See §§ 2847, 2852.

²⁸ Adams v. S., 25 Ohio St. 584, 2 Am. C. R. 395; Hawkins v. S.

(Neb.), 83 N. W. 198; Crawford v. S., 155 Ind. 692, 57 N. E. 931.

²⁹ Falk v. P., 42 Ill. 335.

³⁰ Burke v. P., 148 Ill. 75, 35 N. E. 376; Lycan v. P., 107 Ill. 428. See Felker v. S., 54 Ark. 489, 16 S. W. 663; Garner v. S., 28 Fla. 113, 9 So. 835.

³¹ Feinberg v. P., 174 Ill. 617, 51 N. E. 798; Synon v. P., 188 Ill. 609, 624, 59 N. E. 508.

in their graves and justice may be cheated out of its victim," committed prejudicial error.³²

§ 2860. **Court indicating opinion.**—After the jury had been considering of their verdict, on being sent for by the court one of the jurors remarked to the court, in the presence and hearing of the counsel for the state and the accused and in the presence of the accused and hearing of the rest of the jury, that he thought the jury could not agree. Whereupon the court responded to the juror in the same presence and hearing: "I see no reason why the jury can not agree upon a verdict in this case," and again directed the jury to retire and further consider of their verdict. The remark of the court was held error.³³

§ 2861. **Improper arguments.**—Remarks and statements made by the state's attorney, calculated to inflame the minds of the jury to the prejudice of the defendant, and unwarranted from the evidence, will be error in a case where the facts are not satisfactory.³⁴

§ 2862. **Calling defendant scoundrel.**—The court permitted the state's attorney, in addressing the jury, to use the following language: "The defendant is such a scoundrel that he was compelled to move his trial from Jones county to a county where he is not known. The bold, brazen-faced rascal had the impudence to write me a note yesterday begging me not to prosecute him and threatening me if I did, he would get the legislature to impeach me." Held prejudicial error.³⁵

§ 2863. **Remarks not prejudicial.**—Where it appears from the record that improper remarks of counsel for the state during his argument did not prejudice the rights of the accused, a verdict of conviction will not be disturbed on that account.³⁶

§ 2864. **Court should confine arguments.**—It is the duty of the court to confine the arguments of counsel to such matters as properly

³² Fisher v. P., 23 Ill. 228, 231; Com. v. Werntz, 161 Pa. St. 591, 29 Atl. 272.

³³ S. v. Hurst, 11 W. Va. 54, 3 Am. C. R. 117; P. v. Kindleberger, 100 Cal. 367, 34 Pac. 852.

³⁴ Raggio v. P., 135 Ill. 545, 26 N. E. 377; McDonald v. P., 126 Ill. 153, 18 N. E. 817; Fox v. P., 95 Ill. 78. See S. v. Smith, 75 N. C. 306, 1 Am.

C. R. 581; S. v. King, 64 Mo. 595. See "Records."

³⁵ S. v. Smith, 75 N. C. 306, 1 Am. C. R. 581. See Scott v. S., 91 Wis. 552, 65 N. W. 61, 10 Am. C. R. 153; S. v. Bobbst, 131 Mo. 328, 32 S. W. 1149, 10 Am. C. R. 8.

³⁶ Epps v. S., 102 Ind. 539, 1 N. E. 491, 5 Am. C. R. 527.

pertain to the case, and not permit reference to matters prejudicial to the rights of the defendant.³⁷

§ 2865. Court shall not deny argument.—It is not within the discretion of the court to deny counsel for the accused the right to argue the question of fact before the jury, however conclusive the facts may appear to be against the accused.³⁸

§ 2866. Waiving argument.—The plaintiff may waive the opening argument if he desires; then if the defendant waives his argument the case will go to the jury without any argument.³⁹

§ 2867. Argument on "good time"—Objectionable.—The state's attorney, in his argument to the jury, called their attention to what is known as the "good time" statute, and insisted, over the objection of counsel for the defendant, that it should be taken into consideration in fixing the term of imprisonment: Held error.⁴⁰

§ 2868. Improper argument must be objected to.—Improper language used by counsel in his argument to the jury must be objected to and the attention of the court called to the same, and a ruling had and embodied in a bill of exceptions before the same will be considered by a court of review.⁴¹

§ 2869. Limiting arguments.—Where the court limits the arguments without objection or asking further time it will avail a party nothing to raise the point on a motion for a new trial.⁴² Where several witnesses were examined in a felony case, where the value of property stolen was found by the jury to be one hundred and twenty-five dollars, a limitation of five minutes for the argument was a virtual denial of the right of the accused to be heard by counsel.⁴³

³⁷ McDonald v. P., 126 Ill. 156, 18 N. E. 817; Smith v. P., 8 Colo. 457, 8 Pac. 920, 5 Am. C. R. 616; P. v. Mitchell, 62 Cal. 411.

³⁸ White v. P., 90 Ill. 118. Compare Bill v. P., 14 Ill. 432.

³⁹ Trask v. P., 151 Ill. 530, 38 N. E. 248.

⁴⁰ Farrell v. P., 133 Ill. 246, 24 N. E. 423.

⁴¹ Campbell v. P., 109 Ill. 577; Mayes v. P., 106 Ill. 314; Gannon

v. P., 127 Ill. 519, 21 N. E. 525; Scott v. P., 141 Ill. 214, 30 N. E. 329; Earll v. P., 99 Ill. 136; Martin v. S., 79 Wis. 165, 48 N. W. 119; Matthews v. P., 6 Colo. App. 456, 41 Pac. 839; Metz v. S., 46 Neb. 547, 65 N. W. 190; Saylor v. Com. (Ky.), 57 S. W. 614; S. v. Keenan (Iowa), 82 N. W. 792; S. v. Holloway, 156 Mo. 222, 56 S. W. 734.

⁴² Long v. P., 102 Ill. 337.

⁴³ White v. P., 90 Ill. 119; Dille v.

§ 2870. **Remarks on defendant's conduct.**—If the defendant elects to become a witness in his own behalf and refuses to submit to a full cross-examination within proper limits, then all his conduct and demeanor are proper matters of comment by counsel.⁴⁴

§ 2871. **Reading from law books.**—Counsel, in his argument to the jury, may read reported decisions from the reports, and may read the statement of facts of such cases, and may comment on the same.⁴⁵ In some of the states, where the jury are not made the judges of the law, it has been held discretionary whether counsel should read from the law books to the jury.⁴⁶

ARTICLE VI. WAIVING RIGHTS.

§ 2872. **Defendant may waive rights.**—The accused in a capital case is not presumed to waive any of his rights, but he may, by express consent, admit them all away, but the consent must be affirmatively shown.⁴⁷

§ 2873. **Furnishing copy of indictment—List of witnesses.**—Where a change of venue had been taken, and a copy of the indictment sent instead of the original to the county of the trial, the defendant waives his right to be tried on the original by going to trial on the copy.⁴⁸ If the accused proceed to trial without demanding a copy of the indictment, list of the witnesses and jurors, he waives the right to the same.⁴⁹ The list of witnesses which is required to be furnished to the defendant before arraignment means the witnesses indorsed on the indictment by the foreman of the grand jury.⁵⁰

S., 34 Ohio St. 617, 3 Am. C. R. 374; P. v. Keenan, 13 Cal. 581; Hunt v. S., 49 Ga. 255, 2 Green C. R. 587; S. v. Collins, 70 N. C. 241, 2 Green C. R. 740.

⁴⁴ S. v. Ober, 52 N. H. 459, 1 Green C. R. 211.

⁴⁵ Wolford v. P., 148 Ill. 300, 36 N. E. 107; Klepfer v. S., 121 Ind. 491, 23 N. E. 287; Stout v. S., 96 Ind. 411; S. v. Verry, 36 Kan. 416, 13 Pac. 838; S. v. Anderson, 43 Conn. 514; S. v. Hoyt, 46 Conn. 338; S. v. Whitmore, 53 Kan. 343, 36 Pac. 748.

⁴⁶ Com. v. Hill, 145 Mass. 305, 14 N. E. 124; S. v. Brooks, 92 Mo. 542,

5 S. W. 257, 330; Legg v. Drake, 1 Ohio St. 287.

⁴⁷ Perteet v. P., 70 Ill. 179; P. v. Scates, 3 Scam. (Ill.) 351. *Contra*, Dempsey v. P., 47 Ill. 325; Hopt v. Utah, 110 U. S. 574, 4 S. Ct. 202, 4 Am. C. R. 421.

⁴⁸ Goodhue v. P., 94 Ill. 47.

⁴⁹ McKinney v. P., 2 Gilm. (Ill.) 553; Bartley v. P., 156 Ill. 240, 40 N. E. 831; Minich v. P., 8 Colo. 440, 9 Pac. 4, 5 Am. C. R. 27; Fouts v. S., 8 Ohio St. 98; Pressley v. S., 19 Ga. 192; S. v. Russell, 33 La. 135.

⁵⁰ Gardner v. P., 3 Scam. (Ill.) 89.

§ 2874. **Waiving jury.**—Where a statute authorizes a defendant in a criminal case to waive all right to a jury trial it would not authorize him to consent to a trial by a jury of less than twelve jurors.⁵¹

§ 2875. **Waiving presence of witnesses.**—All of the authorities agree that the accused may waive the right to be confronted with the witnesses on the trial.⁵²

§ 2876. **Waiving constitutional rights.**—The defendant may waive his constitutional rights, with few exceptions.⁵³

ARTICLE VII. MATTERS OF PRACTICE.

§ 2877. **Plea in abatement before merits.**—Where, by statute, a preliminary examination is required to be had before the state's attorney can lawfully file an information for a criminal offense, the better practice is for the defendant to plead the want of such examination in abatement of the information before pleading to the merits. The state's attorney can then take issue on the plea and the fact can be determined by proof, the burden of proving the plea being on the defendant. In the absence of such issue and proof all essential preliminary proceedings must be presumed.⁵⁴

§ 2878. **Supplying lost indictment by copy.**—The court may supply a lost indictment by copy, but this can only be done when there is evidence to show that the indictment had become a record of the court.⁵⁵

§ 2879. **Bill of particulars—When.**—A motion for a bill of particulars is a motion addressed to the discretion of the court, and as such is not reversible error on a bill of exceptions.⁵⁶ A party when re-

⁵¹ Wartner v. S., 102 Ind. 51, 1 N. E. 65, 5 Am. C. R. 180; Moore v. S., 72 Ind. 358. See "Jury; Jurors."

⁵² S. v. Bowker, 26 Or. 309, 9 Am. C. R. 369, 38 Pac. 124; S. v. Wagner, 78 Mo. 644; S. v. Polson, 29 Iowa 133; Williams v. S., 61 Wis. 292, 21 N. W. 56; Shular v. S., 105 Ind. 298, 4 N. E. 870; Cooley Const. Lim. 318.

⁵³ Smurr v. S., 105 Ind. 125, 4 N. E. 445, 7 Am. C. R. 554; Waiver, etc., 6 Cr. L. Mag. 182; In re Staff,

63 Wis. 285, 23 N. W. 587; S. v. Kaufman, 51 Iowa 578, 2 N. W. 275, 2 Am. C. R. 626.

⁵⁴ S. v. Leicham, 41 Wis. 565, 2 Am. C. R. 126.

⁵⁵ S. v. Simpson, 67 Mo. 647, 3 Am. C. R. 332.

⁵⁶ S. v. Nagle, 14 R. I. 331, 5 Am. C. R. 334; Howard v. P. (Colo.), 61 Pac. 595; S. v. Hood, 51 Me. 363; Chaffee v. Soldan, 5 Mich. 242; Com. v. Wood, 4 Gray (Mass.) 11. But see S. v. Wooley, 59 Vt. 357, 10

quired to furnish the other side a bill of particulars must be confined to the particulars specified, as closely and effectually as if they constituted the allegations in the indictment.⁵⁷

§ 2880. **Demurrer to evidence.**—The court should not pass upon the merits of a case in considering a demurrer to the facts or evidence, if the demurrer is so inartificially drawn and the facts so improperly stated as to leave the rights of the parties doubtful.⁵⁸

§ 2881. **Demurring to indictment.**—The doctrine seems to be in England that if a defendant demur to an indictment for a misdemeanor, and the demurrer be overruled, judgment of conviction is rendered, but in felonies the rule is different.⁵⁹

§ 2882. **Striking cause from docket.**—On motion of the state's attorney a cause was stricken from the docket by leave of the court. This action in striking the case absolutely and unconditionally amounted to a *nolle prosequi* and a reinstatement of the cause at a subsequent term of the court and trial were illegal acts.⁶⁰ But if a case be stricken from the docket with leave to reinstate, it may again be placed upon the docket and tried.⁶¹ If an order be made striking the case from the docket, and no exception taken, it will be presumed the court acted upon sufficient cause.⁶²

§ 2883. **Election as to counts.**—The courts will only listen to the request to compel the prosecution to elect in felonies when they can see that the charges are actually distinct and may confound the defendant or distract the attention of the jury. Otherwise it is a matter resting in the discretion of the court, and a refusal to compel such election can not be assigned for error.⁶³

Atl. 84, holding that the accused is entitled to a bill of particulars.

⁵⁷ Com. v. Davis, 11 Pick. (Mass.) 434; McDonald v. P., 126 Ill. 160, 18 N. E. 817, 7 Am. C. R. 137; Com. v. Snelling, 15 Pick. (Mass.) 321; P. v. McKinney, 10 Mich. 54. See Weimer v. P., 186 Ill. 506, 58 N. E. 378.

⁵⁸ Crowe v. P., 92 Ill. 236. See § 2767.

⁵⁹ Johnson v. P., 22 Ill. 317; Fulk-

ner v. S., 3 Heisk. (Tenn.) 33, 1 Green C. R. 664; 4 Bl. Com. 334.

⁶⁰ Kistler v. S., 64 Ind. 371, 3 Am. C. R. 25.

⁶¹ Blalock v. Randall, 76 Ill. 225; Tibbs v. Allen, 29 Ill. 547.

⁶² P. v. Green, 54 Ill. 280.

⁶³ S. v. Letcham, 41 Wis. 565, 2 Am. C. R. 126; Miller v. S., 25 Wis. 384. See "Indictments," § 2784.

§ 2884. **Admitting of further evidence.**—The admission of further evidence after the case has been closed and after arguments made, but before the jury has retired, is a matter resting in the sound discretion of the court, and is not ground for error unless that discretion was abused.⁶⁴

§ 2885. **Law of procedure.**—Prosecutions commenced before the repeal of a statute shall be carried on after the repealing law takes effect, with the law of procedure then in force, that is, the new law.⁶⁵

§ 2886. **Striking plea from files, when error.**—To strike from the files a plea in abatement, in due form and verified, without submitting the same for trial to a jury, is error.⁶⁶

§ 2887. **Special plea and general issue.**—It has been held that if a defendant plead a special plea, and also the general issue, it is error to compel him to go to trial on both at the same time.⁶⁷

§ 2888. **Plea of former acquittal—Practice.**—When the plea of *autre fois acquit* upon its face shows that the offenses are legally distinct and incapable of identification by averments the replication of *nul tiel* record may conclude with a verification and the court may decide the issue.⁶⁸

§ 2889. **Failure to file briefs in court of review.**—In criminal cases the court of review will not affirm the judgment of the court below merely for a failure to file briefs within the rule of the court of review.⁶⁹

⁶⁴ Tucker v. P., 122 Ill. 594, 13 N. E. 809.

⁶⁵ Farmer v. P., 77 Ill. 324; P. v. Mortimer, 46 Cal. 114, 2 Green C. R. 428; Powers v. S., 87 Ind. 144.

⁶⁶ Amann v. P., 76 Ill. 188.

⁶⁷ Clem v. S., 42 Ind. 420, 13 Am. R. 369, 2 Green C. R. 694; Com. v.

Merrill, 8 Allen (Mass.) 545; Henry v. S., 33 Ala. 389; Solliday v. Com., 28 Pa. St. 13; 4 Bl. Com. 338; 1 Bish. Cr. Proc. (3d ed.), § 752.

⁶⁸ Clem v. S., 42 Ind. 420, 13 Am. R. 369, 2 Green C. R. 702.

⁶⁹ Presser v. P., 98 Ill. 406.

CHAPTER LXXXI.

COURT; ATTORNEY.

ART.	I. Assigning Counsel to Defend,	§§ 2890-2891
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ARTICLE I. ASSIGNING COUNSEL TO DEFEND.

§ 2890. **Counsel assigned for defendant.**—Every person charged with crime shall be allowed counsel, and if unable to procure one of his choice the court shall assign him competent counsel, who shall conduct his defense.¹ Counsel assigned to defend the accused shall have reasonable time within which to understand the case and prepare the defense.² An attorney appointed by the court to defend one charged with crime is not required to neglect other business of clients by whom he was previously employed in preparing the defense of the accused. He is entitled to reasonable time after discharging such prior duties to prepare defendant's case for trial.³

§ 2891. **Counsel appointed without compensation.**—An attorney appointed by the court to defend a person under indictment for crime can not recover compensation for his services from the county in

¹ Ill. Rev. Stat. 1874, 410, ch. 38, 966; S. v. Ferris, 16 La. 425; S. v. § 422; North v. P., 139 Ill. 98, 28 Simpson, 38 La. 23.

N. E. 966. ³ North v. P., 139 Ill. 97, 28 N. E.

² North v. P., 139 Ill. 98, 28 N. E. 966.

which the prosecution was conducted; and the court has power to compel an attorney, as one of its officers, to defend a prisoner who is unable to employ counsel.⁴

ARTICLE II. PRIVATE COUNSEL FOR STATE.

§ 2892. **Private counsel assisting prosecution.**—Attorneys employed by private parties ought not to be permitted to aid the district attorney conducting the trial of a case for the prosecution.⁵ But the practice in some jurisdictions of allowing the district or state's attorney to have the assistance of associate counsel in the trial of criminal cases can not be assigned as error.⁶

ARTICLE III. PRIVILEGED COMMUNICATIONS.

§ 2893. **Privileged communication—When not.**—If a party consults an attorney and obtains advice on a matter which afterwards turns out to be the commission of a crime or fraud, the party so consulting the attorney has no privilege whatever to close the lips of the attorney from stating the truth.⁷

ARTICLE IV. DISBARMENT; STRIKING FROM ROLL.

§ 2894. **Power to disbar attorneys.**—The power to disbar attorneys is possessed by all courts which have authority to admit them to practice. But the power can only be exercised where there has been such conduct on the part of the attorney complained of as shows him to be unfit to be a member of the profession. Before a judgment disbaring an attorney is rendered he should have notice of the grounds of complaint against him and ample opportunity of explanation and defense.⁸

⁴ *Vise v. County of Hamilton*, 19 Ill. 78. See also *Dixon v. P.*, 168 Ill. 193, 48 N. E. 108.

⁵ *Biemel v. S.*, 71 Wis. 444, 7 Am. C. R. 562, 37 N. W. 244; *S. v. Orrick*, 106 Mo. 111, 17 S. W. 176, 329; *Com. v. Knapp*, 10 Pick. (Mass.) 477; *Com. v. Williams*, 2 Cush. (Mass.) 582; *Carlisle v. S.*, 73 Miss. 387, 19 So. 207; *Com. v. King*, 8 Gray (Mass.) 501; *S. v. Crafton*, 89 Iowa 109, 56 N. W. 257; *P. v. Wood*, 99 Mich. 620, 58 N. W. 638; *S. v. Howard*, 118 Mo. 127, 24 S. W. 41; *P. v.*

Thacker, 108 Mich. 652, 66 N. W. 562. *Contra*, *Burkhard v. S.*, 18 Tex. App. 618; *S. v. Wilson*, 24 Kan. 189; *Bennyfield v. Com.*, 13 Ky. L. 446, 17 S. W. 271; *S. v. Bartlett*, 55 Me. 200; *Gardner v. S.*, 55 N. J. L. 17, 26 Atl. 30; *Gandy v. S.*, 27 Neb. 707, 43 N. W. 747, 44 N. W. 108.

⁶ *S. v. Fitzgerald*, 49 Iowa 260, 3 Am. C. R. 1. *Contra*, *Meister v. P.*, 31 Mich. 99, 1 Am. C. R. 92-97.

⁷ *Queen v. Cox*, 14 Q. B. D. 153, 5 Am. C. R. 149.

⁸ *Ex parte Robinson*, 19 Wall. (U.

§ 2895. **Striking attorney from roll.**—An information charging an attorney with malconduct in office, filed for the purpose of having his name stricken from the roll, is a civil proceeding, and need not be carried on in the name of the people, nor conclude against the peace and dignity of the same.⁹

§ 2896. **Suspending attorney from practice.**—The statute empowering a judge of the circuit court to suspend an attorney from practice for malconduct extends only to the court over which he presides; he is not authorized to suspend such attorney in the entire judicial circuit, composed of several counties.¹⁰

§ 2897. **Grounds for disbarment.**—Where an attorney is guilty of "malconduct in his office," as an attorney, by fraudulent conduct toward his client, or has been convicted of a felony, he will be disbarred.¹¹ The fact that an information for disbarment charges that the accused is guilty of a crime and that he has been indicted therefor, is not sufficient to warrant the filing of the information where the indictment for such crime is pending for trial.¹² When a lawyer induces a court to enter an order allowing an appeal bond with sureties whom he knows to be worthless or fictitious persons, he practices a fraud upon the court, and for such misconduct may be disbarred.¹³

ARTICLE V. COURT, WHAT CONSTITUTES.

§ 2898. **Court defined.**—The court, for some purposes, consists not merely of a judge, but also of a clerk, a sheriff, a state's attorney and jury.¹

ARTICLE VI. AUTHORITY OF JUDGE.

§ 2899. **Authority of judge.**—Where a judge assumes to act under lawful authority, and there is color of authority, his acts will not be void, and if a party voluntarily goes to trial without objection, an

S.) 505, 2 Green C. R. 139; Beene v. S., 22 Ark. 157; P. v. Turner, 1 Cal. 143; Ex parte Heyfron, 7 How. (Miss.) 127.

⁹ P. v. Montray, 166 Ill. 632, 47 N. E. 79.

¹⁰ Montray v. P., 162 Ill. 199, 44 N. E. 496. See Winkelman v. P., 50 Ill. 451.

¹¹ P. v. Murphy, 119 Ill. 160, 6 N. E. 488; P. v. Palmer, 61 Ill. 255; P.

v. George, 186 Ill. 122, 57 N. E. 804; P. v. Schintz, 181 Ill. 574, 54 N. E. 1011; P. v. Hill, 182 Ill. 428, 55 N. E. 542; P. v. Salomon, 184 Ill. 490, 56 N. E. 815.

¹² P. v. Comstock, 176 Ill. 192, 52 N. E. 67.

¹³ P. v. Pickler, 186 Ill. 64, 57 N. E. 893.

¹ Harris v. P., 128 Ill. 592, 21 N. E. 563.

objection after conviction comes too late to be of any avail. This is in harmony with the great weight of authority.²

§ 2900. Judge has no authority after adjournment.—When the court adjourns, the judge carries no powers with him to his lodgings, and any directions to the jury from him are improper.³

§ 2901. Judge can not try felony case.—The judge of the court has no jurisdiction to try a felony case by the defendant waiving a jury.⁴

§ 2902. Judge leaving bench during trial.—The presiding judge left the court room during the argument of counsel and out of hearing of such argument; objections were interposed to some statements of counsel for the people, which were not passed upon, as appears in the record. Held on review to be reversible error. The parties can not even consent to the absence of the judge.⁵ The judge can not vacate the bench and permit a member of the bar to try a case, even with the consent of the parties to the cause; and any judgments entered on a trial by such agreement by a member of the bar will be a nullity.⁶

§ 2903. Criminal cases for certain terms.—The court has power under the statute to enter an order that certain terms of the court shall be devoted only to civil cases and the grand jury, therefore, dispensed with, and that at certain other terms only criminal cases and the people's docket shall be called for trial.⁷

ARTICLE VII. ADJOURNMENT; TERMS.

§ 2904. Adjournment—Adjourned term.—In the absence of the judge, court may be adjourned from day to day, by the sheriff or his deputy, as provided by statute.⁸ Where an adjourned term is held under color of authority, it will be presumed that it was properly ordered and held.⁹

² *Smurr v. S.*, 105 Ind. 125, 4 N. E. 445, 7 Am. C. R. 553; *Com. v. Hawkes*, 123 Mass. 525.

³ *Rafferty v. P.*, 72 Ill. 47; *Sargent v. Roberts*, 1 Pick. (Mass.) 337.

⁴ *Harris v. P.*, 128 Ill. 589, 21 N. E. 563. See "Jury, Jurors;" "Jurisdiction."

⁵ *Thompson v. P.*, 144 Ill. 380, 32 N. E. 968; *Meredeth v. P.*, 84 Ill. 480.

⁶ *Cobb v. P.*, 84 Ill. 512; *Hoagland v. Creed*, 81 Ill. 507; *Bishop v. Nelson*, 83 Ill. 601.

⁷ *Petty v. P.*, 118 Ill. 154, 8 N. E. 304.

⁸ *Bressler v. P.*, 117 Ill. 429, 8 N. E. 62.

⁹ *Smurr v. S.*, 105 Ind. 125, 4 N. E. 445, 7 Am. C. R. 550; *Cook v. Skelton*, 20 Ill. 107.

§ 2905. **Terms presumed held.**—The court can not judicially know that a regular term was not held, or that a special term had been called, and held in any circuit.¹⁰

ARTICLE VIII. BRANCHES OF COURT.

§ 2906. **Jurisdiction, when several branches.**—Where there are several branches of the same court, each branch, so far as its jurisdiction to try a particular cause is concerned, and to hear and determine the cause in which it is engaged, must be regarded as an independent court, separate and distinct from other branches of the court, as if it were in a separate jurisdiction.¹¹

ARTICLE IX. JUSTICE OF PEACE COURT.

§ 2907. **Powers of justice of peace.**—The powers and duties of justices of the peace, and their jurisdiction, are specially conferred by statute, and they can exercise no authority not thus given. In cases of felony they have no power to try the party, in any legal sense, but can only examine and in proper cases hold to bail or commit in default of bail.¹²

§ 2908. **Justice of peace—Jurisdiction.**—The legislature has no power to confer exclusive jurisdiction on justice of the peace courts in misdemeanor cases.¹³

§ 2909. **Justice jurisdiction—Included offense.**—Where a complaint before a justice of the peace charged an assault with a deadly weapon, it will support a warrant issued on such complaint for an assault and battery, the latter being included in the complaint; and the justice will have jurisdiction to try the charge of assault and battery, though the charge in the complaint is an indictable offense.¹⁴

§ 2910. **Appeal allowed from justice.**—If judgment for costs be entered against the complaining witness for commencing a case maliciously and without probable cause, in a justice court, such witness may appeal from such judgment.¹⁵

¹⁰ Norfolk v. P., 43 Ill. 11.

¹¹ P. v. Matson, 129 Ill. 596, 22 N. E. 456.

¹² S. v. Morgan, 62 Ind. 35, 3 Am. C. R. 152.

¹³ Wilson v. P., 94 Ill. 426.

¹⁴ Severin v. P., 37 Ill. 414.

¹⁵ Berman v. P., 101 Ill. 322.

CHAPTER LXXXII.

JURY, JURORS.

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ARTICLE I. DRAWING JURY.

§ 2911. **Drawing jury—Harmless irregularities.**—Before any irregularities in filling the panel of jurors, by reason of a departure from the statutory mode, can avail the defendant anything, it must appear his rights were affected and that he was prejudiced by such irregularities.¹

¹ *Mapes v. P.*, 69 Ill. 529; *Ferris* 72 Ill. 471; *Goodhue v. P.*, 94 Ill. 37; *v. P.*, 35 N. Y. 125; *Wilhelm v. P.*, *P. v. Hall*, 48 Mich. 482, 12 N. W.

§ 2912. **Filling panel of jurors.**—When the time arrives for the service of particular persons, as jurors, and some are absent, their places may be filled by others, as provided by statute, and any person who has previously served during the same term may be selected for that purpose.²

§ 2913. **Drawing additional jurors.**—On the regular panel of jurors becoming exhausted, the court ordered the clerk to draw one hundred additional jurors from the jury box, instead of directing the sheriff to summon a sufficient number of persons to fill such panel as required by statute. Held not a compliance with the statute, but not such an irregularity as should cause a reversal of the judgment, no injury appearing to have been done the accused.³

§ 2914. **Irregularity—When grounds for challenge.**—When the court saw that a jury would be necessary for the trial of causes for the fourth week of the term, the clerk should have drawn in the manner provided by statute. This not having been done, but a jury having been selected by the sheriff from the county, a challenge to the array is proper; and the overruling of the challenge is such error as will reverse the judgment.⁴

ARTICLE II. FILLING THE PANEL.

§ 2915. **Statutory mode for filling panel.**—Under the statute concerning jurors, in force at the time of the trial, the panel of jurors was irregularly filled. Instead of the court ordering the sheriff to summon a sufficient number to fill the panel, the clerk should have drawn from the box in the county clerk's office containing the list of persons who should have been summoned by the sheriff.⁵ Under the statute, if for any reason the panel shall not be full at the opening of the court, or at any time during the term, the clerk of the court shall again repair to the office of the county clerk and draw in the

665, 4 Am. C. R. 361; Minich v. P., 8 Colo. 440, 9 Pac. 4; Rolland v. Com., 82 Pa. St. 306; Rafe v. S., 20 Ga. 64; Dolan v. P., 64 N. Y. 485; Dotson v. S., 62 Ala. 141.

²North v. P., 139 Ill. 100, 28 N. E. 966.

³Siebert v. P., 143 Ill. 578, 32 N. E. 431; P. v. Board of Supervisors,

125 Ill. 339, 17 N. E. 802. See Beard v. S. (Tex. Cr.), 53 S. W. 348. Compare Waldron v. S., 41 Fla. 265, 26 So. 701.

⁴Borrelli v. P., 164 Ill. 558, 45 N. E. 1024; Siebert v. P., 143 Ill. 576, 32 N. E. 431.

⁵Borrelli v. P., 164 Ill. 557, 45 N. E. 1024.

same manner as the first drawing, who shall be summoned. Under this statute, if none of the jurors first drawn and served should appear at the beginning of the term, it would no doubt be proper to have a full panel drawn and served in like manner. If during the term there should be no jury present for the reason that the time for which they were selected had expired, or for other cause, an entire panel could be drawn and summoned in the mode pointed out in the statute.⁶

§ 2916. Sheriff calling by-standers.—The sheriff may select talesmen from persons accidentally present in court, or he may go outside according to his discretion; and the court may suggest to the sheriff to have proper men present from whom to select talesmen. Persons so selected are regarded as by-standers within the meaning of the law.⁷

§ 2917. Panel, when "exhausted."—A panel of jurors may be "exhausted," within the meaning of the statute, by their failure to appear when summoned, as well as otherwise.⁸

§ 2918. Special bailiff, when objection to sheriff.—Where the statute provides for a special bailiff to fill a panel instead of the sheriff, on objection by either party to the sheriff, it is error for the court to refuse to appoint such special bailiff.⁹

ARTICLE III. CHALLENGE TO ARRAY.

§ 2919. Challenge to array.—If the panel of petit jurors is not selected and drawn by the officers charged with that duty, as prescribed by statute, a challenge to the entire array will be sustained; and should such challenge be overruled and a conviction had, it will, on review, be reversed.¹⁰ But mere irregularities in drawing the jury, where no positive injury is shown to have been done to the accused, are not sufficient cause to sustain a challenge to the array.¹¹

⁶ *Borrelli v. P.*, 164 Ill. 557, 45 N. E. 1024.

⁷ *Patterson v. S.*, 48 N. J. L. 381, 4 Atl. 449, 7 Am. C. R. 310; *Bird v. S.*, 14 Ga. 43; *U. S. v. Loughery*, 13 Blatchf. (U. S.) 267; *Pfueger v. S.*, 46 Neb. 493, 64 N. W. 1094. See *Adams v. S.*, 35 Tex. Cr. 285, 33 S. W. 354.

⁸ *Gropp v. P.*, 67 Ill. 160, citing 1 Chit. Cr. L. 517a.

⁹ *Hanna v. P.*, 86 Ill. 244.

¹⁰ *S. v. Skinner*, 34 Kan. 256, 8 Pac. 420, 6 Am. C. R. 317; *Borrelli v. P.*, 164 Ill. 559, 45 N. E. 1024.

¹¹ *Wilhelm v. P.*, 72 Ill. 471; *Mapes v. P.*, 69 Ill. 529; *Siebert v. P.*, 143 Ill. 578, 32 N. E. 431; *Ferris v. P.*, 35 N. Y. 125; *Harmon v. Ter.*, 9 Okl. 313, 60 Pac. 115; *P. v. Ah Chung*, 54 Cal. 398.

§ 2920. **Proving challenge to array.**—Where a challenge to the array is made, the challenger must stand ready to prove his challenge by proof of the illegality of the panel. This may be done by oral evidence or by affidavits. The latter is the better practice.¹²

§ 2921. **Grounds for challenge to array.**—Defective process for the summoning of jurors or mere informalities are no ground for challenge to the array.¹³ Where no positive injury is shown to have been done the accused, it is not sufficient cause to sustain a challenge to the array.¹⁴

§ 2922. **Good cause for challenge to array.**—The sheriff and jury commissioners, after selecting names for jurors, placed them in the jury wheel, which was sealed with only one seal by sealing wax, instead of the respective seals of the sheriff and each commissioner. Held error, and grounds for challenge to the array of jurors and for quashing the indictment.¹⁵

§ 2923. **Challenge to polls—Not array.**—An objection to the panel of jurors that they had become prejudiced by remarks made by the court can not be raised by challenge to the array. Such objection should be made by challenge to the polls for cause.¹⁶

§ 2924. **Motion to quash venire.**—The motion of the defendant to quash and set aside the venire or list of jurors summoned for the trial because one of them had been a member of the grand jury by which the indictment was found, and was present when the witnesses were examined in the case and returned the indictment into court, was properly overruled.¹⁷

§ 2925. **Jury must be selected from county.**—By the common law the jury must be selected from the county where the offense was committed. Jurors from another county are incompetent.¹⁸

¹² *Borrelli v. P.*, 164 Ill. 559, 45 N. E. 1024. See *Abbott's Cr. Brief*, § 219; *Perry v. S.* (Tex. Cr.), 34 S. W. 618.

¹³ *Abbott's Cr. Brief*, § 217, citing *S. v. Cole*, 9 *Humph.* (Tenn.) 627; *White v. Com.*, 6 *Binn.* (Pa.) 179; *Fields v. S.*, 52 Ala. 348; *Poindexter v. Com.*, 33 *Gratt.* (Va.) 766.

¹⁴ *Wilhelm v. P.*, 72 Ill. 471; *Mapes v. P.*, 69 Ill. 528.

¹⁵ *Brown v. Com.*, 73 Pa. St. 321, 2 *Green C. R.* 518.

¹⁶ *Thompson v. S.*, 109 Ga. 272, 34 S. E. 579.

¹⁷ *Birdsong v. S.*, 47 Ala. 68, 1 *Green C. R.* 732.

¹⁸ *Buckrice v. P.*, 110 Ill. 33; 4 *Bl. Com.* 349; 2 *Hale P. C.* 264.

ARTICLE IV. CHALLENGE FOR CAUSE.

§ 2926. **Challenge for cause—Must state grounds.**—A mere challenge to a juror for cause, without stating the ground therefor, is not sufficient.¹⁹

§ 2927. **Causes of challenge—Two classes.**—At common law challenges were two classes, viz: 1. Principal challenges. 2. Challenges to the favor; but the distinction between the two has not been kept up.²⁰ Principal cause for challenge—that is, cause from which bias or partiality may be inferred as a legal conclusion—is as follows: Consanguinity of the juror with either of the parties within the ninth degree; that the juror was god-father to the child of either party; or that the juror was of the same society or corporation of either party; or was tenant or “within distress” of either party; or that he had an action implying malice depending between him and either party; or was master, servant, counselor, steward, or attorney of either party; or that he ate or drank with either party after he was returned at his expense; or had been chosen as arbitrator by either party; and by most authorities that the juror had declared and expressed an opinion.²¹

§ 2928. **Scruples as to death-penalty.**—“It is good cause of challenge to a juror, in a capital case, that he has conscientious scruples on the subject of punishment by death that will prevent him from agreeing to a verdict of guilty.” And the same may be said as to a juror who would not convict upon circumstantial evidence.²²

§ 2929. **Time of challenge for cause.**—A juror may be challenged for cause after he has been accepted, in the discretion of the court, if

¹⁹ *S. v. Soper*, 148 Mo. 217, 49 S. W. 1007; *S. v. Albright*, 144 Mo. 638, 46 S. W. 620; *P. v. Owens*, 123 Cal. 482, 56 Pac. 251; *S. v. Young*, 104 Iowa 730, 74 N. W. 693.

²⁰ *Coughlin v. P.*, 144 Ill. 164, 165, 33 N. E. 1. On origin of the right of challenge, see 8 Cr. L. Mag. 561.

²¹ *Coughlin v. P.*, 144 Ill. 164, 33 N. E. 1; 3 Bl. Com. 363; *P. v. Bodine*, 1 Den. (N. Y.) 304; 5 Bacon Abridg. 353. See *Keener v. S.*, 97 Ga. 388, 24

S. E. 28; *S. v. Cadotte*, 17 Mont 315, 42 Pac. 857.

²² *Gates v. P.*, 14 Ill. 434; *S. v. David*, 131 Mo. 380, 33 S. W. 28; *U. S. v. Connell*, 2 Mason 91; *S. v. Punshon*, 133 Mo. 44, 34 S. W. 25; *Bradshaw v. S.*, 17 Neb. 147, 5 Am C. R. 501, 22 N. W. 361; *Sawyer v S.*, 39 Tex. Cr. 557, 47 S. W. 650; *P. v. Damon*, 13 Wend. (N. Y.) 351; *Gross v. S.*, 2 Ind. 329; *S. v. Hing* 16 Nev. 307, 4 Am. C. R. 376.

good cause be shown.²³ But a juror can not be challenged by the prosecution after the trial has commenced, after witnesses have been sworn and examined.²⁴

§ 2930. **Exercising right of challenge.**—A juror, on his examination touching his competency in a murder trial, said that he was not related to the deceased by marriage or otherwise. After the jury had been sworn the defendant learned that the juror was related to the deceased. The defendant asked leave to withdraw his acceptance of the juror, which was denied by the court. He then moved to challenge him peremptorily, which was overruled by the court. Held error.²⁵

§ 2931. **Served as juror within year.**—Under the statute of Illinois, if a petit juror is not one of the regular panel, and if he has served as a juror on the trial of a cause in any court of record in the county within one year previous to the time of being offered as a juror, he may be challenged for cause.²⁶

ARTICLE V. PEREMPTORY CHALLENGE.

§ 2932. **Peremptory challenges, by common law.**—At common law the number of peremptory challenges allowed to the accused was thirty-five—that is, one short of three complete juries—but by statute of 22 Henry VIII, was changed to twenty.²⁷ The constitutional right of a trial by a fair and impartial jury is not violated by a statute reducing the number of peremptory challenges below twenty, the number allowed by common law.²⁸

§ 2933. **Peremptory challenges, allowed by statute.**—The statute giving the defendant in every indictment or information four peremptory challenges in misdemeanor cases, where several independent

²³ *McFadden v. Com.*, 23 Pa. St. 12; *Fountain v. West*, 23 Iowa 10; *S. v. Davis*, 80 N. C. 412; *Com. v. Piper*, 120 Mass. 185; *Sparks v. S.*, 59 Ala. 82.

²⁴ *Stone v. P.*, 2 Scam. (Ill.) 328. *Contra*, *S. v. Vaughan*, 23 Nev. 103, 43 Pac. 193.

²⁵ *Garner v. S.*, 76 Miss. 515, 25 So. 363.

²⁶ *P. v. Gropp*, 67 Ill. 154; *Plum-*

mer v. P., 74 Ill. 361; *P. v. Thacker*, 108 Mich. 652, 66 N. W. 562. See *Smith v. S.*, 102 Tenn. 721, 52 S. W. 182.

²⁷ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 210; *S. v. Sutton*, 10 R. I. 159, 2 Green C. R. 370; 4 Bl. Com. 354; 2 Hale P. C. 268.

²⁸ *Brown v. S.*, 62 N. J. L. 666, 42 Atl. 811.

and distinct counts or charges are joined in the one case, will not be construed as four peremptory challenges for each distinct offense alleged in the indictment.²⁹

§ 2934. Peremptory challenges—Without cause.—Peremptory challenges are allowed by law without assigning any reason, nor can any reason be required. The right can be exercised according to the judgment, will or caprice of the party entitled thereto.³⁰

§ 2935. Peremptory challenge to "each party."—Under the revised statutes of Maine, providing that "each party" shall be entitled to two peremptory challenges, "party" does not mean "person." The several defendants must join in their peremptory challenges.³¹

§ 2936. Peremptory challenges—Defendants join.—Unless otherwise provided by statute, where several persons are indicted and tried jointly by the same jury, they all together can have no more peremptory challenges than one defendant alone.³² All the defendants having waived their statutory privilege of separate trial, and declared their election to be tried jointly, their defense was joint and not several, and no one of them had any authority to control the conduct of the defense. Their challenges should have been joint, not several.³³

§ 2937. Peremptory challenge—Each separate.—In some jurisdictions each prisoner on joint trial can challenge the full number of jurors, that is, peremptorily challenge, without regard to what may be done by the others.³⁴

§ 2938. Right of peremptory challenge, when exercised.—The right to the peremptory challenge of a juror continues until he is sworn, even though the party has previously accepted him.³⁵ A

²⁹ *S. v. Skinner*, 34 Kan. 256, 8 Pac. 420, 6 Am. C. R. 313.

³⁰ *Donovan v. P.*, 139 Ill. 415, 28 N. E. 964; 4 Bl. Com. 353.

³¹ *S. v. Cady*, 80 Me. 413, 14 Atl. 940, 7 Am. C. R. 305.

³² *S. v. Sutton*, 10 R. I. 159, 2 Green C. R. 370; *P. v. O'Loughlin*, 3 Utah 133, 1 Pac. 653, 4 Am. C. R. 545; *S. v. Reed*, 47 N. H. 466; *S. v. Cady*, 80 Me. 413, 7 Am. C. R. 305, 14 Atl. 940; 2 Hale P. C. 263; 1 Thomp. Trials, § 45; *S. v. Ballou*, 20 R. I. 607, 40 Atl. 861.

³³ *P. v. O'Loughlin*, 3 Utah 133, 1

Pac. 653, 4 Am. C. R. 547; *P. v. Thayer*, 1 Park. Cr. (N. Y.) 595.

³⁴ *Matson v. P.*, 15 Ill. 536; *Wiggins v. S.*, 1 Lea (Tenn.) 738, 3 Am. C. R. 142; *P. v. Welmer*, 110 Mich. 248, 68 N. W. 141. The statutes of the respective states must govern.

³⁵ *S. v. Spaulding*, 60 Vt. 228, 14 Atl. 769. See *Graves v. Horgan*, 21 R. I. 493, 45 Atl. 152; *Bradham v. S.*, 41 Fla. 541, 26 So. 730; *Rogers v. S.*, 89 Md. 424, 43 Atl. 922; *Garner v. S.*, 76 Miss. 515, 25 So. 363; *S. v. Haines*, 36 S. C. 504, 15 S. E. 555.

qualified jury having been sworn to try the case, the prosecution can not reopen the examination of jurors and can not exercise the right of a peremptory challenge to any of the jurors thus sworn. This would be substantially swearing two juries to try the case. Permitting such practice is error, and the defendant will be ordered discharged.³⁶ In impaneling the jury it appeared that three persons called as jurors were challenged for cause by the defendant, but the challenges were overruled, the court holding the jurors competent. The defendant then challenged them peremptorily, and the court ruled that they could not be challenged peremptorily after being challenged for cause. Held error.³⁷

§ 2939. **Peremptory challenges, not exhausted.**—If the court errs in disallowing a challenge for cause, and the defendant thereafter excuses the obnoxious juror by a peremptory challenge, and the jury is completed without the exhaustion by the defense of all its peremptory challenges, the error of the court will not be reviewed on appeal, because no injury could have resulted to the defendant.³⁸ The defendants, having accepted eleven jurors at the time they had peremptories unused, are estopped from complaining; they virtually agreed to be tried by them.³⁹ Any error with respect to challenges in the impaneling of a jury should be disregarded, unless an objectionable juror had been forced upon the defendant after the exhaustion of his peremptory challenges.⁴⁰

³⁶ *P. v. Dolan*, 51 Mich. 610, 17 N. W. 78, 4 Am. C. R. 308. See *Kurtz v. S.*, 145 Ind. 119, 42 N. E. 1102. *Contra*, *S. v. Wren*, 48 La. 803, 19 So. 745.

³⁷ *Barber v. S.*, 13 Fla. 675, 1 Green C. R. 725-6; *Hendrick v. Com.*, 5 Leigh (Va.) 708; 4 Bl. Com. 363.

³⁸ *P. v. Durrant*, 116 Cal. 179, 48 Pac. 75, 10 Am. C. R. 511, 514; *S. v. Gooch*, 94 N. C. 987; *Williams v. S.*, 30 Tex. App. 354, 17 S. W. 408; *Com. v. Fry* (Pa., 1901), 48 Atl. 257; *S. v. Le Duff*, 46 La. 546, 15 So. 397; *S. v. Yetzer*, 97 Iowa 423, 66 N. W. 737; *S. v. Hartley*, 22 Nev. 342, 40 Pac. 372; *P. v. Aplin*, 86 Mich. 393, 49 N. W. 148; *Brumback v. German Nat. Bank*, 46 Neb. 540, 65 N. W. 198; *Prewitt v. Lambert*, 19 Colo. 7, 34 Pac. 684; *P. v. Decker*, 157 N. Y. 186, 51 N. E. 1018.

³⁹ *Spies v. P.*, 122 Ill. 257, 12 N. E.

865, 17 N. E. 898; *Lambright v. S.*, 34 Fla. 564, 9 Am. C. R. 385, 16 So. 582; *Gott v. P.*, 187 Ill. 249, 257, 58 N. E. 293; *Bean v. S.*, 17 Tex. App. 60, 5 Am. C. R. 480; *Com. v. Fry* (Pa.), 48 Atl. 257.

⁴⁰ *Ochs v. P.*, 124 Ill. 410, 16 N. E. 662; *Spies v. P.*, 122 Ill. 257, 12 N. E. 865, 17 N. E. 898; *Collins v. P.*, 103 Ill. 24; *Holt v. S.*, 9 Tex. App. 571; *Loggins v. S.*, 12 Tex. App. 65; *P. v. Casey*, 96 N. Y. 115, 4 Am. C. R. 318; *S. v. Elliott*, 45 Iowa 486, 2 Am. C. R. 322; *Minich v. P.*, 8 Colo. 440, 9 Pac. 4, 5 Am. C. R. 28; *S. v. Lawlor*, 28 Minn. 216, 9 N. W. 698; *Erwin v. S.*, 29 Ohio St. 186; *S. v. McIntosh*, 109 Iowa 209, 80 N. W. 349; *Ward v. S.*, 102 Tenn. 724, 52 S. W. 996; *Keaton v. S.* (Tex. Cr.), 57 S. W. 1125; *S. v. Weaver*, 58 S. C. 106, 36 S. E. 499; *S. v. Kin-sauls*, 126 N. C. 1095, 36 S. E. 31.

§ 2940. **Peremptory challenge—Exercising right.**—Counsel has the right to put proper questions to jurors to test their capacity and competency, and to advise him of the propriety of exercising the right of peremptory challenge.⁴¹

§ 2941. **Examination—Proper question.**—As testing the competency of a juror it is proper to ask him on his *voir dire* whether he believes a man has the right to take the law in his own hands.⁴²

§ 2942. **Presuming defendant innocent.**—It is improper to ask a juror whether he would go into the jury box or enter upon the trial presuming the accused to be innocent.⁴³ It is also improper to ask a juror whether he would find a man guilty on circumstantial evidence.⁴⁴

§ 2943. **Court controls examination.**—The examination of jurors on their *voir dire* is largely within the discretion of the court.⁴⁵ But to deny counsel the right to examine the jurors for cause and to put questions to them to determine whether he would interpose peremptory challenges ("except he examine the jurors for cause through the mouth of the court," or not at all), is prejudicial error.⁴⁶

ARTICLE VI. OPINIONS WHICH DISQUALIFY.

§ 2944. **Expressed opinion disqualifies.**—If a juror has expressed an opinion on the guilt of the accused, it is good ground of challenge for principal cause; that is, absolute disqualification on proving that fact.⁴⁷ A juror is disqualified if he has formed and expressed a decided opinion upon the merits of the case. If, without any qualification whatever, a juror says the defendant is guilty or the like, or

⁴¹ *Donovan v. P.*, 139 Ill. 414, 28 N. E. 964; *Lavin v. P.*, 69 Ill. 304, 1 Am. C. R. 578; *Stephens v. P.*, 38 Mich. 739; 1 *Thomp. Trials*, § 101; 4 *Bl. Com.* 353; *Towl v. Bradley*, 108 Mich. 409, 66 N. W. 347; *Drye v. S.* (Tex. Cr.), 55 S. W. 65; *S. v. Steeves*, 29 Or. 85, 43 Pac. 947; *S. v. Garrington*, 11 S. D. 178, 76 N. W. 326.

⁴² *P. v. Plyler*, 126 Cal. 379, 58 Pac. 904.

⁴³ *Com. v. Van Horn*, 188 Pa. St. 143, 41 Atl. 469.

⁴⁴ *Lambright v. S.*, 34 Fla. 564, 16 So. 582, 9 Am. C. R. 384.

⁴⁵ *Com. v. Warner*, 173 Mass. 541, 54 N. E. 353; *S. v. Cancienne*, 50 La. 1324, 24 So. 321; *S. v. Harris*, 51 La. 1194, 25 So. 984.

⁴⁶ *Donovan v. P.*, 139 Ill. 414, 28 N. E. 964.

⁴⁷ *Greenfield v. P.*, 74 N. Y. 277; *Coughlin v. P.*, 144 Ill. 166, 33 N. E. 1; *S. v. Brown*, 15 Kan. 400, 2 Am. C. R. 423.

that the plaintiff ought to recover, or that the verdict ought to be against the plaintiff, he would be disqualified as not standing impartial between the parties; but not disqualified if he has formed and expressed an opinion on rumors if they were true, without expressing belief in their truth.⁴⁸ Where a juror clearly disqualifies himself on his examination, such is a disqualification *per se*, and is incapable of being removed by the juror testifying that, notwithstanding his opinion, he can and will render a fair and impartial trial. It is a legal conclusion, incapable of rebuttal.⁴⁹

§ 2945. Formed opinion—Juror impeached.—A venireman, when sworn touching his competency as a juror, stated that he had not formed and expressed an opinion. The accused and his counsel received information after the verdict that this juror had expressed a decided opinion that the prisoner would be hung; that he ought to be hung; that nothing could save him, and that there was no law to clear him. Held disqualified.⁵⁰

§ 2946. Opinion does not necessarily disqualify.—Although a juror has formed an opinion as to the guilt or innocence of the defendant, which it would take evidence to remove, yet if he has no prejudice against the defendant and says he can give a fair trial according to the law and evidence, he is not disqualified.⁵¹

§ 2947. Opinion, not expressed.—Forming an opinion, though not expressed, has been held as a disqualification, especially if it appears that evidence will be required to remove such opinion.⁵²

⁴⁸ *Smith v. Eames*, 3 Scam. (Ill.) 76; *Leach v. P.*, 53 Ill. 316, 4 Cr. L. Mag. 179; *Traviss v. Com.*, 106 Pa. St. 597, 5 Am. C. R. 266; *S. v. Wilson*, 38 Conn. 126; *P. v. O'Loughlin*, 3 Utah 133, 1 Pac. 653; *P. v. Reynolds*, 16 Cal. 128.

⁴⁹ *Coughlin v. P.*, 144 Ill. 176, 33 N. E. 1; *Gray v. P.*, 26 Ill. 344; *Chicago, etc., R. Co. v. Adler*, 56 Ill. 344; *Owens v. S.*, 32 Neb. 167, 49 N. W. 226; *Greenfield v. P.*, 74 N. Y. 277; *Carroll v. S.*, 5 Neb. 31, 2 Am. C. R. 425; *Stephens v. P.*, 38 Mich. 739; *Dugle v. S.*, 100 Ind. 259; *Wright v. Com.*, 32 Gratt. (Va.) 941; *S. v. Ramsey*, 50 La. 1339, 24 So. 202.

⁵⁰ *Sellers v. P.*, 3 Scam. (Ill.) 412.

See *S. v. Vogan*, 56 Kan. 61, 42 Pac. 352.

⁵¹ *S. v. Morse*, 35 Or. 462, 57 Pac. 631. See *Sawyer v. S.*, 39 Tex. Cr. 557, 47 S. W. 650; *Bryant v. S.*, 7 Wyo. 311, 51 Pac. 879, 56 Pac. 596. *Contra*, *Gallaher v. S.*, 40 Tex. Cr. 296, 50 S. W. 388; *S. v. Lattin*, 19 Wash. 57, 52 Pac. 314.

⁵² *Coughlin v. P.*, 144 Ill. 166, 33 N. E. 1; *Owens v. S.*, 32 Neb. 167, 49 N. W. 226; *S. v. Culler*, 82 Mo. 623; *Dugle v. S.*, 100 Ind. 259; *Palmer v. S.*, 42 Ohio St. 596; *Stephens v. P.*, 38 Mich. 739; *Brown v. S.*, 57 Miss. 424; *Collins v. P.*, 48 Ill. 145; *Com. v. Webster*, 5 Cush. (Mass.) 295; *Wright v. Com.*, 32

§ 2948. **Prejudiced juror, incompetent.**—Where it appears that a juror is so prejudiced against one charged with a crime, or misdemeanor, that he could not give him a fair and impartial trial, he would be an incompetent juror.⁵³ Where a juror said he thought the business of selling and manufacturing lager beer was a “perfect nuisance;” thinks it a very low business; no man should be allowed to manufacture or sell it; has no sympathy for a man in that business; it is a curse to the community; bitterly opposed to it; his feeling is to have the thing stopped. Held disqualified.⁵⁴

§ 2949. **Decided opinion disqualifies.**—It has been repeatedly held that if a juror has a decided opinion respecting the merits of the controversy, either from a personal knowledge of the facts, from the statements of witnesses, from the relation of the parties, or from rumor, he is disqualified from trying the case if challenged for cause.⁵⁵ Where a juror stated that he had formed an opinion as to the guilt or innocence of the accused from statements which he had heard regarding the case, and which he believed to be true, he was held disqualified.⁵⁶

§ 2950. **Opinion from reading accounts—Disqualified.**—A juror, having formed an opinion as to the guilt or innocence of the accused entirely from reading reports of the testimony of the witnesses of the transactions as published in the newspapers, is incompetent, although he said on his examination, under oath, that he could, notwithstanding such opinion, render an impartial verdict upon the law and the evidence.⁵⁷

Gratt. (Va.) 941; U. S. v. Wilson, Bald. (U. S.) 85; P. v. Fultz, 109 Cal. 258, 41 Pac. 1040; P. v. Thacker, 108 Mich. 652, 66 N. W. 562; P. v. Miller, 125 Cal. 44, 57 Pac. 770; P. v. Wilmarth, 156 N. Y. 566, 51 N. E. 277.

⁵³ Carrow v. P., 113 Ill. 550. See P. v. Decker, 157 N. Y. 186, 51 N. E. 1018.

⁵⁴ Albrecht v. Walker, 73 Ill. 72. Compare Thiede v. Utah Ter., 159 U. S. 510, 16 S. Ct. 62; P. v. O'Neill, 107 Mich. 556, 65 N. W. 540.

⁵⁵ Collins v. P., 48 Ill. 147; P. v. Johnston, 46 Cal. 78, 2 Green C. R. 427; Erwin v. S., 29 Ohio St. 186, 2

Am. C. R. 262; S. v. Punshon, 133 Mo. 44, 34 S. W. 25; McGuire v. S., 76 Miss. 504, 25 So. 495.

⁵⁶ Neely v. P., 13 Ill. 687; Gardner v. P., 3 Scam. (Ill.) 87; Baxter v. P., 3 Gilm. (Ill.) 377; S. v. Brown, 15 Kan. 400, 2 Am. C. R. 423.

⁵⁷ Frazier v. S., 23 Ohio St. 551, 2 Green C. R. 548; S. v. Rutten, 13 Wash. 203, 43 Pac. 30. See S. v. Ekanger, 8 N. D. 559, 80 N. W. 482. *Contra*, Com. v. Eagan, 190 Pa. St. 10, 42 Atl. 374; Hardin v. S., 66 Ark. 53, 48 S. W. 904; S. v. Willis, 71 Conn. 293, 41 Atl. 820; P. v. Owens, 123 Cal. 482, 56 Pac. 251.

§ 2951. **Read and believed statements—Disqualified.**—A juror having stated that he had read the newspaper statements about the case, and that he believed the statements; that one of the persons mentioned in the newspaper may have been the defendant, is disqualified.⁵⁸ A juror, having read a newspaper account of a previous trial of the prisoners upon the same indictment and formed an opinion at the time that the prisoners were guilty; that he had expressed that opinion, and that it had not been changed since, is disqualified.⁵⁹

§ 2952. **Fixed opinion on material element.**—If a juror has a fixed opinion on a material element in the case—"one of the main issues involved in the case"—he is disqualified.⁶⁰

§ 2953. **Statutory provision on opinion.**—Notwithstanding the statutory provision, a person who has formed or expressed an opinion or impression in reference to the guilt or innocence of the defendant is still, as formerly, disqualified as a juror, unless three things shall concur: (1) He must declare on oath that he believes that such opinion or impression will not influence his verdict; (2) he must also declare on oath that he believes he can render an impartial verdict according to the evidence, and (3) the court must be satisfied that he does not entertain such a present opinion or impression as would influence his verdict. Unless these three things concur, the person must now, as before, be excluded from the jury box.⁶¹ Section 14 of chapter 78, Illinois statutes, relating to jurors, can not be construed or regarded as changing in any degree the essential qualifications which jurors must possess, as announced in the case of *Smith v. Eames*,^{61a} but merely furnishes a new test by which those qualifications may be determined. It simply makes the statement of the juror competent evidence to be considered by the court. His answer, that, notwithstanding his opinions, formed from newspaper statements or rumors, he can and will try the case fairly and impartially, does not

⁵⁸ *Gray v. P.*, 26 Ill. 347; *Smith v. Evans*, 3 Scam. (Ill.) 81; *Gardner v. P.*, 3 Scam. (Ill.) 83; *S. v. Gleim*, 17 Mont. 17, 41 Pac. 998.

⁵⁹ *P. v. Brotherton*, 43 Cal. 530, 1 Green C. R. 739; *Ward v. S.*, 102 Tenn. 724, 52 S. W. 996; *S. v. Start*, 60 Kan. 256, 56 Pac. 15. See *S. v. Savage*, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128.

⁶⁰ *Davis v. Walker*, 60 Ill. 452;

Coughlin v. P., 144 Ill. 183, 33 N. E. 1. See *S. v. Otto*, 61 Kan. 58, 58 Pac. 995.

⁶¹ *P. v. Casey*, 96 N. Y. 115, 4 Am. C. R. 314; *P. v. Wilmarth*, 156 N. Y. 566, 51 N. E. 277; *Thompson v. P.*, 26 Colo. 496, 59 Pac. 51. The statutes of New York and Illinois are substantially the same.

^{61a} 3 Scam. (Ill.) 76.

qualify him. The court must be satisfied of its truth.⁶² Under the statute of New York, the court holds that, notwithstanding a juror has formed, expressed and still entertains an opinion upon the merits, which it will require evidence to remove, yet, if he declares on his oath that he believes, and the court finds that he can render an impartial verdict according to the evidence, he is a competent juror.⁶³

ARTICLE VII. OPINIONS WHICH DO NOT DISQUALIFY.

§ 2954. **Conversed, but no opinion—Opinion once.**—A juror is qualified, although he has conversed with a witness and believed what he heard, if he had not formed an opinion as to the guilt or innocence of the accused.⁶⁴ A juror who had formed some opinion as to the guilt or innocence of the accused, about the time of the homicide, from reading the newspapers, but stated on his examination as a juror he had then no opinion as to such guilt or innocence, is competent.⁶⁵

§ 2955. **Hypothetical opinion, not disqualifying.**—A mere hypothetical opinion formed from the reading of newspapers will not disqualify a juror, he not having heard what purports to be a statement of the facts.⁶⁶

§ 2956. **Opinion, not positive.**—Though a juror has an opinion based on rumor or newspaper statement, but not a positive one, he is not disqualified if he states that he can try the case by the law and the evidence, without regard to what he may have heard.⁶⁷

⁶² Coughlin v. P., 144 Ill. 182, 33 N. E. 1. See also Goins v. S., 46 Ohio St. 457, 21 N. E. 476, 8 Am. C. R. 23; S. v. Meyer, 58 Vt. 457, 3 Atl. 195, 7 Am. C. R. 430; P. v. Casey, 96 N. Y. 115, 4 Am. C. R. 314; S. v. Sawtelle, 66 N. H. 488, 32 Atl. 831, 10 Am. C. R. 391.

⁶³ S. v. Sawtelle, 66 N. H. 488, 32 Atl. 831, 10 Am. C. R. 391; S. v. Brown, 28 Or. 147, 41 Pac. 1042; P. v. Willson, 109 N. Y. 345, 16 N. E. 540; P. v. Buddensieck, 103 N. Y. 487, 9 N. E. 44. Many cases are cited and reviewed in the Sawtelle case, as to qualification of jurors.

⁶⁴ Thompson v. P., 24 Ill. 61.

⁶⁵ Cluck v. S., 40 Ind. 263, 1 Green C. R. 735; S. v. Yetzer, 97 Iowa 423, 66 N. W. 737; S. v. Harras, 22 Wash. 57, 60 Pac. 58.

⁶⁶ Jackson v. Com., 23 Gratt. (Va.)

919, 2 Green C. R. 650; S. v. Shackelford, 148 Mo. 493, 50 S. W. 105; S. v. Bronstine, 147 Mo. 520, 49 S. W. 512; Morrison v. S., 40 Tex. Cr. 473, 51 S. W. 358; S. v. Kelly, 28 Or. 225, 42 Pac. 217; Givens v. S., 103 Tenn. 648, 55 S. W. 1107; Hughes v. S. (Wis.), 85 N. W. 333; Dinsmore v. S. (Neb.), 85 N. W. 445.

⁶⁷ Spies v. P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 6 Am. C. R. 570; S. v. Weems, 96 Iowa 426, 65 N. W. 387, 8 Cr. L. Mag. 565; S. v. Cunningham, 100 Mo. 382, 8 Am. C. R. 670, 12 S. W. 376; Weston v. Com., 111 Pa. St. 251, 6 Am. C. R. 460, 2 Atl. 191; S. v. Sawtelle, 66 N. H. 488, 32 Atl. 831; S. v. Taylor, 134 Mo. 109, 35 S. W. 92; Bohanan v. S., 18 Neb. 57, 24 N. W. 390, 6 Am. C. R. 503; S. v. Tatro, 50 Vt. 483, 3 Am. C. R. 165; S. v. Hoyt, 47 Conn.

§ 2957. **Hearing facts no disqualification.**—One who was present as a spectator and heard the evidence in one case was not for that reason alone disqualified by intendment of law from serving as a juror in the next case on substantially the same issue.⁶⁸

§ 2958. **Examination shows competency.**—On examination the juror said: "I believed the man had been murdered, and that the defendant did it. It would take some evidence or explanation to remove the opinion from my mind. I know nothing about the case except what I have heard from rumor and from the newspapers. I believe I can sit and decide the case with the same impartiality as if I had never heard of the case." Held to be a competent juror.⁶⁹

§ 2959. **Belonging to detective association.**—The fact that a petit juror belongs to an association whose object is to detect crime, as the crime of stealing horses, raises no presumption that he is prejudiced against the accused.⁷⁰

§ 2960. **Grand juror incompetent.**—A member of the grand jury which found the indictment is incompetent to try the accused, and may be challenged for cause.⁷¹

§ 2961. **Examinations prove incompetency.**—The examinations of jurors in the following cases are set out in full in the opinions of the court and the jurors were held incompetent:⁷²

§ 2962. **Court's improper examination.**—Persuasive, coaxing, lecturing questions put to a juror by the court in such a way as to induce the juror to say he can and will try the case fairly and impartially,

518; *S. v. Kingsbury*, 58 Me. 238; *S. v. Medicott*, 9 Kan. 257, 1 Green C. R. 229; *S. v. Collins*, 70 N. C. 241, 2 Green C. R. 740; *P. v. Murphy*, 45 Cal. 137, 2 Green C. R. 414; *Adams v. S.*, 35 Tex. Cr. 285, 33 S. W. 354; *Brown v. S.*, 40 Fla. 459, 25 So. 63.

⁶⁸ *S. v. Sawtelle*, 66 N. H. 488, 32 Atl. 831. See *Cunneen v. S.*, 96 Ga. 406, 23 S. E. 412; *S. v. Philpot*, 97 Iowa 365, 66 N. W. 730.

⁶⁹ *S. v. Lawrence*, 38 Iowa 51; *S. v. Hudson*, 110 Iowa 663, 80 N. W. 232.

⁷⁰ *Musick v. P.*, 40 Ill. 272. See *S. v. Moore*, 48 La. 380, 19 So. 285; *S. v. Flack*, 48 Kan. 146, 29 Pac. 571.

⁷¹ *Williams v. S.*, 109 Ala. 64, 19 So. 530.

⁷² *P. v. Casey*, 96 N. Y. 115, 4 Am. C. R. 314; *Coughlin v. P.*, 144 Ill. 167, 182, 33 N. E. 1; *Staup v. Com.*, 74 Pa. St. 458, 2 Green C. R. 520. See *Leach v. P.*, 53 Ill. 311; *P. v. Brotherton*, 47 Cal. 388, 2 Green C. R. 445.

when it is apparent from his answers that he has a fixed opinion as to the guilt of the accused, and that he is prejudiced, are improper and condemned.⁷³

§ 2963. Defendant's right to disqualified juror.—The defendant in a criminal cause has a right to accept a juror who has expressed an opinion or is prejudiced, and the court can not on its own motion refuse to permit such juror to be sworn.⁷⁴

ARTICLE VIII. JUROR'S PRIVILEGE; AGE.

§ 2964. Exemption no disqualification.—The fact that a juror is exempt from jury service, by reason of his age or otherwise, is no cause for challenge, but such juror may claim his privilege by reason of such exemption.⁷⁵

ARTICLE IX. SWEARING JURY; OATH.

§ 2965. Swearing jury—Record entry.—Relating to the swearing of the jury, the record contained the following entry: "A jury came (naming them), twelve good and lawful men having the qualifications of jurors, who, being elected, tried and sworn well and truly to try the issue joined herein pending the introduction of testimony." Held that these recitals are not to be regarded as an attempt to set out the oath actually administered, but rather as a statement of the fact that the jury had been sworn as required by law.⁷⁶

§ 2966. Swearing jury—Form of oath.—The form of the oath for jurors, as prescribed by statute, should be followed. The substance of the oath can not be dispensed with.⁷⁷ The common law form of oath for swearing the jury in England is as follows: "Well and

⁷³ Coughlin v. P., 144 Ill. 184, 33 N. E. 1.

⁷⁴ Van Blaricum v. P., 16 Ill. 364. See Stone v. P., 2 Scam. (Ill.) 326; P. v. Decker, 157 N. Y. 186, 51 N. E. 1018.

⁷⁵ P. v. Owens, 123 Cal. 482, 56 Pac. 251; Davison v. P., 90 Ill. 225 (age); Chase v. P., 40 Ill. 357; Brown v. S., 40 Fla. 459, 25 So. 63. See also Murphy v. P., 37 Ill. 456; Patterson v. S., 48 N. J. L. 381, 4 Atl. 449, 7 Am. C. R. 311; Stone v. P., 2 Scam. (Ill.) 336. See Guykowski v. P., 1 Scam. (Ill.) 480.

⁷⁶ S. v. Baldwin, 36 Kan. 1, 12 Pac. 318, 7 Am. C. R. 379; Washington v. S., 60 Ala. 10, 3 Am. C. R. 178; S. v. Angelo, 18 Nev. 425, 4 Pac. 1080, 5 Am. C. R. 64; Dyson v. S., 26 Miss. 362; Bartlett v. S., 28 Ohio St. 669.

⁷⁷ S. v. Angelo, 18 Nev. 425, 4 Pac. 1080, 5 Am. C. R. 62; Johnson v. S., 47 Ala. 9, 1 Green C. R. 599; S. v. Owen, 72 N. C. 611; S. v. Rollins, 22 N. H. 528; Edwards v. S., 49 Ala. 336; Morgan v. S., 42 Tex. 224; Maher v. S., 3 Minn. 444.

truly to try and a true deliverance make between our sovereign lord the king and the prisoner whom they have in charge, and a true verdict to give according to the evidence."⁷⁸

§ 2967. **Jury to be sworn in each case.**—Swearing the jury at the commencement of the term to try all causes that might be submitted to it is not the practice. The jury selected in each particular case should be sworn.⁷⁹

ARTICLE X. OFFICER IN CHARGE, SWORN.

§ 2968. **Officer attending jury, not sworn.**—The statutory provision that "when the jury shall retire to consider of their verdict in any criminal case, a constable or other officer shall be sworn to attend the jury until they shall have agreed upon their verdict," is mandatory and can not be dispensed with. The failure to swear the officer who attended the jury is reversible error.⁸⁰ Permitting the jury, after they were impaneled in the case, and before they retire to consider of their verdict, to be in charge of an unsworn officer, is error, though perhaps not reversible in cases not capital.⁸¹ But if the defendant does not object that the officer attending the jury was not sworn, as required, the irregularity is waived.⁸² Swearing the officer *before* the time to attend the jury during their consideration of their verdict, instead of at *the time* the jury retires, though irregular, is not material.⁸³

§ 2969. **Disqualified officer—Minor as officer.**—If a witness who testified to material facts in a case be selected to take charge of the jury, and he be present during the time the jury are deliberating on the verdict, this, of itself, is reversible error.⁸⁴ A person less than twenty-one years of age is not for that reason disqualified to take charge of a jury.⁸⁵

⁷⁸ 4 Bl. Com. 355.

⁷⁹ *Barney v. P.*, 22 Ill. 160; *Kitter v. P.*, 25 Ill. 27.

⁸⁰ *Lewis v. P.*, 44 Ill. 454; *McIntyre v. P.*, 38 Ill. 518.

⁸¹ *Gibbons v. P.*, 23 Ill. 468.

⁸² *Dreyer v. P.*, 188 Ill. 46, 59 N. E. 424.

⁸³ *Sanders v. P.*, 124 Ill. 224, 16 N. E. 81.

⁸⁴ *Gainey v. P.*, 97 Ill. 280; *P. v. Knapp*, 42 Mich. 267, 3 N. W. 927; *Cooney v. S.* (Neb.), 85 N. W. 281.

⁸⁵ *McCann v. P.*, 88 Ill. 106.

ARTICLE XI. JURORS SEPARATING.

§ 2970. **Permitting separation of jury.**—The law in capital cases undoubtedly is that from the commencement of the trial till the rendition of the verdict, the jury, during all the adjournments of the court, should be placed in charge of a sworn officer, unless it is otherwise ordered by the court with the consent of the accused and the attorney for the people. A separation of the jury is such an irregularity that the court would be bound to set aside the verdict, unless it was the result of misapprehension, accident or mistake on the part of the jury, and such separation was not prejudicial to the prisoner.⁸⁶

§ 2971. **Jury separating during trial.**—In the United States the practice is to permit the jury to separate during recesses in all cases less than capital, but such is not the practice in England.⁸⁷

§ 2972. **Separation not prejudicial.**—Even in capital cases, the separation of the jury without consent, or the mere fact that other persons may speak to them, is not of itself grounds for a new trial or interference with a verdict otherwise right. It must appear that some of the jurors might have been tampered with or improperly influenced to the prejudice of the defendant.⁸⁸

§ 2974. **Separation, when presumed injurious.**—After a juror had been sworn and entered upon the discharge of his duties in the trial of a cause, he was permitted to separate himself from the jury and mingle with a crowd of persons by crossing the street, unaccompanied by an officer. It will be presumed that the defendant was injured by this misconduct of the juror, and it is incumbent on the state to rebut this presumption by showing that the juror did not hear any one in the crowd through which he passed express an opinion in relation to the case, and that he did not speak to any one about the case.⁸⁹

⁸⁶ *Jumpertz v. P.*, 21 Ill. 411; *McKinney v. P.*, 2 Gilm. (Ill.) 553; *Gibbons v. P.*, 23 Ill. 468.

⁸⁷ *Sutton v. P.*, 145 Ill. 283, 34 N. E. 420.

⁸⁸ *Reins v. P.*, 30 Ill. 273; *Marzen v. P.*, 190 Ill. 81, 88; *S. v. Harrison*, 36 W. Va. 729, 15 S. E. 982, 9 Am. C. R. 627; *Gott v. P.*, 187 Ill. 249,

257, 58 N. E. 293; *S. v. Williams*, 149 Mo. 496, 51 S. W. 88; *Payne v. S.*, 66 Ark. 545, 52 S. W. 276; *S. v. Dougherty*, 55 Mo. 69, 2 Green C. R. 610; *P. v. Douglass*, 4 Cow. (N. Y.) 26.

⁸⁹ *Daniel v. S.*, 56 Ga. 653, 2 Am. C. R. 421.

§ 2975. **Recalling jury after discharge.**—After a jury trying a case has been discharged and separated the court has no power to call them together again; the case is beyond their control or jurisdiction.⁹⁰

ARTICLE XII. IMPEACHING JUROR.

§ 2976. **Evidence, on impeaching a juror.**—When an effort is made on a motion for a new trial to show that a juror had sworn falsely on his *voir dire*, the evidence must clearly preponderate in establishing the fact.⁹¹

ARTICLE XIII. WAIVING DISQUALIFICATION.

§ 2977. **Incompetency of juror waived.**—It is well settled that all objections to the competency of a juror are waived by neglecting to exercise due diligence in urging objections at the proper time—after they have come to a party's knowledge.⁹² If a disqualification of a juror was known to the defendant or his counsel before he was accepted, it can not be assigned for error after verdict.⁹³

§ 2978. **Irregularity waived.**—Any irregularity in summoning jurors will be waived if not taken advantage of at the proper time, especially where the party had knowledge of such irregularity.⁹⁴

ARTICLE XIV. WAIVING TRIAL BY JURY.

§ 2979. **Waiving a jury.**—A jury can not be waived in a felony case—even by agreement or consent of the defendant. It is jurisdictional, and consent can never confer jurisdiction.⁹⁵ The defendant

⁹⁰ Williams v. P., 44 Ill. 478; Farley v. P., 138 Ill. 100, 27 N. E. 927; Sargent v. S., 11 Ohio 472.

⁹¹ Davison v. P., 90 Ill. 227; Hughes v. P., 116 Ill. 338, 6 N. E. 55; Spies v. P., 122 Ill. 264, 12 N. E. 865, 17 N. E. 898.

⁹² Adams v. S., 99 Ind. 244, 4 Am. C. R. 311; 1 Bish. Cr. Proc., § 946; P. v. Evans, 124 Cal. 206, 56 Pac. 1024; S. v. Burke, 107 Iowa 659, 78 N. W. 677. See Givens v. S., 103 Tenn. 648, 55 S. W. 1107 (minor).

⁹³ Mackin v. P., 115 Ill. 330, 3 N. E. 222; Fitzpatrick v. P., 98 Ill. 274.

⁹⁴ S. v. Jones, 52 La. 211, 26 So.

782. See P. v. Oliveria, 127 Cal. 376, 59 Pac. 772; Cornell v. S., 104 Wis. 527, 80 N. W. 745; Com. v. Cressinger, 193 Pa. St. 326, 44 Atl. 433; P. v. McArron, 121 Mich. 1, 79 N. W. 944; Carter v. S., 39 Tex. Cr. 345, 46 S. W. 236, 48 S. W. 508; S. v. Minor, 106 Iowa 642, 77 N. W. 330.

⁹⁵ Harris v. P., 128 Ill. 589, 21 N. E. 563; Morgan v. P., 136 Ill. 161, 26 N. E. 651; S. v. Simons, 61 Kan. 752, 60 Pac. 1052; 4 Bl. Com. 349; S. v. Lockwood, 43 Wis. 403; S. v. Davis, 66 Mo. 684; Cancemi v. P., 18 N. Y. 128; Hill v. P., 16 Mich. 351; Allen v. S., 54 Ind. 461, 2 Am.

may waive his right to a jury trial in a prosecution for a misdemeanor, and be tried by the court instead of a jury, where such waiver has been authorized by statute; and the courts have upheld the constitutionality of statutes providing for such waiver in misdemeanor cases.⁹⁶

§ 2980. **Statute on waiving jury.**—A statute permitting a waiver of the right of trial by jury in misdemeanor and petty cases is valid and not unconstitutional.⁹⁷

§ 2981. **Demand for jury trial.**—A failure of a party accused of a criminal offense to demand a jury trial in a justice court is not a waiver of such right.⁹⁸

ARTICLE XV. ERRORS IN SELECTING JURY.

§ 2982. **Ruling on competency, reviewable.**—The conclusion of the trial court as to the competency of a juror is not final, but may be reviewed on error assigned.⁹⁹

§ 2983. **Ruling on competency, when not reviewable.**—When it appears that a fair and impartial jury was obtained it is a general rule that any error of the court in allowing a challenge and permitting a juror to be excused is not subject to review.¹⁰⁰ The supreme court

C. R. 442; S. v. Stewart, 89 N. C. 563, 4 Am. C. R. 111; Williams v. S., 12 Ohio St. 622; P. v. Lennox, 67 Cal. 113, 7 Pac. 260; Cooley Const. Lim. 319; S. v. Ellis, 22 Wash. 129, 60 Pac. 136. See § 2560. The above authorities cover the question of trial with less than twelve jurors also. *Contra*, In re Staff, 63 Wis. 285, 23 N. W. 587, 6 Am. C. R. 141; S. v. Kaufman, 51 Iowa 578, 2 N. W. 275.

⁹⁶ Brewster v. P., 183 Ill. 143, 152, 55 N. E. 640; Edwards v. S., 45 N. J. L. 419; Ward v. P., 30 Mich. 116; In re Staff, 63 Wis. 285, 23 N. W. 587; George v. P., 167 Ill. 417, 47 N. E. 741; S. v. Ill, 74 Iowa 441, 38 N. W. 143; S. v. Robinson, 43 La. 383, 8 So. 937; S. v. Maine, 27 Conn. 281; Opinion of Justices, 41 N. H. 551; Murphy v. S., 97 Ind. 579; Harris v. P., 128 Ill. 585, 21 N. E. 563;

League v. S., 36 Md. 257; Connelly v. S., 60 Ala. 89; S. v. Worden, 46 Conn. 349. See S. v. Tucker, 96 Iowa 276, 65 N. W. 152.

⁹⁷ Lancaster v. S., 90 Md. 211, 44 Atl. 1039; Brewster v. P., 183 Ill. 143, 55 N. E. 640. See S. v. Jackson, 69 N. H. 511, 43 Atl. 749.

⁹⁸ Danner v. S., 89 Md. 220, 42 Atl. 965.

⁹⁹ Coughlin v. P., 144 Ill. 186, 33 N. E. 1; Winnesheik Ins. Co. v. Schueller, 60 Ill. 465; Plummer v. P., 74 Ill. 361; Wilson v. P., 94 Ill. 299; Spies v. P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898. *Contra*, S. v. Kinsauls, 126 N. C. 1095, 36 S. E. 31; S. v. Feldman, 80 Minn. 314, 83 N. W. 182.

¹⁰⁰ P. v. Durrant, 116 Cal. 179, 48 Pac. 75, 10 Am. C. R. 514; Richards v. S., 36 Neb. 17, 53 N. W. 1027; S. v. Ward, 39 Vt. 225; Ter. v. Roberts,

of California has repeatedly held, under a statute similar to the statute of Nevada, that the allowance of a challenge of a juror for implied bias, is not the subject of an exception.¹

§ 2984. Practice, on challenging.—In the absence of statutory regulation or a general rule of court, it is within the discretion of the court to determine the order in which the right to challenge shall be exercised, by the prosecution or defense, and no exception lies to the exercise of that discretion.²

ARTICLE XVI. COURT JUDGE OF LAW.

§ 2985. Court judge of law.—The doctrine that jurors are judges of the common law is contrary to the great preponderance of authority in this country.³ It is the duty of the court to declare the law in criminal as well as civil cases, and the jury has no right in either class of cases to render a verdict in disregard to the law so declared and by which their judgment should be controlled.⁴

ARTICLE XVII. JURY JUDGES OF LAW AND FACT.

§ 2986. Jury judges of law.—Where, by statute, the jury are made the judges of the law as well as the facts of a case, they are not bound by the law as "laid down" and given them by the court in the form of instructions, if they can say on oath that they believe they know the law better than the court.⁵

§ 2987. Jury judges of witnesses and facts.—Where there is a conflict in the testimony of the witnesses, it is for the jury to determine to whom they will give credence; they are the judges of the credibility

9 Mont. 12, 22 Pac. 132; *S. v. Ching Ling*, 16 Or. 419, 18 Pac. 844; *Watson v. S.*, 63 Ind. 548; *S. v. McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. C. R. 542.

¹ *S. v. Hing*, 16 Nev. 307, 4 Am. C. R. 376; *P. v. Atherton*, 51 Cal. 495.

² *Patterson v. S.*, 48 N. J. L. 381, 4 Atl. 449, 7 Am. C. R. 310; *Schufflin v. S.*, 20 Ohio St. 233.

³ *S. v. Burpee*, 65 Vt. 1, 25 Atl. 964, 9 Am. C. R. 555; *McDonald v. S.*, 63 Ind. 544, 3 Am. C. R. 300; *Hamilton v. P.*, 29 Mich. 173, 1 Am. C. R. 631; *Adams v. S.*, 29 Ohio St.

412; *Safford v. P.*, 1 Park. Cr. (N. Y.) 474; *Nicholson v. Com.*, 96 Pa. St. 503; 2 *Thomp. Trials*, § 2132; *Cooley Const. Lim.* (5th ed.), 324.

⁴ *S. v. Rheams*, 34 Minn. 18, 24 N. W. 302, 6 Am. C. R. 541; *Duffy v. P.*, 26 N. Y. 588; *Com. v. Rock*, 10 Gray (Mass.) 4; 1 *Greenl. Ev.*, § 49; *Lord v. S.*, 16 N. H. 325.

⁵ *Fisher v. P.*, 23 Ill. 231; *Wohlford v. P.*, 148 Ill. 300, 36 N. E. 107; *Beard v. S.*, 71 Md. 275, 17 Atl. 1044, 8 Am. C. R. 177; *McDonald v. S.*, 63 Ind. 544, 3 Am. C. R. 301; *Mullinix v. P.*, 76 Ill. 212.

of the witnesses, including the defendant.⁶ By the common law the jury are the judges of the facts in criminal as well as civil cases, and the court the judge of the law.⁷ The jury, in determining the facts, must be governed by the evidence. They have no right to act on any belief which is not produced wholly from the evidence.⁸

ARTICLE XVIII. STATUTE CONSTITUTIONAL.

§ 2988. Statute on examination valid.—The statute of Illinois permitting a juror to testify touching his competency and qualifications as a juror,—that notwithstanding he has formed an opinion based on rumor or newspaper statements (about the truth of which he has expressed no opinion), he can still give a fair and impartial trial,—is constitutional.⁹

ARTICLE XIX. DISCHARGING JURY.

§ 2989. Juror engaged in another case.—If a juror is engaged in the trial of another case the defendant can not insist as a matter of right in drawing him; the court may set aside the name of such juror and proceed with other jurors not so engaged.¹⁰

§ 2990. Sick juror may be excused.—A juror of the regular panel may, for good cause shown, such as illness or the like, be excused by the court, in the absence of the accused and without his knowledge or consent.¹¹ The sickness of a juror is ground to discharge the jury,

⁶Peeples v. McKee, 92 Ill. 397; Bonardo v. P., 182 Ill. 417, 55 N. E. 519; Rogers v. P., 98 Ill. 583; Higgins v. P., 98 Ill. 521; Connaghan v. P., 88 Ill. 461; Spahn v. P., 137 Ill. 543, 27 N. E. 688; S. v. Philpot, 97 Iowa 365, 66 N. W. 730. See "Witnesses." P. v. Willard, 92 Cal. 482, 28 Pac. 585; S. v. Lucas, 24 Or. 168, 33 Pac. 538; S. v. Jacobs, 106 N. C. 695, 10 S. E. 1031; P. v. Nino, 149 N. Y. 317, 43 N. E. 853; S. v. Mecum, 95 Iowa 433, 64 N. W. 286; Hickory v. U. S., 160 U. S. 408, 16 S. Ct. 327; Underhill Cr. Ev., § 276; S. v. Aughtry, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; Williams v. S., 46 Neb. 704, 65 N. W. 783.

⁷Sparf v. U. S., 156 U. S. 51, 15 S. Ct. 273, 10 Am. C. R. 180.

⁸Graff v. P., 134 Ill. 382, 25 N. E. 563.

⁹Coughlin v. P., 144 Ill. 180, 33 N. E. 1; Spies v. P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898; Spies v. Illinois, 123 U. S. 131, 8 S. Ct. 21.

¹⁰Prater v. S., 107 Ala. 26, 18 So. 238; Dorsey v. S., 107 Ala. 157, 18 So. 199. See Handy v. S., 121 Ala. 13, 25 So. 1023; S. v. Campbell, 35 S. C. 28, 14 S. E. 292; Thurmond v. S., 37 Tex. Cr. 422, 35 S. W. 965.

¹¹Thomas v. S., 125 Ala. 45, 27 So. 315; Beard v. S. (Tex. Cr.), 53 S. W. 348. See West v. S. (Fla.), 28 So. 430.

without jeopardy intervening, and for any other legal cause the jury may be discharged.¹²

ARTICLE XX. SCOPE OF FEDERAL STATUTES.

§ 2991. **Federal statutes includes territories.**—The provisions of the federal constitution relating to the right of trial by jury in criminal causes include the territories of the United States.¹³

¹² Whar. Cr. Pl. & Pr. (8th ed.), § 514; Thompson v. U. S., 155 U. S. 271, 9 Am. C. R. 212, 15 S. Ct. 73. See "Jeopardy."
¹³ Thompson v. Utah, 170 U. S. 343, 18 S. Ct. 620.

CHAPTER LXXXIII.

WITNESSES.

ART.	I. Competency,	§§ 2992-3016
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	XI. Cross-Examination,	§§ 3058-3072
	XII. Evidence of Dead Witness,	§ 3073
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	XIV. Non-Experts,	§§ 3080-3082

ARTICLE I. COMPETENCY.

§ 2992. **Accomplice as witness—Co-defendant.**—By the common law an accomplice not joined in the indictment is a competent witness for the prisoner, with whom he himself committed the crime.¹ An accomplice can not testify in favor of one jointly indicted while the indictment is pending against him. The criminal charge against him must be finally disposed of before he can testify for a co-defendant.² One of two or more joint defendants can not be a witness for

¹ Gray v. P., 26 Ill. 347; 4 Bl. Com. Williams v. S., 41 Fla. 295, 27 So. 267; Myers v. P., 26 Ill. 176. See 898.
² Underhill Cr. Ev., § 70, citing Collier v. S., 20 Ark. 36; S. v. Dunlop, 65 N. C. 288; Ballard v. S., 31 Fla. 266, 12 So. 865; Moss v. S., 17 U. S., 101 Fed. 430, 102 Fed. 134; Ark. 327.

or against another, even on a separate trial, until the case as to himself is disposed of by a plea of guilty or a verdict of conviction or acquittal or a discharge on a plea in abatement. Then he may be. If the indictments are separate he may be a witness, though the offense is supposed to be joint.³

§ 2993. Accomplice—Weight of his testimony.—Whilst a defendant may be convicted on the unsupported evidence of an accomplice, yet where the testimony of that accomplice is impeached by his own sworn evidence at another time it must be weighed with extreme caution.⁴

§ 2994. Detective not accomplice.—A detective joining an organization for the purpose of detecting and exposing criminals and bringing them to punishment is not a co-conspirator or accomplice in the eyes of the law so long as he honestly carries out his purpose, although he may have encouraged and counseled others to commit the crime.⁵

§ 2995. Competency—If convicted of crime.—By the common law, persons convicted of infamous crimes were rendered incompetent as witnesses and excluded, but not so unless such conviction is followed by judgment.⁶ All crimes, under the common law, were not deemed infamous, and it was the infamy of the crime, and not the nature or mode of punishment, that made the witness incompetent.⁷

§ 2996. Husband and wife—Competency.—The exclusion of husband and wife from being witnesses for or against each other is not

³ 1 Bish. Cr. Proc., § 1020; 1 Greenl. Ev., §§ 363, 379; P. v. Bill, 10 Johns. (N. Y.) 95; S. v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704, 7 Am. C. R. 410. See Whar. Cr. Ev. (9th ed.), 439. *Contra*, Smith v. P., 115 Ill. 21, 3 N. E. 733; Collins v. P., 98 Ill. 588.

⁴ Waters v. P., 172 Ill. 371, 50 N. E. 148; Com. v. Holmes, 127 Mass. 424; White v. S., 52 Miss. 216; P. v. Hare, 57 Mich. 505, 24 N. W. 843; S. v. Jones, 64 Mo. 391. See Underhill Cr. Ev., § 71; S. v. Thompson, 47 La. 1597, 18 So. 621; Lawhead v. S., 46 Neb. 607, 65 N. W. 779; S. v. Donnelly, 130 Mo. 642, 32 S. W. 1124; S. v. Hill (W. Va.), 35 S. E. 831. See "Evidence."

⁵ Campbell v. Com., 84 Pa. St. 187, 197; P. v. Bolanger, 71 Cal. 17, 11 Pac. 799; Com. v. Graves, 97 Mass. 114, 8 Cr. L. Mag. 1; S. v. Brownlee, 84 Iowa 473, 51 N. W. 25; Underhill Cr. Ev., § 69. See "Defenses;" "Evidence."

⁶ Bartholomew v. P., 104 Ill. 607; P. v. Rodrigo, 69 Cal. 601, 11 Pac. 481, 8 Am. C. R. 57; Com. v. Lockwood, 109 Mass. 323; S. v. Houston, 103 N. C. 383, 9 S. E. 699; 1 Greenl. Ev., § 374; Blaufus v. P., 69 N. Y. 109; 3 Bl. Com. 369; Underhill Cr. Ev., § 206.

⁷ Bartholomew v. P., 104 Ill. 607; 3 Greenl. Ev., § 375.

solely on the ground of interest, but partly on the identity of their legal rights and interests and partly on principles of public policy which lie at the base of civil society.⁸

§ 2997. Husband and wife—Valid marriage essential.—It is only where there has been a valid marriage that the husband and wife are rendered incompetent and are excluded from testifying for or against each other by the common law.⁹

§ 2998. Husband and wife—Adultery.—Where a man and woman live together in adultery or fornication they are not thereby rendered incompetent witnesses for or against each other. The only test is, are they husband and wife?¹⁰

§ 2999. Wife witness for co-defendant.—Where the husband and another are jointly indicted the wife can not testify for such other person if her testimony would have a tendency to influence the case against her husband.¹¹ Nor is the wife competent as a witness for the co-defendant of her husband if they be tried separately.^{11a} On the trial of two persons jointly indicted, if the grounds of defense are several and distinct and not dependent upon each other, the wife of one defendant may be admitted to testify for the other, but the wife is not a competent witness where the direct effect is to aid the husband and where the testimony concerns him.¹²

§ 3000. Husband and wife after divorce.—On the trial for adultery, committed by the defendant with the wife of a man who had subsequently procured a divorce, the divorced husband was a competent witness to prove his marriage to his divorced wife.¹³

⁸ Creed v. P., 81 Ill. 568; 1 Greenl. Ev., § 334; Mitchinson v. Cross, 58 Ill. 368. See Johnson v. McGregor, 157 Ill. 352, 41 N. E. 558; Underhill Cr. Ev., § 184.

⁹ Clark v. P., 178 Ill. 37, 52 N. E. 857; S. v. Gordon, 46 N. J. L. 432, 4 Am. C. R. 3; 1 Greenl. Ev., § 339. See "Bigamy."

¹⁰ Rickerstricker v. S., 31 Ark. 208, 3 Am. C. R. 352; 1 Greenl. Ev., § 339.

¹¹ Ter. v. Paul, 2 Mont. Ter. 314, 2 Am. C. R. 335.

^{11a} Pullen v. P., 1 Doug. (Mich.) 48; Collier v. S., 20 Ark. 36; Johnson v. S., 47 Ala. 9. See Underhill Cr. Ev., § 188. *Contra*, S. v. Burnside, 37 Mo. 343; Cornelius v. Com., 3 Metc. (Ky.) 481; Workman v. S., 4 Sneed (Tenn.) 425.

¹² Gillespie v. P., 176 Ill. 238, 245, 52 N. E. 250; 1 Greenl. Ev., § 335.

¹³ S. v. Dudley, 7 Wis. 664; S. v. Briggs, 9 R. I. 361, 1 Green C. R. 516.

§ 3001. **Husband and wife, wife's adultery.**—The husband of the woman with whom the offense of adultery was committed by the accused is not a competent witness to prove the fact.¹⁴

§ 3002. **Husband and wife—Statement to others.**—The defendant, on being interrogated regarding stolen goods which he had purchased, said: "My wife will make out my answer for me." His wife made out a statement in writing for him and handed it to the police the next day in the presence of her husband. Held competent.¹⁵

§ 3003. **Husband and wife—Impeaching each other.**—A woman testified for the prosecution that she was present at the time of the homicide in question. The woman was married but had not been living with her husband for several years. Her husband was called as a witness for the defense, by whom the defendant offered to prove that the reputation of his wife for truth and veracity in the neighborhood where she resided was bad: Held error to refuse this testimony; it was competent.¹⁶

§ 3004. **Religious test—Form of oath.**—There is no longer any test or qualification in respect to religious opinion or belief or want of the same which affects the competency of citizens to testify as witnesses in courts of justice.¹⁷ Every person believing in any other than the Christian religion shall be sworn according to the peculiar ceremony of his religion.¹⁸

§ 3005. **Deaf mute, competent, by signs.**—A deaf mute is not disqualified as a witness because of his physical condition. His examination may be carried on by means of signs, which may be interpreted by a qualified interpreter.¹⁹

¹⁴ S. v. Wilson, 31 N. J. L. 77; S. v. Gardner, 1 Root (Conn.) 485; S. v. Welch, 26 Me. 30.

¹⁵ Queen v. Mallory, L. R. 13 Q. B. D. 33, 4 Am. C. R. 586.

¹⁶ Ware v. S., 35 N. J. L. 553, 1 Green C. R. 513. See Owen v. S., 78 Ala. 425, 6 Am. C. R. 208.

¹⁷ Hronek v. P., 134 Ill. 152, 24 N. E. 861; P. v. Copsey, 71 Cal. 548, 12 Pac. 721; S. v. Powers, 51 N. J.

L. 432, 17 Atl. 969; Underhill Cr. Ev., § 201.

¹⁸ S. v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704, 7 Am. C. R. 415; 1 Greenl. Ev., § 371; P. v. Green, 99 Cal. 564, 34 Pac. 231; Underhill Cr. Ev., § 199.

¹⁹ Kirk v. S. (Tex. Cr.), 37 S. W. 440; Skaggs v. S., 108 Ind. 53, 8 N. E. 695; S. v. Howard, 118 Mo. 127, 24 S. W. 41. See 4 Bl. Com. 303.

§ 3006. **Child as witness.**—The capacity or incapacity of a child as a witness in certain essential particulars is a question of fact which the judge determines upon personal inspection and oral examination, and the finding of fact on such examination is not the subject of review by a court of appeal on review.²⁰

§ 3007. **Testing competency of witness.**—When the state presented a certain witness the prisoner proposed to examine her and to introduce proof to show that she was not competent to testify: Held error to refuse, as it was the right of the prisoner to test the competency of the witness. And it is no answer that on another occasion (in another trial of a different person the day before) the judge made such examination.²¹

§ 3008. **Witness rejected for incompetency.**—Where a witness is rejected on the grounds of incompetency it must be presumed that the witness would have been rejected no matter how material his evidence might have been. In such case the party introducing the witness is not bound to state in advance what facts he expects to prove by him, unless required by the court.²²

§ 3009. **Defendant compelled to be witness.**—A witness for the prosecution testified, among other things, that he discovered, at or near the house where the homicide occurred, tracks of a man's left foot and also impressions as if made by one's knee; that it looked like he was on his knee of the other leg. He further said the prisoner's right leg was cut off. In order to give the witness an opportunity to testify as to the character and extent of the amputation of the prisoner's leg the court ordered him to stand up in the presence of the jury. This was done for the purpose of determining whether his limb thus amputated would likely make an impression on the ground of the character testified to by the witness. Held error.²³

²⁰ S. v. Scanlan, 58 Mo. 204, 1 Am. C. R. 186; Com. v. Lynes, 142 Mass. 577, 8 N. E. 408. See Williams v. S., 109 Ala. 64, 19 So. 530; McGuff v. S., 88 Ala. 147, 7 So. 35; P. v. Craig, 111 Cal. 460, 44 Pac. 186; Blume v. S., 154 Ind. 343, 56 N. E. 771; S. v. Baum, 64 N. J. L. 410, 45 Atl. 806; S. v. Baughman (Iowa), 82 N. W. 452; S. v. Foote, 58 S. C. 218, 36 S. E. 551.

²¹ White v. S., 52 Miss. 216, 2 Am.

C. R. 459; Evans v. Hettick, 7 Wheat. (U. S.) 453; Gebhart v. Shindle, 15 S. & R. (Pa.) 235.

²² Rickerstricker v. S., 31 Ark. 208, 3 Am. C. R. 351; S. v. Jim, 3 Jones (N. C.) 348; Duffee v. Pennington, 1 Ala. 506.

²³ Blackwell v. S., 67 Ga. 76, 4 Am. C. R. 184; S. v. Jacobs, 5 Jones (N. C.) 259; Day v. S., 63 Ga. 669. See "Evidence."

§ 3010. Defendant as witness.—The accused as a witness differs from other witnesses only in the fact that he is the defendant charged with and being tried for crime, which may be considered in testing his credibility, but his testimony must be treated the same as that of any other witness.²⁴ In case the defendant as a witness stands uncontradicted the jury are warranted in concluding that his testimony is true.²⁵

§ 3011. Defendant same as other witness.—In the light of authority and reason a defendant who, at his own option, becomes a witness, occupies the same position as any other witness; is liable to cross-examination on any matters pertinent to the issue; may be contradicted and impeached as any other witness, and is subject to the same tests as other witnesses. And his credibility may be impeached by attacking his general reputation or character for truth and veracity.²⁶

§ 3012. Juror as witness.—If a juror trying a cause knows anything of the matter in issue he may be sworn as a witness and give his evidence publicly in court.²⁷

§ 3013. Grand juror as witness.—The common law doctrine that a grand juror will not be permitted to testify how a witness testified before the grand jury, except in a prosecution for perjury, is not now the law.²⁸

§ 3014. Dead witness, evidence of.—If a witness testified at a former trial and was then cross-examined, his testimony so given at such former trial may be introduced at a subsequent or second trial if he has since died, and may be proved by witnesses who heard the testimony of the deceased witness.²⁹

²⁴ Sullivan v. P., 114 Ill. 27, 28 N. E. 381; Chambers v. P., 105 Ill. 412; Gullihier v. P., 82 Ill. 146; S. v. Ober, 52 N. H. 459, 1 Green C. R. 211.

²⁵ Mulford v. P., 139 Ill. 595, 28 N. E. 1096.

²⁶ S. v. Clinton, 67 Mo. 380, 3 Am. C. R. 141; Norfolk v. Gaylord, 28 Conn. 309; Mershon v. S., 51 Ind. 14; Conners v. P., 50 N. Y. 240; S. v. Ober, 52 N. H. 459, 1 Green C. R. 212; Underhill Cr. Ev., § 59.

²⁷ S. v. Sawtelle, 66 N. H. 488, 32

Atl. 831, 10 Am. C. R. 361; Murdock v. Sumner, 22 Pick. (Mass.) 156; 3 Bl. Com. 375.

²⁸ Bressler v. P., 117 Ill. 436, 8 N. E. 62; S. v. Wood, 53 N. H. 484, 2 Green C. R. 354; Gordon v. Com., 92 Pa. St. 216; Little v. Com., 25 Gratt. (Va.) 921; Com. v. Mead, 12 Gray (Mass.) 167.

²⁹ Hair v. S., 16 Neb. 601, 21 N. W. 464; Brown v. Com., 73 Pa. St. 325; Johnson v. S., 1 Tex. App. 333; Barnett v. P., 54 Ill. 330; S. v. Johnson, 12 Nev. 121; Collins v. Com., 12

§ 3015. **Absent witness.**—Proof of what an absent witness swore to before the magistrate on an examination of the accused for the same offense is not competent, even though the accused procured such witness to be taken out of the state beyond the jurisdiction of the court.³⁰

§ 3016. **Explaining absence of witness.**—Where a witness was present at the time and place of the crime, but was not present at the trial, it is competent to show where he was and why he was absent from the trial, otherwise he should have been called as a witness.³¹

ARTICLE II. CREDIBILITY.

§ 3017. **Jury judge of credibility**—Disregarding credible witness.—The question of the credibility of the witnesses is one peculiarly for the jury.³² The facts are to be determined by the jury from all the evidence, and their decision in that respect will not be disturbed by an appellate court except in rare and unusual circumstances.³³ But the jury have no right to arbitrarily disregard the testimony of a reliable witness.³⁴

ARTICLE III. SUSTAINING WITNESS.

§ 3018. **Confirming witness.**—We find the decided weight of authority to be that proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is, as a general rule, inadmissible, even after the witness has

Bush (Ky.) 271, 2 Am. C. R. 283; P. v. Murphy, 45 Cal. 137, 2 Green C. R. 414; Thompson v. S., 106 Ala. 67, 17 So. 512, 9 Am. C. R. 203; P. v. Brotherton, 47 Cal. 388, 2 Green C. R. 452; Mattox v. U. S., 156 U. S. 237, 15 S. Ct. 337; Underhill Cr. Ev., § 261.

³⁰ Bergen v. P., 17 Ill. 427; S. v. Atkins, 1 Tenn. 229; P. v. Newman, 5 Hill (N. Y.) 295; Finn v. Com., 5 Rand. (Va.) 701; Wilbur v. Selden, 6 Cow. (N. Y.) 162; Hobson v. Doe, 2 Blackf. (Ind.) 308; Chess v. Chess, 17 S. & R. (Pa.) 409; Le Baron v. Crombie, 14 Mass. 234; 2 Starkie Ev. 894. *Contra*, Thompson v. S., 106 Ala. 67, 17 So. 512, 9 Am. C. R. 203; Underhill Cr. Ev., § 264.

³¹ P. v. Clark, 106 Cal. 32, 39 Pac. 53, 9 Am. C. R. 599.

³² Bean v. P., 124 Ill. 580, 16 N. E. 656; Peeples v. McKee, 92 Ill. 397; Spahn v. P., 137 Ill. 543, 27 N. E. 688; Aholtz v. P., 121 Ill. 562, 13 N. E. 524; Huston v. P., 121 Ill. 500, 13 N. E. 538; Whitten v. S., 47 Ga. 297, 1 Green C. R. 579; 4 Bl. Com. 214.

³³ Watt v. P., 126 Ill. 26, 18 N. E. 340; Cronk v. P., 131 Ill. 60, 22 N. E. 862; Davis v. P., 114 Ill. 99, 29 N. E. 192; Dacey v. P., 116 Ill. 578, 6 N. E. 165; Scott v. P., 141 Ill. 214, 30 N. E. 329; Johnson v. P., 140 Ill. 352, 29 N. E. 895; Moore v. S., 68 Ala. 360; Terry v. S., 13 Ind. 70.

³⁴ McMahon v. P., 120 Ill. 584, 11 N. E. 883; Walsh v. P., 65 Ill. 63; Jones v. S., 48 Ga. 164; S. v. Smallwood, 75 N. C. 104; S. v. Seymour (Idaho), 61 Pac. 1033.

been impeached or discredited.³⁵ But where it is charged that a witness in giving his testimony was prompted to do so under the influence of some motive inducing him to make a false statement, it may be shown in confirmation that he made similar statements at a time when the imputed motive did not exist.³⁶

§ 3019. Sustaining witness by former statements.—Where the credit of a witness is attacked by cross-examination or otherwise, by proving former statements contradictory to his statements in court, it is competent in his support to show statements made at other times and places consistent therewith.³⁷ Where the defense has impeached a witness the state may, by rebuttal, prove by other evidence that what such witness testified to is true.³⁸

§ 3020. Sustaining witness—Character.—Where the character of a witness has been attacked by evidence that he has been convicted of a felony, it may be sustained by evidence of his general reputation for truth and veracity.^{38a} But it can not be sustained where the witness had been impeached by proof of contradictory statements.³⁹ Where a witness committed perjury on a former trial of the accused he will be permitted to state his reasons and what influences caused him to testify falsely at the former trial. To refuse him the privilege of explaining would in effect be condemning him without a hearing.⁴⁰

ARTICLE IV. IMPEACHING WITNESS.

§ 3021. Impeaching one's own witness.—As a general rule a party who voluntarily introduces a witness to give evidence in his behalf

³⁵ *Stolp v. Blair*, 68 Ill. 544; *S. v. Hant*, 137 Ind. 537, 37 N. E. 409, 9 Am. C. R. 434; 1 Greenl. Ev., § 469; *Hobbs v. S.*, 133 Ind. 404, 32 N. E. 1019; *Ball v. S.*, 31 Tex. Cr. 214, 20 S. W. 363. *Contra*, *Underhill Cr. Ev.*, § 241, citing *Goode v. S.*, 32 Tex. Cr. 505, 24 S. W. 102; *Connor v. P.*, 18 Colo. 373, 33 Pac. 159; *Lowe v. S.*, 97 Ga. 792, 25 S. E. 676.

³⁶ *Gates v. P.*, 14 Ill. 438; *Stolp v. Blair*, 68 Ill. 544; 1 Greenl. Ev., § 469; *McCord v. S.*, 83 Ga. 521, 10 S. E. 437, 8 Am. C. R. 636.

³⁷ 1 *Roscoe Cr. Ev.* 106, n. 3; *S. v. Vincent*, 24 Iowa 575; *Coffin v. Anderson*, 4 Blackf. (Ind.) 398; *S. v. Callahan*, 47 La. 444, 17 So. 50, 10 Am. C. R. 112; *Yarbrough v. S.*,

105 Ala. 43, 16 So. 758, 10 Am. C. R. 63; *S. v. McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. C. R. 546; *P. v. Doyell*, 48 Cal. 85; *S. v. Parish*, 79 N. C. 610; *Surles v. S.*, 89 Ga. 167, 15 S. E. 38; *S. v. Jones*, 29 S. C. 201, 7 S. E. 296; *Underhill Cr. Ev.*, § 243.

³⁸ 1 *Roscoe Cr. Ev.*, 156; *S. v. McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. C. R. 545; *Duke v. S.*, 35 Tex. Cr. 283, 33 S. W. 349.

^{38a} *P. v. Amanacus*, 50 Cal. 233, 1 Am. C. R. 197.

³⁹ *P. v. Olmstead*, 30 Mich. 431, 1 Am. C. R. 305.

⁴⁰ *S. v. Reed*, 62 Me. 129, 2 Green C. R. 480; *Com. v. Hawkins*, 3 Gray (Mass.) 465; 1 Greenl. Ev., § 462.

will be held as vouching for his truthfulness and as being entitled to credence, and will not be permitted to impeach him. To this rule, however, there are exceptions, as, where the party introducing the witness has been deceived or entrapped by him.⁴¹ If the defendant introduces a witness whose name is indorsed on the back of the indictment, such witness becomes his own witness.⁴²

§ 3022. Impeaching defendant improperly.—Compelling the defendant on cross-examination to testify that he had frequented other saloons besides the one where the shooting occurred, on divers times, and had drunk and played cards and billiards there, is incompetent.⁴³ To compel the defendant on cross-examination to admit that he had visited houses of ill fame in different places, and the number of times, and that he had connection with the inmates of such houses, and also that he had played cards for money, is improper impeachment.⁴⁴

§ 3023. Impeaching defendant—Infamous crime.—The fact that the defendant has been convicted of an infamous crime may be shown in evidence, when he offers himself as a witness, for the purpose of affecting his credibility. This is provided for by statute.⁴⁵ The statute of Illinois, removing the common law disability, excluding and discrediting witnesses, could not have been designed to allow proof of a conviction for an offense not legally presumed to affect his credibility to be given in evidence.⁴⁶

§ 3024. Impeaching witness improperly.—A witness can not be impeached on immaterial matters or matters not pertinent to the issue.⁴⁷

§ 3025. Impeaching co-defendant.—If one of several defendants jointly indicted and tried testifies as a witness in his own behalf the

⁴¹ *P. v. Jacobs*, 49 Cal. 384; *Gillett Indirect & Col. Ev.*, § 89.

⁴² *Bressler v. P.*, 117 Ill. 437, 8 N. E. 62.

⁴³ *Hayward v. P.*, 96 Ill. 502. See *Carr v. S.*, 43 Ark. 99, 5 Am. C. R. 439.

⁴⁴ *Gifford v. P.*, 87 Ill. 212; *Aiken v. P.*, 183 Ill. 221, 55 N. E. 695.

⁴⁵ Sec. 6, Div. 42, of the *Crim. Code of Illinois*; *Bartholomew v. P.*, 104 Ill. 607.

⁴⁶ *Bartholomew v. P.*, 104 Ill. 608; *Collins v. P.*, 98 Ill. 588.

⁴⁷ *Dacey v. P.*, 116 Ill. 575, 6 N. E. 165; *Swan v. P.*, 98 Ill. 612; *Kidwell v. S.*, 63 Ind. 384, 3 Am. C. R. 237; *Welch v. S.*, 104 Ind. 347, 3 N. E. 850; *Carter v. S.*, 36 Neb. 481, 54 N. W. 853; *Crawford v. S.*, 112 Ala. 1, 21 So. 214; *Huber v. S.*, 126 Ind. 185, 25 N. E. 904; *Wilson v. S.*, 37 Tex. Cr. 64, 38 S. W. 610; *P. v. Stackhouse*, 49 Mich. 76, 13 N. W. 364; *Reynolds v. S.*, 147 Ind. 3, 46 N. E. 31; *S. v. Conerly*, 48 La. 1561, 21 So. 192; *S. v. Brown*, 100 Iowa 50, 69 N. W. 277.

other defendants have the same right to impeach him on cross-examination as though he had been called as a witness for the state.⁴⁸

§ 3026. Impeaching reputation of witness.—The reputation of a witness for truthfulness can not be impeached by proof of particular acts; it must be by proving his general reputation for truth and veracity to be bad.⁴⁹

§ 3027. Impeaching witness' recollection.—If a witness neither directly admits nor denies the act or declaration, as when he merely says he does not recollect, or gives any other direct answer, not amounting to an admission, it is competent to prove the affirmative by way of impeachment.⁵⁰

§ 3028. Impeaching by contradiction—Former statement.—Before a witness can be called to impeach a witness by way of showing something he said out of court contradictory to what he testified on the trial, his attention must be first called at the time and place, as to what he said out of court, thereby affording him an opportunity of explaining.⁵¹ The deceased was shot and killed at Bay View on May 15. A witness for the state testified that the prisoner admitted to her in a conversation between them that he had shot a man the night before at Bay View. But at the inquest this same witness stated as follows: "He (prisoner) said he had shot a man the night before, but did not say where it was." Defendant offered in evidence the statement of the witness thus made at the inquest for the purpose of impeaching her: Held competent and error to refuse it.⁵²

⁴⁸ S. v. Goff, 117 N. C. 755, 23 S. E. 355, 10 Am. C. R. 20; S. v. Patterson, 2 Ired. (N. C.) 346.

⁴⁹ Gifford v. P., 87 Ill. 214; McCarty v. P., 51 Ill. 231; Dimick v. Downs, 82 Ill. 570; Randall v. S., 132 Ind. 539, 32 N. E. 305; S. v. Rogers, 108 Mo. 202, 18 S. W. 976; S. v. Gesell, 124 Mo. 531, 27 S. W. 1101; Underhill Cr. Ev., § 236.

⁵⁰ Bressler v. P., 117 Ill. 434, 8 N. E. 62; Ray v. Bell, 24 Ill. 451; Wood v. Shaw, 48 Ill. 276; 1 Roscoe Cr. Ev. 216; 1 Thomp. Trials, § 507; Smith v. S. (Tex. Cr.), 20 S. W. 554; Payne v. S., 60 Ala. 80; Billings v. S., 52 Ark. 303, 12 S. W. 504; Wagner v. S., 116 Ind. 181, 18 N. E. 833.

⁵¹ Aneals v. P., 134 Ill. 412, 25 N. E. 1022; 1 Greenl. Ev., § 462; Jackson v. Com., 23 Gratt. (Va.) 919, 2 Green C. R. 654; P. v. Bush, 65 Cal. 129, 3 Pac. 590; S. v. Hart, 67 Iowa 142, 25 N. W. 99; P. v. Webster, 139 N. Y. 73, 34 N. E. 730; Underhill Cr. Ev., § 238; Carpenter v. S., 62 Ark. 286, 36 S. W. 900; P. v. Shaw, 111 Cal. 171, 43 Pac. 593; Com. v. Mosier, 135 Pa. St. 221, 19 Atl. 943; Hester v. S., 103 Ala. 85, 15 So. 857; P. v. Bosquet, 116 Cal. 75, 47 Pac. 879; P. v. Chin Hane, 108 Cal. 597, 41 Pac. 697; Com. v. Smith, 163 Mass. 411, 40 N. E. 189; Kent v. S., 42 Ohio St. 426; Gillett Indirect & Col. Ev., § 89.

⁵² P. v. Devine, 44 Cal. 452, 2 Green

§ 3029. **Impeaching by contradiction—Identification.**—An officer who arrested the defendant for a criminal assault on a woman testified that he took him to the house of the woman to see whether she would identify him, and that she did identify him as the person who assaulted her. On cross-examination the officer was asked that if, at the close of this interview, he did not say to the woman, naming her, as follows: "Mrs. Hale, as you can not identify him and swear to him positively, there is no use of my holding him;" and also, if he did not afterwards, at a time and place named, referring to the attempted identification, say that "she could not swear to him positively." Held error to refuse this cross-examination.⁵⁴

§ 3030. **Impeaching by contradiction—Hostility.**—There is no distinction, so far as the rule is concerned, between admitting declarations of hostility of a witness for the purpose of affecting the value of his testimony and admitting contradictory statements for the same purpose, as in either case an opportunity should be given the witness to explain what he said.⁵⁴

§ 3031. **Impeaching by contradiction—All said.**—To discredit the witness Foster, the witness May testified to facts tending to show that Foster, on the trial, testified differently than on the hearing before the justice. May stated a part of Foster's former testimony; the court properly admitted evidence of all of it. To impeach a witness by showing a part of what he said would be unjust; all he said should be shown.⁵⁵

§ 3032. **Impeaching by contradictions—Letter.**—A witness for the prosecution on cross-examination denied that he had any knowledge whatever of a letter shown him purporting to have been written by him to the defendant, stating that he knew nothing against the defendant relating to the transaction: Held competent for the purpose of impeaching the witness on making *prima facie* proof that it was written at the dictation of the witness and was in fact sent by him to the defendant.⁵⁶

C. R. 406; Com. v. Hawkins, 3 Gray (Mass.) 463; Stephens v. P., 19 N. Y. 549. See Jones v. P., 166 Ill. 269, 46 N. E. 723.

⁵⁵ Burt v. S., 23 Ohio St. 394, 2 Green C. R. 544.

⁵⁴ S. v. Mackey, 12 Or. 154, 6 Pac. 648, 5 Am. C. R. 534.

⁵⁵ S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 218.

⁵⁶ Schriedley v. S., 23 Ohio St. 130, 2 Green C. R. 533. See Underhill Cr. Ev., § 239.

§ 3033. Impeaching by contradiction—Grand jury evidence.—Testimony given by a witness before the grand jury is in no sense a confidential communication to the attorney for the prosecution, although given in his presence and hearing. The prosecuting attorney, having heard the testimony of the witness so given, becomes a competent witness to tell what such witness said before the grand jury, for the purpose of impeaching him, by showing contradictory statements.⁵⁷

§ 3034. Impeaching by contradiction—Before coroner.—Two witnesses testified before the coroner that they knew nothing whatever as to how the deceased received the injuries causing death, and on the trial they stated that they saw the accused beat the deceased to death with a club. The only explanation for this extraordinary and unprecedented conduct was that they feared injury from the accused. Their testimony was greatly impaired if not wholly destroyed.⁵⁸

§ 3035. Impeaching witness—Failure to disclose.—The defendant introduced witnesses living in the vicinity who testified that at or about the time of the homicide in question they saw a man riding away at a rapid gait on a different colored horse from that ridden by the defendant, and also saw two other persons in an open buggy. Counsel for the prosecution, on cross-examination, asked these witnesses if they told what they had seen, to anybody, and one said she had, naming a neighbor to whom she had told what she had seen. This neighbor was called in rebuttal and said that the witness told her nothing of the kind. Held proper impeaching testimony.⁵⁹

§ 3036. Impeaching by showing ill will.—It is competent to show on cross-examination that the witness has feelings of ill-will or hatred toward the party against whom he testifies, and if he denies the same, contradictory evidence may be introduced to impeach him.⁶⁰

§ 3037. Impeached, by criminal life.—Under the evidence the witness Brown was so completely impeached that no credit should

⁵⁷ *S. v. Van Buskirk*, 59 Ind. 385, 3 Am. C. R. 356.

⁵⁸ *Gibbons v. P.*, 23 Ill. 466.

⁵⁹ *S. v. McKinney*, 31 Kan. 570, 5 Am. C. R. 544, 3 Pac. 356.

⁶⁰ *Aneals v. P.*, 134 Ill. 414, 25 N. E. 1022, citing 1 Greenl. Ev., § 450; *Phenix v. Castner*, 103 Ill. 207.

have been given his evidence by an intelligent jury. He admitted on cross-examination that he had served a term of imprisonment in the penitentiary; had also been convicted of larceny and charged with burglary and larceny "all his life," and was impeached on his general reputation in the neighborhood where he resided.⁶¹

ARTICLE V. OPINIONS OF WITNESS.

§ 3038. **Opinions by non-experts.**—Non-experts may give their opinion on the mental condition of a person, at the same time stating the facts observed on which they base their opinions, including conversations as a part of the facts; their opinion must be based on the specific facts thus disclosed.⁶²

§ 3039. **Opinions—By medical experts.**—Medical experts, graduates of medical colleges who have practiced their profession many years, in giving their testimony and opinion as experts, are not confined to opinions derived from their own observations and experience, but may give an opinion based upon information derived from medical books.⁶³

§ 3040. **Opinions, by bank experts.**—The opinion of a banker is admissible as to the genuineness of a bank note, he having made the subject a matter of study.⁶⁴

ARTICLE VI. PRIVILEGES OF WITNESS.

§ 3041. **Privilege from arrest.**—A witness will be protected from arrest not only during the time he is going to and from the place where he is required to attend court, but also during the time of his detention at court.⁶⁵

⁶¹ *Eller v. P.*, 153 Ill. 345, 38 N. E. 660; *Walsh v. P.*, 65 Ill. 63.

⁶² 1 Greenl. Ev. (Redf. ed.), § 440; *Jamison v. P.*, 145 Ill. 377, 34 N. E. 486; *Upstone v. P.*, 109 Ill. 175; *P. v. Borgetto*, 99 Mich. 336, 58 N. W. 328; *Shults v. S.*, 37 Neb. 481, 55 N. W. 1080; *Parsons v. S.*, 81 Ala. 577, 7 Am. C. R. 288, 2 So. 854; *Dove v. S.*, 3 Heisk. (Tenn.) 348, 1 Green C. R. 766; *S. v. Ketchey*, 70 N. C. 621, 2 Green C. R. 747. See "Evidence."

⁶³ *Siebert v. P.*, 143 Ill. 579, 32 N. E. 431; *S. v. Wood*, 53 N. H. 484; *Mitchell v. S.*, 58 Ala. 417. *Contra*, *Soquet v. S.*, 72 Wis. 659, 40 N. W. 391.

⁶⁴ *Keating v. P.*, 160 Ill. 487, 43 N. E. 724; *Atwood v. Cornwall*, 28 Mich. 336; *May v. Dorsett*, 30 Ga. 116; *Crawford v. S.*, 2 Ind. 132.

⁶⁵ *Thompson's Case*, 122 Mass. 428; *Underhill Cr. Ev.*, § 258.

§ 3042. **Privilege of witness from exposure.**—A witness is not bound to answer any question, either in a court of law or equity, the answer to which will expose him to any penalty, fine, forfeiture or punishment, or which will have a tendency to accuse him of any crime or misdemeanor, or to expose him to any penalty or forfeiture, or which would be a link in a chain of evidence to convict him of a criminal offense; nor can he be compelled to produce books or papers having the same effect.⁶⁶ But where the criminal prosecution, to which the answer of a witness might render him liable, has been barred by the statute of limitations, he can not claim his privilege, but must testify; and it should appear affirmatively that no prosecution is then pending.⁶⁷

§ 3043. **Privilege may be waived—When not.**—The privilege that a person is not bound to testify on a matter that would convict him or furnish evidence against him may be waived, and if he elect to testify, and give false testimony, he may be indicted for perjury.⁶⁸ A witness who becomes the moving cause of a prosecution by voluntarily signing and swearing to the complaint or information, or voluntarily appears before the grand jury, and by his testimony procures an indictment, does not thereby waive his privilege of refusing to give evidence which will criminate or tend to criminate himself on being called as a witness at the trial of the cause.⁶⁹

§ 3044. **Privilege of attorney and client.**—The relation of attorney and client can not exist for the purpose of counsel in concocting crime. The privilege can not be claimed in such cases.⁷⁰ A communication to or advice from the representative of an attorney is no less privileged than a communication by or to the attorney. Thus, a

⁶⁶ *Lamson v. Boyden*, 160 Ill. 618, 43 N. E. 781 (citing *Minters v. P.*, 139 Ill. 365, 29 N. E. 45; 1 *Greenl. Ev.*, §§ 451-454); *Mackin v. P.*, 115 Ill. 321, 3 N. E. 222; *Wildon v. Burch*, 12 Ill. 375; *Counselman v. Hitchcock*, 142 U. S. 547, 12 S. Ct. 195; *P. v. Mather*, 4 *Wend. (N. Y.)* 229; *Boyle v. Smithman*, 146 Pa. St. 255, 23 Atl. 397; *Stevens v. S.*, 50 Kan. 712, 32 Pac. 350; *S. v. Kent*, 5 N. D. 516, 67 N. W. 1052; *Com. v. Trider*, 143 Mass. 180, 9 N. E. 510; *Bolen v. P.*, 184 Ill. 339, 56 N. E. 408.

⁶⁷ *Lamson v. Boyden*, 160 Ill. 618, 43 N. E. 781.

⁶⁸ *Mackin v. P.*, 115 Ill. 321, 3 N. E. 222; *S. v. Maxwell*, 28 La. 361; *Chamberlain v. P.*, 23 N. Y. 85; *Bolen v. P.*, 184 Ill. 339, 56 N. E. 408.

⁶⁹ *Samuel v. P.*, 164 Ill. 383, 384, 45 N. E. 728; *Temple v. Com.*, 75 Va. 392.

⁷⁰ *P. v. Van Alstine*, 57 Mich. 69, 23 N. W. 594, 6 Am. C. R. 280; *P. v. Blakeley*, 4 Park. Cr. (N. Y.) 176; *Underhill Cr. Ev.*, § 175.

clerk, interpreter or agent of the attorney will not be allowed to testify to any communication made to him in a professional capacity by a client of his employer.⁷¹

§ 3045. Privilege is personal to witness.—The privilege of a witness in refusing to give evidence tending to criminate him is personal to the witness, and can not be interposed by either of the parties to the cause, nor can either party raise the objection for the witness.⁷²

§ 3046. Statute relating to witness' privilege.—A statutory enactment requiring a witness to give evidence which may convict him of a crime is unconstitutional, unless it affords absolute immunity against future prosecution for the offense to which the question relates. The exonerating statute must be so broad as to give the witness complete amnesty.⁷³

ARTICLE VII. ADDITIONAL WITNESSES.

§ 3047. Additional witnesses at trial.—It has frequently been held not to be error to allow a witness to testify whose name is not on the indictment, and where no notice has been given that the witness would be called.⁷⁴ But if it appears that the testimony of any witness was given not indorsed on the indictment, or no notice given that any such witness would be called, then it is error.⁷⁵ Other witnesses than those on the indictment may, in the discretion of the court, be called and examined on notice first given.⁷⁶

⁷¹ Underhill Cr. Ev., § 173, citing Hawes v. S., 88 Ala. 37, 68, 7 So. 802.

⁷² Samuel v. P., 164 Ill. 383, 45 N. E. 728; Reg. v. Kinglake, 11 Cox C. C. 499; Bolen v. P., 184 Ill. 339, 56 N. E. 408.

⁷³ Lamson v. Boyden, 160 Ill. 620, 43 N. E. 781, citing Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195.

⁷⁴ Simons v. P., 150 Ill. 76, 36 N. E. 1019; Bulliner v. P., 95 Ill. 394; Logg v. P., 92 Ill. 598; Smith v. P., 74 Ill. 144; Gates v. P., 14 Ill. 436; Gardner v. P., 3 Scam. (Ill.) 89.

⁷⁵ P. v. Hall, 48 Mich. 482, 12 N. W. 665; Reg. v. Frost, 9 C. & P. 147.

⁷⁶ Trask v. P., 151 Ill. 529, 38 N. E. 248; Logg v. P., 92 Ill. 598; Bulliner v. P., 95 Ill. 394; Kota v. P., 136 Ill. 658, 27 N. E. 53; Gore v. P., 162 Ill. 266, 44 N. E. 500; Kirkham v. P., 170 Ill. 13, 48 N. E. 465; S. v. McKinney, 31 Kan. 570, 3 Pac. 356; Minich v. P., 8 Colo. 440, 9 Pac. 4; Bolen v. P., 184 Ill. 339, 56 N. E. 408; S. v. Regan, 8 Wash. 506, 36 Pac. 472. See also, as to indorsing witnesses on indictment: S. v. Hawks, 56 Minn. 129, 57 N. W. 455; S. v. Doyle, 107 Mo. 36, 17 S. W. 751; S. v. Sorter, 52 Kan. 531, 34 Pac. 1036; S. v. Bokien, 14 Wash. 403, 44 Pac. 889; Johnson v. S., 34 Neb. 257, 51 N. W. 835; Rauschkolb v. S., 46 Neb. 658, 65 N. W. 776.

§ 3048. **All eye-witnesses to a crime.**—The prosecution should be required to call all the witnesses indorsed on the indictment, unless, perhaps, in cases where the witnesses are too numerous.⁷⁷

ARTICLE VIII. EXCLUDING WITNESSES.

§ 3049. **Excluding witnesses from court—Counsel forbidden to consult witness.**—Where a witness violates the order of the court excluding witnesses from the court room, the court may, in its discretion, permit the witness to testify; he is not necessarily rendered incompetent.⁷⁸ If the court refuse to let counsel for the accused consult with his own witnesses, upon the ground that they were under the rule, and for no other reason, this will be error sufficient to reverse.⁷⁹

ARTICLE IX. WITNESS FEES.

§ 3050. **Witness fees when subpoenaed.**—In civil actions a witness is not compelled to obey a subpoena as such witness unless his fees and mileage shall have been tendered him, and the rule applies as well to a party to the suit where subpoenaed by his opponent as a witness.⁸⁰ At common law no witness fees were paid, and in the absence of a statute authorizing it, no fees can be taxed as costs or recovered.⁸¹

§ 3051. **Fees of expert witness.**—A physician called as an expert witness to give his opinion in answer to a hypothetical question can

⁷⁷ *P. v. Etter*, 81 Mich. 570, 45 N. W. 1109; *S. v. Magoon*, 50 Vt. 333. *Contra*, *S. v. Smallwood*, 75 N. C. 104; *Morrow v. S.*, 57 Miss. 836; *S. v. Cain*, 20 W. Va. 679; *S. v. Martin*, 2 Ired. (N. C.) 101; *Bonker v. P.*, 37 Mich. 4, 2 Am. C. R. 82.

⁷⁸ *Bow v. P.*, 160 Ill. 441, 43 N. E. 593; *S. v. Ward*, 61 Vt. 153, 8 Am. C. R. 211, 17 Atl. 483; *P. v. O'Loughlin*, 3 Utah 133, 1 Pac. 653, 4 Am. C. R. 548; 1 Greenl. Ev., § 432; *Haskins v. Com.*, 8 Ky. L. 419, 1 S. W. 730; *Rummel v. S.*, 22 Tex. App. 558, 3 S. W. 763; *Leache v. S.*, 22 Tex. App. 279, 3 S. W. 539; *P. v. Garnett*, 29 Cal. 629. *Contra*, *Rooks v. S.*, 65 Ga. 330, 4 Am. C. R. 484. See also *Bulliner v. P.*, 95 Ill. 399; *Kota v. P.*, 136 Ill. 658, 27 N. E. 53; *McLean v. S.*, 16 Ala. 672; *Kelly v. P.*, 17 Colo. 133, 29 Pac. 805; *Com. v. Thompson*, 159

Mass. 56, 33 N. E. 1111; *Trujillo v. Ter.*, 6 N. M. 589, 30 Pac. 870; *S. v. Whitworth*, 126 Mo. 573, 29 S. W. 595; *Underhill Cr. Ev.*, § 225; *P. v. Sam Lung*, 70 Cal. 515, 11 Pac. 673; *Cunningham v. S.*, 97 Ga. 214, 22 S. E. 954; *Bishop v. S. (Tex. Cr.)*, 35 S. W. 170. See *S. v. Gesell*, 124 Mo. 531, 27 S. W. 1101.

⁷⁹ *Allen v. S.*, 61 Miss. 627, 4 Am. C. R. 252; *White v. S.*, 52 Miss. 216, 2 Am. C. R. 461.

⁸⁰ *Rapalje's Law of Witnesses*, p. 519; *Vickers v. Hill*, 1 Scam. (Ill.) 307; *Peoria, etc., R. Co. v. Bryant*, 15 Ill. 438.

⁸¹ *Dixon v. P.*, 163 Ill. 187, 48 N. E. 108; *Smith v. McLaughlin*, 77 Ill. 596; *Board of Comrs. v. Lee*, 3 Colo. App. 177, 32 Pac. 841; *S. v. Cantieny*, 34 Minn. 1, 24 N. W. 458, 6 Am. C. R. 424; *S. v. Kinne*, 41 N. H. 238.

not refuse to answer the question upon the ground that no greater compensation than that allowed to ordinary witnesses has been paid or promised him.⁸²

§ 3052. Arrest of witness in court, error.—Three material witnesses who testified for the defendant proved or tended to prove an alibi for him. After these witnesses had testified, the court, in the presence and hearing of the jury, commanded the sheriff to arrest them, and such arrest was made in the presence of the jury, and made because of the evidence just given by them for the defendant. Held error sufficient to reverse.⁸³

ARTICLE X. EXAMINATION OF WITNESSES.

§ 3053. Examination, in discretion of court.—The examination of witnesses is a matter so largely in the discretion of the court that a court of review will not interpose, except where there has been an abuse of that discretion.⁸⁴

§ 3054. Further examination discretionary.—It is in the discretion of the court to admit further evidence in the trial of a cause, after the case is closed and before the jury retires.⁸⁵ A witness may be recalled for further examination after his direct, cross, re-direct and re-cross-examination, in the discretion of the court.⁸⁶

§ 3055. Counsel should examine.—The examination of witnesses is more the appropriate function of counsel than the judge of the court. It is a task of great delicacy and much difficulty for a presiding judge to so conduct the examination of a witness as to prevent the jury from learning the trend of his mind.⁸⁷ The court may ask any question on any material matter omitted by counsel for the prosecu-

⁸² *Dixon v. P.*, 168 Ill. 186, 48 N. E. 108; *Flinn v. Prairie Co.*, 60 Ark. 204, 29 S. W. 459; *Ex parte Dement*, 53 Ala. 389; *Rogers Expert Testimony* (2d ed.), § 188; *S. v. Teipner*, 36 Minn. 535, 32 N. W. 678. *Contra*, *Wright v. P.*, 112 Ill. 544; *Buchman v. S.*, 59 Ind. 1, 26 Am. R. 75, 2 Am. C. R. 187.

⁸³ *Burke v. S.*, 66 Ga. 157, 4 Am. C. R. 580.

⁸⁴ *Birr v. P.*, 113 Ill. 646.

⁸⁵ *Bolen v. P.*, 184 Ill. 339, 56 N. E. 408.

⁸⁶ *Pigg v. S.*, 145 Ind. 560, 43 N. E. 309; *S. v. Dilley*, 15 Or. 70, 13 Pac. 648; *S. v. Robinson*, 32 Or. 43, 48 Pac. 357; *P. v. McNamara*, 94 Cal. 509, 29 Pac. 953; *Brown v. S.*, 72 Md. 468, 20 Atl. 186.

⁸⁷ *Dunn v. P.*, 172 Ill. 595, 50 N. E. 137.

tion or defense.⁸⁸ The court did not err by asking the defendant the following question: "You say you were born in Chicago and mean to tell this jury you don't know where Dearborn street is?"⁸⁹

§ 3056. **Leading questions, improper.**—The court, in a rape case, permitted a series of leading questions to be put to each of the witnesses (two young girls, of the ages of eleven and nine), and to be answered, and which, on the material matters, were answered by "yes" or "no," the questions directly indicating the answer sought. Held error sufficient of itself to reverse.⁹⁰ Where a witness was asked a leading question, which was objected to and ruled out, it was held the witness might testify to the same point if the question be properly put.⁹¹

§ 3057. **Memorandum, aiding memory.**—That a witness may be permitted to refresh his memory from a writing or memorandum made by himself shortly after the occurrence of the fact to which it relates can not be questioned; such writing or memorandum is used, not as evidence, but to aid the memory.⁹² If a witness, in giving his testimony, refers to a book or memorandum as to facts involved in the issue, he is bound to produce the memorandum, and it is error for the court to refuse to compel the witness to produce it.⁹³

ARTICLE XI. CROSS-EXAMINATION.

§ 3058. **Intentional omission on first examination.**—Where a witness, on a second examination as to a particular transaction, states an important fact omitted in his previous account of the matter, his attention, on cross-examination, may properly be called to the fact, and if he intentionally caused the discrepancy, it would and should affect his credibility.⁹⁴

⁸⁸ *Epps v. S.*, 19 Ga. 102; *Colee v. S.*, 75 Ind. 511; *S. v. Lee*, 80 N. C. 483; *Underhill Cr. Ev.*, § 214; *S. v. Atkinson*, 33 S. C. 100, 11 S. E. 693.

⁸⁹ *Rogers v. P.*, 98 Ill. 583. See *Underhill Cr. Ev.*, § 214.

⁹⁰ *Coon v. P.*, 99 Ill. 369; *Cannon v. P.*, 141 Ill. 278, 30 N. E. 1027; *Barnes v. S.*, 37 Tex. Cr. 320, 39 S. W. 684; *Com. v. Chaney*, 148 Mass. 6, 18 N. E. 572; *Anderson v. S.*, 104 Ala. 83, 16 So. 108; *Hamilton v. S.* (Tex. Cr.), 58 S. W. 93.

⁹¹ 1 Ros. Cr. Ev. 214, citing *Heisler v. S.*, 20 Ga. 153.

⁹² *S. v. Baldwin*, 36 Kan. 1, 12 Pac. 318, 7 Am. C. R. 388; *Daniel v. S.*, 55 Ga. 222, 1 Am. C. R. 187; 1 Roscoe Cr. Ev. 220; *Com. v. Clancy*, 154 Mass. 128, 27 N. E. 1001; *Jenkins v. S.*, 31 Fla. 196, 12 So. 677; *Underhill Cr. Ev.*, § 217.

⁹³ *Daniel v. S.*, 55 Ga. 222, 1 Am. C. R. 187; *Duncan v. Seeley*, 34 Mich. 369; *Chute v. S.*, 19 Minn. 271, 1 Green C. R. 573; 1 Greenl. Ev., § 466.

⁹⁴ *Ritzman v. P.*, 110 Ill. 371.

§ 3059. **Cross-examination—When improper.**—It is a well-settled rule that a witness can not be cross-examined as to any fact which is collateral or irrelevant to the issue merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. His answer is conclusive against the party.⁹⁵

§ 3060. **Cross-examination controlled in offensive details.**—The exercise of the right of cross-examination may be controlled by the court to such an extent as does not infringe upon the right itself. Such control is often exercised to prevent offensive details when the meaning of the witness can as well be conveyed by intimation and suggestion.⁹⁶

§ 3061. **Cross-examination—Latitude allowed.**—If a witness, competent to testify, be sworn to give evidence by the party calling him, the opposing party will be entitled to cross-examine him, although he has not been examined in chief.⁹⁷ Great latitude should always be allowed in cross-examination, especially in a capital case. The right of cross-examination is justly esteemed one of the most efficient means of eliciting the truth.⁹⁸ In the cross-examination of witnesses for the prosecution, who were parties to the affray, the broadest latitude should be allowed, and, on the other hand, their examination by the people should be correspondingly restricted.⁹⁹ When the defendant, as a witness, in accounting for his time on the night of the robbery, stated that he went to a certain part of the town, he may be cross-examined as to what he and his companions were doing there.¹⁰⁰

§ 3062. **Cross-examination on letters.**—On cross-examination by the defense, the witness admitted writing some letters shown her, and passages were then read to her from them in the presence of the jury. This gave the prosecution the right to read the whole of the letters to the jury.¹

⁹⁵ 3 Greenl. Ev., § 449; Moore v. P., 108 Ill. 487; Crittenden v. Com., 82 Ky. 164, 6 Am. C. R. 202; Welch v. S., 104 Ind. 347, 5 Am. C. R. 454, 3 N. E. 850. See Underhill Cr. Ev., § 60.

⁹⁶ S. v. Plant, 67 Vt. 454, 32 Atl. 237, 10 Am. C. R. 275.

⁹⁷ Beal v. Nichols, 2 Gray (Mass.)

264; P. v. Murray, 52 Mich. 288, 17 N. W. 843; 2 Phillipps Ev. 898.

⁹⁸ Ritzman v. P., 110 Ill. 371; Tracy v. P., 97 Ill. 103.

⁹⁹ Sutton v. P., 119 Ill. 254, 10 N. E. 376.

¹⁰⁰ P. v. Clark, 106 Cal. 32, 39 Pac. 53, 9 Am. C. R. 602.

¹ Beasley v. P., 89 Ill. 579.

§ 3063. **Cross-examination—Witness may explain.**—Where a witness, on cross-examination, is asked if she did not say a certain thing, and denies having said it, she may afterwards show what she did say.²

§ 3064. **Questions for impeachment.**—Where are you stopping at this time? A. I am in the jail of Taylor county. How long have you been in jail? A. Since the last part of February. These questions were propounded to a witness who testified for the defendant. Held competent.³ A witness for the defense, on cross-examination, was asked this question: State if you have ever been confined in the Baltimore city jail? Held competent, though the authorities are conflicting.*

§ 3065. **Inquiry as to reputation.**—The proper inquiry is whether the witness knows the general reputation of the person sought to be impeached or sustained, among his or her neighbors, for truth and veracity, which question must be answered in the affirmative before asking what that reputation is.⁵

§ 3066. **Impeachment by cross-examination.**—The witness, on cross-examination, said that he had formerly been a member of the firm of Granger & Sabin, bankers at Detroit. Defendant's counsel then asked him this question: Did you not, while a member of that firm, extract from an envelope securities which were left in your vault for safe keeping, and use their proceeds in stock speculations in New York? Held competent.⁶

§ 3067. **Impeaching by contradiction.**—On a charge of an indecent assault on a female, the prosecuting witness having testified that

² Scott v. P., 141 Ill. 214, 30 N. E. 329; Bressler v. P., 117 Ill. 435, 8 N. E. 62; Tracy v. P., 97 Ill. 105.

³ S. v. Pugsley, 75 Iowa 744, 8 Am. C. R. 102, 38 N. W. 498; Smith v. S., 64 Md. 25, 6 Am. C. R. 197, 20 Atl. 1026; Underhill Cr. Ev., § 244.

⁴ Smith v. S., 64 Md. 25, 20 Atl. 1026, 6 Am. C. R. 197; S. v. Pugsley, 75 Iowa 744, 8 Am. C. R. 102, 38 N. W. 498; P. v. Ogle, 104 N. Y. 511, 11 N. E. 53; Com. v. Bonner, 97 Mass. 587; Underhill Cr. Ev., § 61. See also S. v. Hilsabeck, 132 Mo. 348, 34 S. W. 38; Roberts v. Com., 14

Ky. L. 219, 20 S. W. 267; S. v. Philpot, 97 Iowa 365, 66 N. W. 730; P. v. Giblin, 115 N. Y. 196, 21 N. E. 1062; Warren v. Com., 99 Ky. 370, 18 Ky. L. 141, 35 S. W. 1028.

⁵ Gifford v. P., 148 Ill. 176, 35 N. E. 754; Gifford v. P., 87 Ill. 210; Laclede Bank v. Keeler, 109 Ill. 385; Crabtree v. Hagenbaugh, 25 Ill. 214; Dimick v. Downs, 82 Ill. 570; Ter. v. Paul, 2 Mont. Ter. 314, 2 Am. C. R. 332.

⁶ P. v. Arnold, 40 Mich. 710, 3 Am. C. R. 75.

the defendant took indecent liberties with her person, on a day when he took her to drive, and on cross-examination she having denied on a subsequent occasion telling him, in the presence of a person named, that she would kiss him if he would take her to drive, it is competent to call such person and show that she did so tell him.⁷

§ 3068. Impeachment—Questions concerning conviction.—A witness may be asked on cross-examination, within the discretion of the court, not only concerning his conviction, but also concerning any serious charge brought against him.⁸

§ 3069. Proving contradictions, how show.—To contradict a witness on the trial by showing that he made different statements in his former testimony, the counsel should select such passages in the notes of his former testimony as were claimed to be in conflict with his present story. To go further is error.⁹

§ 3070. Improper cross-examination of defendant.—On cross-examination of the defendant the counsel for the state was permitted, against objection, to ask him the following questions: Did you assault Mr. Farrer on the Calais road, while drunk? Similar questions were allowed to be put to the witness against objection as to assaults on several other persons at different times and places while drunk. These matters had not been gone into in the examination in chief. Held incompetent, having no connection with the case (murder), and not proper impeachment of the witness.¹⁰ On a charge of assault with intent to commit murder, on the cross-examination of one of the defendants, the court permitted a wide range. The defendant was asked if she had not rented a house for purposes of prostitution; whether she had not had a fight with a prostitute at a certain time; whether her picture did not hang in the rogues' gallery in the city of New York; whether she had not at one time chased a man through a saloon; whether she had not been drunk while in jail, and other questions of like nature. Held to be improper impeachment, oppressive, unjust and highly injurious and prejudicial.¹¹ On the trial of a

⁷ *Com. v. Bean*, 111 Mass. 438.

⁸ *Driscoll v. P.*, 47 Mich. 417, 11 N. W. 221; *S. v. Bacon*, 13 Or. 143, 9 Pac. 393, 8 Cr. L. Mag. 81.

⁹ *S. v. Hannett*, 54 Vt. 83, 4 Am. C. R. 41.

¹⁰ *S. v. Carson*, 66 Me. 116, 2 Am.

C. R. 58; *Holbrook v. Dow*, 12 Gray (Mass.) 357; *Com. v. Thrasher*, 11 Gray (Mass.) 450.

¹¹ *S. v. Gleim*, 17 Mont. 17, 41 Pac. 998, 10 Am. C. R. 54; *P. v. Un Dong*, 106 Cal. 83, 39 Pac. 12.

case for causing a nuisance by keeping a house of ill fame, counsel for the prosecution was permitted, over objection, to ask a witness for the state these questions: What is the reputation of Clara Hull, the defendant? Do you know her reputation for chastity? Held error, the reputation of the defendant not being in issue.¹²

§ 3071. Cross-examination of defendant limited.—Church, C. J., says: "I am of opinion that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offenses, should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses. I believe such a rule necessary to prevent a conviction of one offense by proof that the accused may have been guilty of others. Such a result can only be avoided, practically, by the observance of this rule."¹³

§ 3072. Examination of officer, prejudicial.—On examination, a police officer was asked: Why did you tell Cannon (defendant) to go home and go to bed? Answer: Well, we had often had him under arrest before. Held manifest error to permit this question and answer to stand.¹⁴

ARTICLE XII. EVIDENCE OF DEAD WITNESS.

§ 3073. Dead witness' testimony.—The correct method of introducing the testimony of a witness taken by a stenographer, at a former trial of the same cause (the witness having since died), would perhaps be to first ask the witness if he could state from memory the testimony of the deceased witness, and if he can not, he can refresh his memory by the notes taken by him.¹⁵ In proving the testimony of a deceased witness given on a former trial, the precise language used by the deceased need not be shown—the substance is sufficient. And any minutes taken by counsel, if shown to be substantially correct, may be read in evidence as showing what was the testimony of the deceased witness.¹⁶

¹² S. v. Hull, 18 R. I. 207, 26 Atl. 191, 10 Am. C. R. 428.

¹³ P. v. Brown, 72 N. Y. 571; Clarke v. S., 78 Ala. 474, 6 Am. C. R. 533; S. v. Carson, 66 Me. 116, 2 Am. C. R. 58, 59.

¹⁴ Cannon v. P., 141 Ill. 278, 30 N. E. 1027.

¹⁵ Hair v. S., 16 Neb. 601, 21 N. W. 464, 4 Am. C. R. 131; Underhill Cr. Ev., § 261; Horton v. S., 53 Ala. 488; P. v. Sligh, 48 Mich. 54, 11 N. W. 782.

¹⁶ P. v. Murphy, 45 Cal. 137, 2 Green C. R. 417; Brown v. Com., 73 Pa. St. 321, 2 Green C. R. 515; S.

ARTICLE XIII. EXPERT WITNESS.

§ 3074. **Questions to expert.**—The questions to an expert witness may be propounded from the whole of the evidence, if not conflicting, or any part of it; but where the facts on one side are in conflict with the facts on the other side, they ought not to be incorporated in one question.¹⁷ The rule is that questions must be based upon the hypothesis of the truth of all the evidence, or upon a hypothesis specifically framed of certain facts assumed to be proved for the purpose of the inquiry.¹⁸

§ 3075. **Hypothetical questions—How framed—To non-experts.**—In framing hypothetical questions it is not required to set forth all the facts and circumstances of the case, the other party having the right to introduce any fact or circumstance omitted by the party propounding the question.¹⁹ Propounding a long hypothetical question which assumes the existence of a multitude of facts is improper.²⁰ Hypothetical questions to non-expert witnesses are improper. Non-expert witnesses are incompetent to give opinions on a hypothetical state of facts.^{20a}

§ 3076. **Cross-examination of expert.**—In cross-examining a medical expert, counsel have a right to assume the facts as they believe them to exist, and to ask the expert's opinion upon the facts thus assumed.²¹ An expert may be examined beyond the scope of the evidence, for the purpose of eliciting his reasons for his opinion, or to test his knowledge.²² The other party may cross-examine the expert witness by taking his opinion based upon any other state of facts assumed by him to have been proven by the evidence, provided that such hypothetical state of facts is within the scope of evidence.²³

v. Houser, 26 Mo. 435; Com. v. Richards, 18 Pick. (Mass.) 434; 1 Greenl. Ev., § 165; Jackson v. S., 81 Wis. 127, 51 N. W. 89; S. v. O'Brien, 81 Iowa 88, 46 N. W. 752.

¹⁷ Coyle v. Com., 104 Pa. St. 117, 4 Am. C. R. 383; Fairchild v. Bascomb, 35 Vt. 406.

¹⁸ 3 Greenl. Ev., § 5; 1 Thomp. Trials, § 604.

¹⁹ Williams v. S., 64 Md. 384, 1 Atl. 887, 5 Am. C. R. 516; Howard v. P., 185 Ill. 559, 57 N. E. 441; Underhill Cr. Ev., § 318, citing Goodwin v. S., 96 Ind. 550, 554; Epps v. S., 102 Ind.

539, 554, 1 N. E. 491; Zoldoske v. S., 82 Wis. 580, 52 N. W. 778; Conway v. S., 118 Ind. 482, 490, 21 N. E. 285.

²⁰ 1 Thomp. Trials, § 612; Haish v. Payton, 107 Ill. 371.

^{20a} Ragland v. S., 125 Ala. 12, 27 So. 983.

²¹ 1 Thomp. Trials, § 628, citing Louisville, etc., R. Co. v. Falvey, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

²² 1 Thomp. Trials, § 628, citing Erickson v. Smith, 2 Abb. App. Dec. (N. Y.) 65.

²³ P. v. Durrant, 116 Cal. 179, 48

§ 3077. **Medical expert—On part of testimony.**—A medical expert who has not heard all the testimony of all the medical witnesses relating to the cause of death can not give his opinion from such portions he heard. His conclusions can not be based on part of the testimony, but on all of it.²⁴

§ 3078. **Competency of medical expert.**—A physician can not testify as an expert on symptoms of poisoning who has never treated or seen a case of poisoning in his practice, and whose knowledge is only such as he has obtained by reading books and from his instruction at the medical school.²⁵

§ 3079. **Opinion of medical expert—Upon what based.**—An expert may give an opinion upon a statement of facts assumed to be in evidence, but not upon the conclusions or inferences of other witnesses. The witness was not asked his opinion in regard to the dislocation of the neck of the deceased based upon the failure of Dr. Gill, who conducted the examination, to produce crepitation, but based also upon conclusions reached by Dr. Gill. This was clearly objectionable.²⁶

ARTICLE XIV. NON-EXPERTS.

§ 3080. **Non-expert witness, competency.**—Under proper circumstances a common witness may testify directly as to sanity or insanity, solvency or insolvency, and also as to persons being sick or in pain, whether a person was drunk or sober, whether a horse is safe or gentle.²⁷ Non-expert witnesses for the defendant, having on their direct examination detailed fully the facts upon which their opinions were based, and having stated in answer to a question by the defense as to the mental condition of the defendant, "He never was just right," then the following question was held competent on cross-examination: "I will ask you whether, in your opinion, the defendant has not sense enough to know right from wrong?"²⁸

Pac. 75, 10 Am. C. R. 528; Filer v. New York Cent., etc., R. Co., 49 N. Y. 46.

²⁴ S. v. Medlicott, 9 Kan. 257, 1 Green C. R. 236. See Underhill Cr. Ev., § 318.

²⁵ Underhill Cr. Ev., § 318, citing Soquet v. S., 72 Wis. 662-665, 40 N. W. 391. *Contra*, P. v. Thacker, 108 Mich. 652, 66 N. W. 562.

²⁶ Williams v. S., 64 Md. 384, 1 Atl. 887, 5 Am. C. R. 517.

²⁷ Gallagher v. P., 120 Ill. 182, 11 N. E. 335; Yarbrough v. S., 105 Ala. 43, 16 So. 758, 10 Am. C. R. 64; Sydleman v. Beckwith, 43 Conn. 13; P. v. Eastwood, 14 N. Y. 566; Underhill Cr. Ev., §§ 161, 167; Phelps v. Com., 47 Ky. L. 706, 32 S. W. 470.

²⁸ S. v. Porter, 34 Iowa 131, 1 Green C. R. 245; Yarbrough v. S., 105 Ala. 43, 10 Am. C. R. 64, 16 So. 758.

§ 3081. **Opinion, competent—When incompetent conclusions.**—A witness is allowed to state appearances in any case where they are in their nature incapable of exact and minute description; for example, the health or sanity of a person, the appearance of a person when charged with crime; and when the facts are of such a character as to be incapable of being presented with their proper force to any one but the observer himself, so as to enable the court or jury to draw a correct or intelligent conclusion from them without the aid of the judgment or opinion of the witnesses who had the benefit of personal observation, the witness is allowed, to a certain extent, to add his conclusion, judgment or opinion.²⁹ The defense, in attempting to establish an alibi, “offered to show to the jury that, in the opinion of the witness, the defendant could not have left or got out of the house without the witness knowing it. Held incompetent as calling for an opinion or conclusion.”³⁰

§ 3082. **“Impression” of witness—Conclusions.**—A witness, on examination as to any material facts, may be permitted to state his impressions, such as, “That is my impression;” “I think so;” “But I am not positive.” The fainter the impression, the less weight it should have.³¹ The person whose name was alleged to have been forged was examined as a witness. He stated that he would recognize the signature to the warrant or order as genuine if he had seen it anywhere else. He was then asked if he would state that the paper was a forgery, to which question the defendant objected, and the court overruled the objection. The witness replied: “Yes; the paper is a forgery.” This was error.³²

²⁹ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 212; *Stowe v. Bishop*, 58 Vt. 500, 3 Atl. 494.

³⁰ *Bennett v. S.*, 52 Ala. 370, 1 Am. C. R. 190; *Walker v. Walker*, 34 Ala. 469; *S. v. Garvey*, 11 Minn. 163; *Pelamourges v. Clark*, 9 Iowa 16; *Crane v. Northfield*, 33 Vt. 124; *Reg.*

v. Layton, 4 Cox C. C. 149. *Contra*, *Guiteau's Case*, 10 Fed. 161.

³¹ *S. v. Ward*, 61 Vt. 153, 8 Am. C. R. 218, 17 Atl. 483; *Humphries v. Parker*, 52 Me. 502; *Underhill Cr. Ev.*, § 55.

³² *Wiggins v. S.*, 1 Lea (Tenn.) 738, 3 Am. C. R. 143.

CHAPTER LXXXIV.

EVIDENCE.

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ARTICLE I. STATUTORY RULES; ELEMENTS.

§ 3083. **Statutory rules of evidence.**—The legislature has power to enact that even in criminal actions, where certain facts have been proved, they shall be *prima facie* evidence of the main fact in question.¹

§ 3084. **Essential elements—Burden.**—"The proof of the charge in criminal cases involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged, and none other. In other words, proof of the *corpus delicti*, and of the identity of the prisoner."² It is an elementary and fundamental principle that every material fact essential to constitute an offense must be distinctly alleged and proven to warrant a conviction, and the burden is on the prosecution.³

¹ P. v. Cannon, 139 N. Y. 32, 34 N. E. 759; S. v. Buck, 120 Mo. 479, 25 S. W. 573; Underhill Cr. Ev., § 16; Com. v. Williams, 6 Gray (Mass.) 1; S. v. Hurley, 54 Me. 562; Robertson v. P., 20 Colo. 279, 38 Pac. 326, 9 Am. C. R. 293; Board, etc., v. Merchant, 103 N. Y. 148, 8 N. E. 484; American, etc., Bank v. Paeschke Mfg. Co., 150 Ill. 336, 37 N. E. 227. See Carr v. S., 104 Ala. 4, 16 So. 150, 10 Am. C. R. 86; Parsons v. S. (Neb.), 85 N. W. 64. See § 1447.

² 3 Greenl. Ev. (Redf. ed.), § 30; Carroll v. P., 136 Ill. 462, 27 N. E. 18; Gore v. P., 162 Ill. 265, 44 N. E. 500; Carlton v. P., 150 Ill. 186, 37 N. E. 244, 41 Am. R. 346; Winslow v. S., 76 Ala. 42, 5 Am. C. R. 45.

³ Williams v. P., 101 Ill. 385; P. v. Plath, 100 N. Y. 590, 3 N. E. 790; Gravely v. S., 38 Neb. 871, 57 N. W. 751; Jones v. S., 51 Ohio St. 331, 38 N. E. 79; S. v. Harvey, 131 Mo. 339, 32 S. W. 1110; Underhill Cr. Ev., § 23.

§ 3085. **Evidence deficient—Wanting.**—The failure of a witness to testify on the part of the prosecution, or the absence of certain facts, or the want of evidence, is important in determining the issues in a cause.⁴ The mere fact that goods were missed from a store and found in possession of a person will not warrant a conviction for larceny.⁵

ARTICLE II. AFFIRMATIVE AND NEGATIVE.

§ 3086. **Affirmative, negative evidence.**—The testimony of a witness having full opportunity to see and know that a person did not do an act, such as the striking of a blow, is affirmative evidence.⁶ A witness for the prosecution, having testified that the defendant made an admission tending to prove guilt, and another having testified for the defendant that he was present, and says that no such conversation or admission was made by the defendant, then it was proper to ask that if any such conversation was had, as testified to by the witness for the prosecution, would he have heard it?⁷

§ 3087. **Proving negative proposition.**—Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.⁸ If one witness of equal knowledge and credibility swears positively to a fact, and many swear negatively that they did not see or know the fact, the one witness swearing positively, and not contradicted, is to be believed in preference to the many.⁹

§ 3088. **Preponderance, insufficient—Conjecture.**—In criminal cases the evidence must exclude all reasonable doubt to authorize a conviction. Neither a mere preponderance of evidence, nor any

⁴ 1 Roscoe Cr. Ev. 59; 1 Greenl. Ev., § 13a; May v. P., 92 Ill. 345; S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 222; Jarrell v. S., 58 Ind. 293; Stout v. S., 90 Ind. 1; Rice v. Com., 102 Pa. St. 408, 4 Am. C. R. 566; Lacy v. S., 31 Tex. Cr. 78, 19 S. W. 896. * See P. v. Davis, 97 Cal. 194, 31 Pac. 1109 (owner).

⁵ Johnson v. S., 86 Ga. 90, 13 S. E. 282; 1 Roscoe Cr. Ev. (8th ed.), 32.

⁶ Coughlin v. P., 18 Ill. 268; 1 Roscoe Cr. Ev. 87; 1 Bish. Cr. Proc., § 1071.

⁷ Maynard v. P., 135 Ill. 434, 25 N. E. 740.

⁸ Williams v. P., 121 Ill. 90, 11 N. E. 881; 1 Greenl. Ev., § 79; Harbaugh v. City of Monmouth, 74 Ill. 371; Whar. Cr. Ev. (8th ed.), § 128; S. v. Keggan, 55 N. H. 19, 2 Green C. R. 369; Com. v. Zelt, 138 Pa. St. 615, 21 Atl. 7; S. v. Crow, 53 Kan. 662, 37 Pac. 170; S. v. Woodward, 34 Me. 293; Underhill Cr. Ev., § 24, p. 34.

⁹ Johnson v. S., 14 Ga. 55; Coles v. Perry, 7 Texas 109; 1 Roscoe Cr. Ev. 87.

weight of preponderant evidence is sufficient for the purpose, unless it generates full belief of the fact to the exclusion of all reasonable doubt.¹⁰ Testimony which raises a mere conjecture ought not to go to a jury as evidence proving or tending to prove a material fact in issue.¹¹

ARTICLE III. CORPUS DELICTI.

§ 3089. *Corpus delicti*, defined—Proving.—The *corpus delicti*, or body or substance of an offense, means the existence of a criminal fact.¹² The prosecution must prove the *corpus delicti* beyond a reasonable doubt.¹³ And it may be established by circumstantial evidence alone.¹⁴

§ 3090. *Corpus delicti*, circumstantial evidence.—The weight of authority now is that all of the elements of the *corpus delicti* may be proved by presumptive or circumstantial evidence.¹⁵ The *corpus delicti* must be proven before evidence as to how or by whom it was committed is competent.¹⁶

¹⁰ 3 Greenl. Ev., § 29; Shields v. S., 104 Ala. 35, 16 So. 85, 9 Am. C. R. 155.

¹¹ S. v. Carter, 72 N. C. 99, 1 Am. C. R. 445; S. v. Allen, 3 Jones (N. C.) 257.

¹² P. v. Palmer, 109 N. Y. 110, 16 N. E. 529, 7 Am. C. R. 401; Sam v. S., 33 Miss. 347; Campbell v. P., 159 Ill. 19, 42 N. E. 123; Laughlin v. Com., 18 Ky. L. 640, 37 S. W. 590; Gillett Indirect & Col. Ev., § 118.

¹³ S. v. Parsons, 39 W. Va. 464, 19 S. E. 876; Gray v. Com., 101 Pa. St. 380, 47 Am. R. 733; Lee v. S., 76 Ga. 498; Power v. P., 17 Colo. 178, 28 Pac. 1121; P. v. Harris, 136 N. Y. 423, 33 N. E. 65; Hunter v. S., 34 Tex. Cr. 599, 31 S. W. 674; S. v. Hambricht, 111 N. C. 707, 16 S. E. 411; Traylor v. S., 101 Ind. 65.

¹⁴ Com. v. Johnson, 162 Pa. St. 63, 29 Atl. 280; Johnson v. Com., 81 Ky. 325; Carlton v. P., 150 Ill. 181, 41 Am. R. 346, 37 N. E. 244; Campbell v. P., 159 Ill. 9, 42 N. E. 123; S. v. Winner, 17 Kan. 298; Wilson v. S., 43 Tex. 472; S. v. Cardelli, 19 Nev. 319, 10 Pac. 433; Martin v. S., 125 Ala. 64, 28 So. 92; Underhill Cr. Ev., § 7.

¹⁵ Campbell v. P., 159 Ill. 22, 42 N. E. 123; Smith v. Com., 21 Gratt. (Va.) 809; S. v. Williams, 7 Jones L. (N. C.) 446, 78 Am. Dec. 248; Kerr Homicide, p. 539, § 493; Wills Cir. Ev. 179; P. v. Parmelee, 112 Mich. 291, 70 N. W. 577; Laughlin v. Com., 18 Ky. L. 640, 37 S. W. 590; 3 Greenl. Ev., §§ 30, 131; Carroll v. P., 136 Ill. 463, 27 N. E. 18; Gore v. P., 162 Ill. 265, 44 N. E. 500; S. v. Davidson, 30 Vt. 377; Winslow v. S., 76 Ala. 42, 5 Am. C. R. 45; McCulloch v. S., 48 Ind. 109; Com. v. Webster, 5 Cush. (Mass.) 310, 52 Am. D. 711; P. v. Alvino, 55 Cal. 230; Morgan v. S., 51 Neb. 672, 71 N. W. 788; Gray v. Com., 101 Pa. St. 380. See P. v. Palmer, 109 N. Y. 110, 16 N. E. 529, 7 Am. C. R. 402. *Contra*, Ruloff v. P., 18 N. Y. 179; Reg. v. Hopkins, 8 C. & P. 591; 2 Hale P. C. 290.

¹⁶ Carlton v. P., 150 Ill. 186, 37 N. E. 244; Winslow v. S., 76 Ala. 42; P. v. Hall, 48 Mich. 482, 12 N. W. 665, 4 Am. C. R. 359; McCulloch v. S., 48 Ind. 109, 1 Am. C. R. 318; P. v. Alvino, 55 Cal. 230; Zoldoske v. S., 82 Wis. 580, 52 N. W. 778; S. v. Keeler, 28 Iowa 551; S. v. Dickson, 78 Mo. 438; Johnson v. Com., 81 Ky.

§ 3091. *Corpus delicti*—When connects accused.—The same evidence which connects or tends to connect the accused with the charge may also tend to prove the *corpus delicti*, so that the existence of the crime and the guilt of the defendant may stand together inseparable on one foundation of circumstantial evidence.¹⁷

§ 3092. *Corpus delicti*—Cases illustrating.—After the lapse of several months, in the woods, between the house where the defendant lived and the field where he went to work when he was accompanied by the deceased, a pair of old boots and some other clothing were found, and also some bones. The evidence introduced to identify the boots and clothing as those belonging to and worn by the deceased only showed that they were similar, no witness swearing to a positive identification. Held not sufficient proof of the *corpus delicti*.¹⁸ Circumstantial evidence is competent to identify a skeleton produced as the remains of the deceased, as well as to show the cause and manner of death: as, if a skeleton found is of the sex of the person charged to have been murdered.¹⁹

§ 3093. *Corpus delicti*—Confessions not sufficient.—The *corpus delicti* can not be established alone by the confessions of the accused. This rule is fully recognized by the ablest text-writers and the general current authorities.²⁰ It must be established by evidence other than declarations or confessions.²¹

325, 4 Am. C. R. 140; P. v. Millard, 53 Mich. 63, 18 N. W. 562. See Johnson v. S., 83 Ga. 553, 12 S. E. 471.

¹⁷ Carroll v. P., 136 Ill. 463, 27 N. E. 18; P. v. O'Neil, 109 N. Y. 251, 16 N. E. 68.

¹⁸ S. v. German, 54 Mo. 526, 2 Green C. R. 605-7.

¹⁹ McCulloch v. S., 48 Ind. 109; 3 Greenl. Ev., § 133. Proof held sufficient in the following cases: P. v. Holmes, 118 Cal. 444, 50 Pac. 675; Kugadt v. S., 38 Tex. Cr. 681, 44 S. W. 989; Moore v. P., 190 Ill. 336, 60 N. E. 535. But not sufficient: High v. S., 26 Tex. App. 545, 10 S. W. 238; P. v. Ah Fung, 16 Cal. 137; Morris v. Com., 20 Ky. L. 402, 46 S. W. 491. See S. v. Patterson, 73 Mo. 695.

²⁰ Williams v. P., 101 Ill. 386; Campbell v. P., 159 Ill. 24, 42 N. E.

123. See Moore v. P., 190 Ill. 236, 60 N. E. 535; Gray v. Com., 101 Pa. St. 380, 47 Am. R. 773; May v. P., 92 Ill. 343; 1 Greenl. Ev., § 217; Lambright v. S., 34 Fla. 564, 16 So. 582, 9 Am. C. R. 391; S. v. German, 54 Mo. 526; P. v. Deacons, 109 N. Y. 374, 16 N. E. 676; Laughlin v. Com., 18 Ky. L. 640, 37 S. W. 590; P. v. Simonsen, 107 Cal. 345, 40 Pac. 440; Davis v. S., 51 Neb. 301, 70 N. W. 984; Heard v. S., 59 Miss. 545; Harris v. S., 13 Tex. App. 309; Underhill Cr. Ev., § 147; Gillett Indirect and Col. Ev., § 117.

²¹ Gore v. P., 162 Ill. 265, 44 N. E. 500; South v. P., 98 Ill. 263; May v. P., 92 Ill. 345; 1 Greenl. Ev. (Redf. ed.), § 217; P. v. Badgley, 16 Wend. (N. Y.) 53; P. v. Hennessey, 15 Wend. (N. Y.) 147; Andrews v. P., 117 Ill. 201, 7 N. E. 265; Bergen v. P., 17 Ill. 428; P. v. Tarbox, 115 Cal. 57, 46 Pac. 896; Bartley v. P., 156 Ill.

ARTICLE IV. CONFESSIONS; STATEMENTS.

§ 3094. **Confessions made voluntarily.**—Where the crime is clearly shown, independently of admissions or confessions, to have been committed by some person, then admissions or confessions freely or voluntarily made may be sufficient to convict.²²

§ 3095. **Confessions—Weight.**—Extra-judicial confessions, when freely and voluntarily made, are of the highest order of evidence.²³ But Blackstone says: "They are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favor, or menaces; seldom remembered accurately or reported with due precision, and incapable in their nature of being disproved by other negative evidence."²⁴ Verbal admissions of a person on trial charged with a crime should be received with great caution, as that kind of evidence is subject to imperfection and mistake.²⁵

§ 3096. **Confessions obtained by promise.**—If any degree of influence has been exerted to induce the accused to make a confession, it is incompetent. Telling the accused it would be better for him to tell the whole story and the punishment would likely be lighter, and thereby procure a confession, renders it incompetent.²⁶ Burns, the accused, was taken into the presence of three officers. If any of the

240, 40 N. E. 831; Winslow v. S., 76 Ala. 42, 5 Am. C. R. 45; Smith v. S., 17 Neb. 358, 5 Am. C. R. 365, 22 N. W. 780; Ter. v. McClint, 1 Mont. 394, 1 Green C. R. 707; S. v. German, 54 Mo. 526, 2 Green C. R. 605; Johnson v. S., 59 Ala. 37, 3 Am. C. R. 259; Harden v. S., 109 Ala. 50, 19 So. 494; Holland v. S., 39 Fla. 178, 22 So. 298; Attaway v. S., 35 Tex. Cr. 403, 34 S. W. 112.

²² Gore v. P., 162 Ill. 265, 44 N. E. 500; S. v. Abbato, 64 N. J. L. 658, 47 Atl. 10; Andrews v. P., 117 Ill. 195, 7 N. E. 265; Fuller v. S., 109 Ga. 809, 35 S. E. 298; Anderson v. S., 72 Ga. 98, 5 Am. C. R. 449; Williams v. P., 101 Ill. 382; P. v. Meyer, 162 N. Y. 357, 56 N. E. 758, 14 N. Y. Cr. 487, 56 N. Y. Supp. 1097; Underhill Cr. Ev., § 126, citing Com. v. Preece, 140 Mass. 276, 5 N. E. 494; P. v. Taylor, 93 Mich. 638, 641, 53 N. W. 777; Walker v. S., 136 Ind. 663, 36 N. E. 356; P. v. Ward, 15 Wend. (N. Y.)

231; Gillett Indirect & Col. Ev., § 100.

²³ Langdon v. P., 133 Ill. 392, 24 N. E. 874; Miller v. P., 39 Ill. 457; 1 Greenl. Ev., §§ 216, 219. See Underhill Cr. Ev., § 146. See Hill v. S. (Neb.), 85 N. W. 836.

²⁴ 4 Bl. Com. 357; Bergen v. P., 17 Ill. 427; Underhill Cr. Ev., § 146. Persons arrested and charged with crime should not be questioned or cross-examined by the police: Rex v. Histed, 19 Cox C. C. 16.

²⁵ Marzen v. P., 173 Ill. 61, 50 N. E. 249; 1 Greenl. Ev. (Redf. ed.), § 200. See Gillett Indirect & Col. Ev., § 116.

²⁶ Robinson v. P., 159 Ill. 119, 42 N. E. 375; Com. v. Preece, 140 Mass. 276, 5 N. E. 494, 5 Am. C. R. 107; S. v. Day, 55 Vt. 570, 4 Am. C. R. 105. Contra, S. v. Bradford, 156 Mo. 91, 56 S. W. 898; S. v. Komstell (Kan.), 61 Pac. 805.

officers said to Burns, "You had better tell the truth, or you had better tell about it," and the accused confessed, such confession would be incompetent.²⁷ A confession procured on the promise by the state's attorney that it should not be used against him is not competent.²⁸ Where the respondent claims that the confessions made by him were procured by solitary confinement and the promises by the jailor that he could go below with the other prisoners, this was a promise of a temporary boon, and not a hope or favor held out in respect of the criminal charge, and the holding out of such favor does not exclude the evidence of confession.²⁹

§ 3097. Confessions, through hope.—The witness Stokes said to the prisoner: "Tom, this is mighty bad; they have got the dead wood on you, and you will be convicted," and at the same time said something to him about "owning up." Another witness, at the same time, said to the accused: "You are very young to be in such difficulty as this; there must have been some one with you who was older, and I, if in your place, would tell who it was; it is not right for you to suffer the whole penalty and let some one else who is guiltier go free, that it might go lighter with you." Held incompetent.³⁰

§ 3098. Confessions—Through fear.—Confessions induced by the appliances of hope or fear are not regarded as voluntarily made, and are therefore not to be relied on as true.³¹ The rule is a confession can never be received in evidence when the prisoner has been influenced by any threat or promise.³²

§ 3099. Confessions by threat.—"Any the slightest menace or threat, or any hope engendered or encouraged that the prisoner's case will be lightened, meliorated or more favorably dealt with if he will

²⁷ *Com. v. Preece*, 140 Mass. 276, 5 Am. C. R. 107, 5 N. E. 494; *Flagg v. P.*, 40 Mich. 706, 3 Am. C. R. 71.

²⁸ *Robinson v. P.*, 159 Ill. 119, 42 N. E. 375.

²⁹ *S. v. Tatro*, 50 Vt. 483, 3 Am. C. R. 166; 3 Greenl. Ev., § 229; *Rex v. Green*, 6 C. & P. 655; *S. v. Wentworth*, 37 N. Y. 218.

³⁰ *Newman v. S.*, 49 Ala. 9, 1 Am. C. R. 179; *Bram v. U. S.*, 168 U. S. 532, 18 S. Ct. 183, 10 Am. C. R. 565, 572. See *Reg. v. Reeve*, 12 Cox 179, 1 Green C. R. 398; *Com. v. Preece*,

140 Mass. 276, 5 Am. C. R. 107, 5 N. E. 494.

³¹ *Gates v. P.*, 14 Ill. 436; 1 Greenl. Ev., § 219; *Johnson v. S.*, 59 Ala. 37, 3 Am. C. R. 258; *Newman v. S.*, 49 Ala. 9, 1 Am. C. R. 173; *P. v. Barrie*, 49 Cal. 342, 1 Am. C. R. 181; *Gillett Indirect & Col. Ev.*, § 110.

³² *Austine v. P.*, 51 Ill. 239; *Bartley v. P.*, 156 Ill. 238, 40 N. E. 831; *Queen v. Thompson*, 2 Q. B. D. 12, 9 Am. C. R. 272; 2 Starkie Ev. 36; *Biscoe v. S.*, 67 Md. 6, 8 Atl. 571.

confess—either of these is enough to exclude the confession thereby superinduced.”³³ The confession of the accused, a girl of fourteen, was reluctantly made, and before she made it, said: “If I tell you, won’t you hurt me?” To which the officer replied: “No, you shant be hurt; I came here to arrest you and you shant be hurt.” Held incompetent.³⁴

§ 3100. Confessions when under arrest.—Admissions or confessions are admissible even when the defendant is under arrest, if no improper influence was used to induce the accused to make them and he was free to speak in denial.³⁵

§ 3101. Confessions by deception—No warning given.—Confessions otherwise competent are admissible, though obtained by artifice, deception or falsehood.³⁶ A confession freely and voluntarily made by the accused is competent evidence against him, although he may not have been warned that it might be used against him.³⁷ When a confession has been once obtained, after appliances of hope or fear, any subsequent confession must alike be excluded until the prisoner’s mind is perfectly free to make a voluntary confession, as if no attempt had ever been made to induce him to confess.³⁸

§ 3102. Confessions made when intoxicated.—There is no rule of law which compels jurors to believe confessions made by a defendant

³³ *Owen v. S.*, 78 Ala. 425, 6 Am. C. R. 206.

³⁴ *Earp v. S.*, 55 Ca. 136, 1 Am. C. R. 171. See *Reg. v. Reeve*, 12 Cox 179, 1 Green C. R. 398 and note.

³⁵ *Sparf v. U. S.*, 156 U. S. 51, 15 S. Ct. 273, 10 Am. C. R. 171; *P. v. Rogers*, 18 N. Y. 9, 72 Am. D. 484; *P. v. Druze*, 103 N. Y. 655, 8 N. E. 733, 5 N. Y. Cr. 10; *Whar. Cr. Ev.* (9th ed.), § 661; *Anderson v. S.*, 25 Neb. 550, 41 N. W. 357; *Pierce v. U. S.*, 160 U. S. 355, 16 S. Ct. 321; *Willis v. S.*, 93 Ga. 208, 19 S. E. 43; *Jackson v. Com.*, 100 Ky. 239, 18 Ky. L. 795, 38 S. W. 422, 1091; *Williams v. S.*, 37 Tex. Cr. 147, 38 S. W. 999; *Underhill Cr. Ev.*, § 129.

³⁶ 1 *Roscoe Cr. Ev.* (8th ed.) 81; *Andrews v. P.*, 117 Ill. 201, 7 N. E. 265; *King v. S.*, 40 Ala. 314; *P. v. Barker*, 60 Mich. 277, 27 N. W. 539; *Heldt v. S.*, 20 Neb. 492, 30 N. W. 626; *Shields v. S.*, 104 Ala. 35, 16 So. 85,

9 Am. C. R. 150; *S. v. Jones*, 54 Mo. 478, 2 Green C. R. 604; *S. v. Phelps*, 74 Mo. 136, 21 Am. L. Reg. 482; *Burton v. S.*, 107 Ala. 108, 18 So. 284; *Osborn v. Com.*, 14 Ky. L. 246, 20 S. W. 223.

³⁷ *S. v. Baker*, 58 S. C. 111, 36 S. E. 501. See *White v. S.* (Tex. Cr.), 57 S. W. 100.

³⁸ *Owen v. S.*, 78 Ala. 425, 6 Am. C. R. 207; *Com. v. Sheets*, 197 Pa. St. 69, 46 Atl. 753; 1 *Greenl. Ev.*, § 214; 1 *Whar. Cr. L.*, § 594; *S. v. Jones*, 54 Mo. 478, 2 Green C. R. 603; *Com. v. Harman*, 4 Pa. St. 269; *Van Buren v. S.*, 24 Miss. 512; *Barnes v. S.*, 36 Tex. 356, 1 Green C. R. 649; *S. v. Guild*, 5 Hals. (N. J. L.) 192, 18 Am. D. 404; *S. v. Potter*, 18 Conn. 166. See *Com. v. Piper*, 120 Mass. 185; *U. S. v. Nardello*, 4 Mackey (U. S.) 503; *Underhill Cr. Ev.*, § 130.

when he is sober in preference to those of a contradictory character made when drunk. The relative credibility of the statements is a question for the jury.³⁹

§ 3103. **Confessions, competency for court.**—The court must decide in the first instance whether the evidence of the *corpus delicti* is *prima facie* sufficient to allow evidence of confessions to go to the jury.⁴⁰

§ 3104. **Confessions—Preliminary proof.**—When a confession is offered in a criminal case it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing *prima facie* that it was freely and voluntarily made.⁴¹

§ 3105. **Confessions—Testing competency.**—Where objection is made to evidence of confessions upon the ground that they were made in consequence of offers of favor by the officer who arrested the defendants, it is the duty of the judge to determine that fact by hearing all competent evidence relating to the matter, which may be tendered by either party to the cause.⁴² The question, where objection is made to the admissibility of the confession, must in the first instance be adjudged by the court; and then to inquire of the witness and prove that the confession was induced by threats and promises can not be postponed until after the confession is introduced and the entire examination of the witness in chief has been concluded.⁴³ The accused is entitled to introduce all his evidence tending to prove the

³⁹ Finch v. S., 81 Ala. 41, 1 So. 565; Com. v. Howe, 75 Mass. 110; S. v. Grear, 28 Minn. 426, 10 N. W. 472; S. v. Feltes, 51 Iowa 495, 1 N. W. 755; Jefferds v. P., 5 Park. Cr. (N. Y.) 522; P. v. Ramirez, 56 Cal. 533; South v. P., 98 Ill. 261; Underhill Cr. Ev., § 137.

⁴⁰ Lambright v. S., 34 Fla. 565, 9 Am. C. R. 390, 16 So. 582; Gray v. Com., 101 Pa. St. 380.

⁴¹ P. v. Soto, 49 Cal. 67; Nicholson v. S., 38 Md. 153; S. v. Garvey, 28 La. 925, 26 Am. R. 123; P. v. Swetland, 77 Mich. 60, 43 N. W. 779; Amos v. S., 83 Ala. 1, 3 So. 749. *Contra*, Williams v. S., 19 Tex. App. 276; Com. v. Culver, 126 Mass. 464, 3 Am. C. R. 81; Rufer v. S., 25 Ohio

St. 464, 470; S. v. Davis, 34 La. 351; Underhill Cr. Ev., § 127.

⁴² Com. v. Culver, 126 Mass. 464, 3 Am. C. R. 81; S. v. Fidment, 35 Iowa 541, 2 Green C. R. 633; Kirk v. Ter. (Okla.), 60 Pac. 797; 1 Greenl. Ev., § 219; Simmon v. S., 61 Miss. 243; S. v. Storms (Iowa), 85 N. W. 610.

⁴³ Rufer v. S., 25 Ohio St. 463; Ter. v. McClint, 1 Mont. 394, 1 Green C. R. 705; S. v. Fidment, 35 Iowa 541, 2 Green C. R. 632; Hunter v. S., 74 Miss. 515, 21 So. 305; P. v. Howes, 81 Mich. 396, 45 N. W. 961; Underhill Cr. Ev., § 126; Hauk v. S., 148 Ind. 238, 46 N. E. 127, 47 N. E. 465.

incompetency of the confession before admitting the confession in evidence.⁴⁴

§ 3106. Testing competency—Age, condition, situation.—Whether a confession made was voluntary is a question for the consideration and determination of the court and is usually shown by negative answers to such questions, as, whether the prisoner had been told it would be better for him to confess or worse for him if he did not, or whether similar language had been addressed to him. The better test is a fair and just consideration of the age, condition, situation and character of the prisoner and all the circumstances attending the confession.⁴⁵

§ 3107. Confessions—All that was said.—“In the proof of confessions, as in the case of admissions in civil actions, the whole of what the person said on the subject at the time of making the confession should be taken together.”⁴⁶ A witness introduced to prove the confession of the accused, on cross-examination stated that he could “not remember all the conversation that took place; that a great many things were said he did not remember.” The witness having failed to state that he remembered the substance of all that was said, his testimony was held incompetent.⁴⁷

§ 3108. Confession reduced to writing.—Where a statute requires that the justice of the peace shall reduce to writing the voluntary confession of the accused, to be by him certified to the next term of the circuit court, on or before the first day of the term, the law conclusively presumes that if anything was taken down by him in writing he performed his whole duty by taking down all that was material. In such case parol evidence of what the prisoner may have said on that occasion can not be received on the trial.⁴⁸

§ 3109. Confessions—Leading to discovery.—Confessions induced through promises, hope or fear, are not voluntary, but if such confessions thus obtained lead to the discovery of the property stolen, or

⁴⁴ *Com. v. Culver*, 126 Mass. 464, 3 Am. C. R. 81; *Brown v. S.*, 70 Ind. 576; *Simmons v. S.*, 61 Miss. 243; *Rufer v. S.*, 25 Ohio St. 464; *Underhill Cr. Ev.*, § 127.

⁴⁵ *Johnson v. S.*, 59 Ala. 37, 3 Am. C. R. 258; *P. v. Barker*, 60 Mich. 277, 8 Cr. L. Mag. 70, 27 N. W. 539.

⁴⁶ *Berry v. Com.*, 10 Bush (Ky.) 15, 1 Am. C. R. 274 (citing 1 Greenl.

Ev., § 218); *Everhart v. S.*, 47 Ga. 608; *S. v. Davis*, 34 La. 351.

⁴⁷ *Berry v. Com.*, 10 Bush (Ky.) 15, 1 Am. C. R. 274; *P. v. Gelabert*, 39 Cal. 663; *Coffman v. Com.*, 10 Bush (Ky.) 495, 1 Am. C. R. 294.

⁴⁸ *Wright v. S.*, 50 Miss. 332, 1 Am. C. R. 192; 1 Greenl. *Ev.*, § 227; *Peters v. S.*, 4 S. & M. (Miss.) 31.

the instrument of the crime, or the bloody clothes of the person murdered, or any other material fact is discovered, they are competent to show that such discovery was made conformably to the information given by the prisoner.⁴⁹

ARTICLE V. DECLARATIONS OF ACCUSED.

§ 3110. **Declarations—All that was said.**—It is a general rule of evidence that alleged declarations, made by a prisoner out of court, should be received with extreme caution, because misleading.⁵⁰ The people having proved statements made by the defendant to a pawnbroker, while attempting to borrow money on a watch alleged to have been stolen, he was entitled to show all that was said, not only as a part of the conversation but as part of the *res gestae*.⁵¹ The prosecution having given evidence of the declarations of the accused in reference to a homicide, he was entitled to adduce the whole of what he said at the time.⁵² "The prosecution having introduced evidence that the accused was in possession of a watch the next day after it was stolen, and evidence of what he said with reference to borrowing money and pledging it as security, as evidence of his guilt, he unquestionably had the right to prove all that was said in that conversation, not only as part of the *res gestae*, but as part of the conversation."⁵³

§ 3111. **Declarations—Res gestae.**—*Res gestae* are the surrounding facts of a transaction, explanatory of an act as showing motive for acting. They are regarded as verbal facts indicating a present purpose. This will include declarations of the accused at the time of firing the shot.⁵⁴ "Though generally the declarations must be con-

⁴⁹ Gates v. P., 14 Ill. 437; 1 Greenl. Ev., §§ 231, 232; 2 Hawk. P. C., ch. 46, § 36; Williams v. Com., 27 Gratt. (Va.) 997, 2 Am. C. R. 70; S. v. Graham, 74 N. C. 646, 1 Am. C. R. 183; White v. S., 3 Heisk. (Tenn.) 358; P. v. Barker, 60 Mich. 277, 27 N. W. 539; Duffy v. P., 26 N. Y. 538; Rice v. S., 3 Heisk. (Tenn.) 215, 1 Green C. R. 370; Com. v. Knapp, 9 Pick. (Mass.) 496. But see S. v. Garvey, 28 La. 925, 26 Am. R. 126.

⁵⁰ Rafferty v. P., 72 Ill. 46; 1 Roscoe Cr. Ev. 67; 4 Bl. Com. 357.

⁵¹ 1 Roscoe Cr. Ev. 43; Comfort v. P., 54 Ill. 406; 1 Greenl. Ev., § 108; McDonald v. P., 126 Ill. 162, 18 N. E. 817; S. v. Daley, 53 Vt. 442; S. v.

Walker, 77 Me. 488, 1 Atl. 357; Underhill Cr. Ev., § 100; P. v. Gelabert, 39 Cal. 663; Dodson v. S., 86 Ala. 60, 5 So. 485; Griswold v. S., 24 Wis. 144; S. v. Green, 48 S. C. 136, 26 S. E. 234.

⁵² Burns v. S., 49 Ala. 370, 1 Am. C. R. 327; 1 Greenl. Ev., § 218.

⁵³ Comfort v. P., 54 Ill. 406; Conner v. S., 34 Tex. 659; S. v. Worthington, 64 N. C. 594; S. v. Williamson, 106 Mo. 162, 17 S. W. 172.

⁵⁴ Carr v. S., 43 Ark. 99, 5 Am. C. R. 440; 1 Greenl. Ev., § 108; 1 Bish. Cr. Proc. (3d ed.), §§ 1083-1087; Davidson v. P., 90 Ill. 227; S. v. Walker, 77 Me. 488, 5 Am. C. R. 465, 1 Atl. 357; Green v. S., 154 Ind.

temporaneous with the event, yet, when there are connecting circumstances they may, even when made some time afterward, form a part of the whole *res gestae*. Each case must depend upon its facts."⁵⁵ At the time of a robbery the defendants ran out of the place where the crime was committed, and the person robbed, following immediately in pursuit of them, hollowing that he was robbed, said: "Which way did you see those parties go past here?" Held competent as part of the *res gestae*.⁵⁶ What explanations a person makes while in the possession of stolen property, at the time of finding it in his possession, are admissible in evidence as explanatory of the character of his possession and admissible as a part of the *res gestae*.⁵⁷

§ 3112. Declarations to prove motive.—It is well settled that one may prove his own declarations, when made just before or at the time of starting to a particular place, for the purpose of showing his motives or object in going.⁵⁸

§ 3113. Declarations—Weight.—A witness for the prosecution testified that the defendant said to him: "You go home, and we will get out by swearing to lies." If this statement was made by the defendant it would not justify a conviction, in the absence of other evidence connecting him with the homicide.⁵⁹

§ 3114. Letters—By defendant.—Letters written by the defendant, proven to be his writing, and found in his possession after his arrest, the contents of which prove motive, are competent, though it is

655, 57 N. E. 637; Underhill Cr. Ev., § 330. See *P. v. Benham*, 63 N. Y. Supp. 923, 14 N. Y. Cr. 434; *S. v. Taylor* (Idaho), 61 Pac. 288.

⁵⁵ *Insurance Co. v. Mosley*, 8 Wall. (U. S.) 397; *S. v. Davis*, 104 Tenn. 501, 58 S. W. 122; *Whar. Cr. Ev.* (8th ed.), § 262; *Com. v. Werntz*, 161 Pa. St. 591, 29 Atl. 272; *Com. v. McPike*, 3 Cush. (Mass.) 181, 9 Am. C. R. 452; *S. v. Garrand*, 5 Or. 216; *Blount v. S.*, 49 Ala. 381, relating to declarations of some of the defendants not on trial. See also *Chalk v. S.*, 35 Tex. Cr. 116, 32 S. W. 534; *S. v. Bigelow*, 101 Iowa 430, 70 N. W. 600; *S. v. Brown*, 28 Or. 147, 41 Pac. 1042; *S. v. Walker*, 77 Me. 488, 1 Atl. 357; *Lewis v. S.*, 29 Tex. App. 201, 15 S. W. 642; *P. v.*

O'Brien, 92 Mich. 17, 52 N. W. 84; *Smith v. S.*, 21 Tex. App. 277, 17 S. W. 471; *Evans v. S.*, 58 Ark. 47, 22 S. W. 1026; *Lovett v. S.*, 80 Ga. 255, 4 S. E. 912; *S. v. Punshon*, 133 Mo. 44, 34 S. W. 25; *Honeycutt v. S.* (Tex. Cr.), 57 S. W. 806.

⁵⁶ *Bow v. P.*, 160 Ill. 440, 43 N. E. 593; *Healy v. P.*, 163 Ill. 380, 45 N. E. 230; *Com. v. Werntz*, 161 Pa. St. 591, 29 Atl. 272; *S. v. Rollins*, 113 N. C. 722, 18 S. E. 394; 1 *McClain Cr. L.*, § 414; *Underhill Cr. Ev.*, § 330.

⁵⁷ *Bennett v. P.*, 96 Ill. 607; 1 *Greenl. Ev.*, § 108. See *Bunckley v. S.*, 77 Miss. 540, 27 So. 638.

⁵⁸ *Price v. P.*, 109 Ill. 113.

⁵⁹ *Jones v. P.*, 166 Ill. 269, 46 N. E. 723.

not proved directly that they had been delivered to the person addressed.⁶⁰ A letter found on the defendant can be introduced after showing that he invited it and answered it, or in some way acquiesced in its contents.⁶¹ A letter written addressed to one of two brothers in business as partners, and intended for both of them, is competent against the accused on a charge of murdering the other brother.⁶²

§ 3115. **Defendant advertising scheme.**—On a charge of obtaining money by false pretenses, all the facts and circumstances conspired to prove that a number of letters (each containing postage stamps, etc.) were invited and written in answer to a certain false advertisement inserted in a newspaper by the accused. Such letters were competent evidence against him, though they were intercepted by the post-office officials before they reached the hands of the accused.⁶³

ARTICLE VI. DECLARATIONS OF THIRD PERSONS.

§ 3116. **Declarations of third persons.**—Declarations of third parties, acting with the defendant at the time of the difficulty, are competent.⁶⁴ But extra-judicial statements of third persons can not be proved by hearsay, unless such statements were part of the *res gestae*.⁶⁵ Two witnesses who had witnessed an assault, on the next day were together, and on seeing a man passing near the place where it happened, one, calling the attention of the other, said: "There goes the man;" the other replying: "Yes, there he goes." Held competent to give these declarations in evidence.⁶⁶ A witness and his wife had a conversation about seeing the horse in the defendant's

⁶⁰ *Simons v. P.*, 150 Ill. 75, 36 N. E. 1019; *S. v. Stair*, 87 Mo. 268; *S. v. Briggs*, 68 Iowa 416, 27 N. W. 358; *P. v. Cassidy*, 133 N. Y. 612, 30 N. E. 1003; *Whar. Cr. Ev.* (8th ed.), § 1123.

⁶¹ *Whar. Cr. Ev.* (8th ed.), §§ 644, 682, 688; *Spies v. P.*, 122 Ill. 233, 12 N. E. 865, 17 N. E. 898. See 1 *Roscoe Cr. Ev.* 57; *P. v. Green*, 1 *Park. Cr.* (N. Y.) 11; *P. v. Lee Dick Lung*, 129 *Cal.* 491, 62 *Pac.* 71.

⁶² *Westbrook v. P.*, 126 Ill. 81, 18 N. E. 304.

⁶³ *Queen v. Cooper*, 1 *Q. B. D.* 19, 3 *Am. C. R.* 433.

⁶⁴ *Lyons v. P.*, 137 Ill. 614, 27 N. E. 677; *Underhill Cr. Ev.*, § 331, citing *Johnson v. S.*, 88 *Ga.* 203, 14 *S. E.*

208; *S. v. Biggerstaff*, 17 *Mont.* 510, 43 *Pac.* 709.

⁶⁵ *Carlton v. P.*, 150 Ill. 181, 37 N. E. 244; *Ex parte Kennedy* (*Tex. Cr.*), 57 *S. W.* 648; *Thomas v. P.*, 67 N. Y. 218; *S. v. Haynes*, 71 N. C. 79; *S. v. Johnson*, 30 *La.* 921; *Reg. v. Gibson*, 16 *Cox C. C.* 181, 7 *Am. C. R.* 177; *Smith v. S.*, 9 *Ala.* 990; *S. v. Smith*, 35 *Kan.* 618, 11 *Pac.* 908; *S. v. Davis*, 77 N. C. 483; *Owensby v. S.*, 82 *Ala.* 63, 2 *So.* 764; *Com. v. Chabbock*, 1 *Mass.* 144; *Underhill Cr. Ev.*, §§ 101, 331.

⁶⁶ *Lander v. P.*, 104 Ill. 256. *Contra*, *Rex v. Gibson*, 16 *Cox C. C.* 181, 7 *Am. C. R.* 171.

barn one evening, and at a later hour of the same evening the horse was gone. This conversation tending to prove that they were testifying about the same evening, was for that purpose admissible.⁶⁷

§ 3117. Conversation of husband and wife overheard.—Declarations of the wife, made in conversation with her husband on hearing that her son was dead, may be shown in evidence against the husband by third persons who heard such declarations.⁶⁸

§ 3118. Declarations of agent.—Declarations and statements made by an agent are competent against the principal or against the person by whom sent, if made by authority of the principal.⁶⁹

§ 3119. Declarations in conspiracy.—Declarations made after a conspiracy is over are competent against the party making them, and the court must protect the others by cautioning the jury not to permit the confession of their alleged associate to prejudice them.⁷⁰ Under the rules of evidence, declarations of other persons jointly charged with an offense, made after the act, are not competent against any one who participated in the crime. Such declarations are regarded as any other hearsay testimony. It can not be admitted for any purpose. It is not competent to prove that a crime was in fact committed, nor to connect the defendant with the crime.⁷¹

§ 3120. Defendant's statement taken down.—The record of the examination of the defendant before a justice or examining magistrate, as well as any oral statements made by him, may be given in evidence against the defendant.⁷² Under enabling statutes making the defendant a competent witness if he desires to testify, his testimony taken under oath at the preliminary examination, if freely given without compulsion or promise, is admissible in evidence on the

⁶⁷ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 217; *Whitney v. Houghton*, 125 Mass. 451.

⁶⁸ *Gannon v. P.*, 127 Ill. 518, 21 N. E. 525; *Com. v. Griffin*, 110 Mass. 181, 2 Green C. R. 264; *Whar. Cr. Ev.* (8th ed.), § 398; *Reynolds v. S.*, 147 Ind. 3, 46 N. E. 31; *P. v. Lewis*, 62 Hun 622, 16 N. Y. Supp. 881; *Underhill Cr. Ev.*, § 187.

⁶⁹ *Isaacs v. P.*, 118 Ill. 538, 8 N. E. 821; *Whar. Cr. Ev.*, § 695; *Murphy*

v. P., 104 Ill. 534; *S. v. Morrow*, 40 S. C. 221, 18 S. E. 853, 9 Am. C. R. 43; *U. S. v. Morrow*, 4 Wash. C. C. 733.

⁷⁰ *P. v. Arnold*, 46 Mich. 268, 9 N. W. 406. See "Conspiracy."

⁷¹ *S. v. Westfall*, 49 Iowa 328, 3 Am. C. R. 348.

⁷² *S. v. Bowe*, 61 Me. 171, 2 Green C. R. 460; *P. v. Banker*, 2 Park. Cr. (N. Y.) 26.

trial.⁷³ When resort is made to the examination of a prisoner, that examination should be taken down in the precise words used by him, and the language ought not to be changed, as the change of a word may change the character of the confession.⁷⁴ But the taking down of the statement in writing will not bar proving it by parol.⁷⁵

ARTICLE VII. HEARSAY EVIDENCE.

§ 3121. **Declarations, when hearsay.**—The opinion of the witness expressed to her husband, in the absence of the prisoner, that the horses were stolen, was clearly incompetent; and the message sent to the sheriff that they had arrested the accused, who had stolen the horses, is of the same character.⁷⁶ Two or three days after the birth of her child the deceased said to her nurse: "Oh! aint it awful, that awful medicine." The nurse said in reply: "Yes, what made you take it?" "The doctor is to blame; he persuaded me to take it." Held to be hearsay.⁷⁷

§ 3122. **Hearsay—Husband and wife.**—The husband of the defendant stated to another that he made his wife kill the deceased, and the defendant offered witnesses to prove that her husband made such declarations. Held incompetent, as being mere hearsay.⁷⁸

§ 3123. **By-stander's statement, hearsay.**—To permit by-standers to give testimony not under oath is contrary to law in any case and shocking to the mind when such evidence is given against a defendant in a capital case. Where a juror trying a case asked a question of a by-stander as to a matter testified to by a witness, it was highly prejudicial and improper.⁷⁹

ARTICLE VIII. PREVIOUS ASSAULTS, ATTEMPTS.

§ 3124. **Previous attempts.**—Evidence of previous unsuccessful attempts to commit the same crime, for which the accused is on trial, is admissible.⁸⁰

⁷³ Lyons v. P., 137 Ill. 617, 27 N. E. 677; Whar. Cr. Ev. (9th ed.), § 699; 1 Greenl. Ev. (14th ed.), § 225; P. v. Kelley, 47 Cal. 125.

⁷⁴ Austine v. P., 51 Ill. 239.

⁷⁵ 1 Roscoe Cr. Ev. 4.

⁷⁶ Clark v. P., 31 Ill. 481.

⁷⁷ P. v. Aiken, 66 Mich. 460, 33 N. W. 821, 7 Am. C. R. 356.

⁷⁸ Edwards v. S., 27 Ark. 493, 1 Green C. R. 743; S. v. Clary, 24 S. C. 116.

⁷⁹ Dempsey v. P., 47 Ill. 324.

⁸⁰ S. v. Ward, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 213; Com. v. Jackson, 132 Mass. 16; Hamilton v. S. (Tex. Cr.), 56 S. W. 926.

§ 3125. **Previous assaults and ill treatment.**—Brutal conduct of the accused toward the deceased several days previous to the death is competent as tending to prove motive, and this may be followed up by showing that the deceased was in ordinary health before and that he complained of pains after the assault by the accused.⁸¹ Long ill treatment by a husband of his wife, and violent quarrels between them from time to time, are competent to prove motive in cases of marital homicide, such as threats against her person and life and violent assaults made upon her at different times while they were living together as husband and wife, and also evidence that tended to prove he compelled his wife to procure money for him by pursuing the vocation of a common prostitute.⁸²

ARTICLE IX. FLIGHT AS EVIDENCE.

§ 3126. **Evidence of flight.**—Testimony of an officer that when he went to arrest the defendant, he outran and for a time escaped him, was admissible without proof that the defendant had been informed that he was to be arrested "on this identical charge." Its force and value, under all the circumstances, were for the jury to determine.⁸³

§ 3127. **Rebutting evidence of flight.**—A defendant offered to prove that he had a conversation with the witness about going away to get a job of work instead of going away to avoid prosecution; that he made known his intention publicly to several persons, and that he went and got work: Held not error to reject this evidence, the state having introduced no evidence to claim flight or evasion of arrest.⁸⁴

ARTICLE X. DEFENDANT'S SILENCE.

§ 3128. **Defendant's silence.**—Admissions or confessions may be implied from the conduct of a party in remaining silent when charged with crime, or when statements are made by third persons in his

⁸¹ *Williams v. S.*, 64 Md. 384, 5 Am. C. R. 512, 1 Atl. 887. See "Homicide."

⁸² *Painter v. P.*, 147 Ill. 457, 35 N. E. 64. See also *S. v. Bradley*, 67 Vt. 465, 32 Atl. 238; *Boyle v. S.*, 61 Wis. 440, 21 N. W. 289; *S. v. Cole*, 63 Iowa 695, 17 N. W. 183.

⁸³ *S. v. Frederic*, 69 Me. 400, 3 Am. C. R. 80; *Sewell v. S.*, 76 Ga. 836; *Saylor v. Com.* (Ky.), 57 S. W.

614; *S. v. Rodman*, 62 Iowa 456, 17 N. W. 663; *Clarke v. S.* (Ala.), 8 Cr. L. Mag. 21; *P. v. Ogle*, 4 N. Y. Cr. 349; *Bell v. S.*, 115 Ala. 25, 22 S. E. 526; *Hall v. P.*, 39 Mich. 717. See *Gray v. S.* (Fla.), 28 So. 53; *S. v. Lucey* (Mont.), 61 Pac. 994; *Underhill Cr. Ev.*, § 118.

⁸⁴ *Welch v. S.*, 104 Ind. 347, 5 Am. C. R. 454, 3 N. E. 850. See *Underhill Cr. Ev.*, § 119.

presence affecting him, when the circumstances afford an opportunity to act or speak in reply. The natural inference is that silence is tantamount to confession.⁸⁵ If the silence of the accused be attributable to fear, or if it be doubtful whether the statement was distinctly heard by him or understood, or circumstances existed which might prevent a reply or render it improper or inexpedient to reply, then anything said to him imputing his guilt would be entitled to little or no weight; but its value should be determined by the jury.⁸⁶

§ 3129. Defendant's silence, when incompetent.—On a charge of murder the court permitted witnesses to testify that the mother of the accused said in her presence just after the dead body of her child was found, and while the accused was under arrest, that "she had a child this way before and put it away," the prisoner making no reply: Held incompetent and prejudicial, being evidence of a distinct and substantive offense.⁸⁷ Question by the state: "Heard you any talk of what they (the persons assembled there) would do with the man that killed the woman? A. Some said to hang him. Q. What threats were made upon that occasion within the hearing of this man? A. While I was there several expressed themselves that he ought to be hung." Held incompetent. No charge was made directly to him that he had killed the woman.⁸⁸

§ 3130. Defendant's silence explained.—Where the accused has promised to keep his temper under control at an interview, and let another do the talking, he is not bound to make denial of charges there made against him, and his silence under the circumstances is not competent evidence of guilt.⁸⁹

ARTICLE XI. ARTICLES, THINGS, IMPLEMENTS.

§ 3131. Articles and clothing.—Physical objects, such as the bed and bed clothing, in the room where the deceased was killed, and the

⁸⁵ *Ackerson v. P.*, 124 Ill. 572, 16 N. E. 847; 1 Greenl. Ev. (8th ed.), §§ 197-215; *Franklin v. S.*, 69 Ga. 36; *P. v. McCrea*, 32 Cal. 98; *Underhill Cr. Ev.*, § 122; *Gillett Indirect & Col. Ev.*, § 5; *Kelley v. P.*, 55 N. Y. 565, 14 Am. R. 342; 1 *Roscoe Cr. Ev.* (8th ed.), 89.

⁸⁶ *Ackerson v. P.*, 124 Ill. 573, 16 N. E. 847; 2 *Phillipps Ev.* 194, note 191; *Underhill Cr. Ev.*, § 124. See *Jones v. S.*, 107 Ala. 93, 18 So. 237; *Willi-*

ford v. S., 36 Tex. Cr. 414, 37 S. W. 761; *S. v. Good*, 132 Mo. 114, 33 S. W. 790; *P. v. Young*, 108 Cal. 8, 41 Pac. 281; *S. v. Magoon*, 68 Vt. 289, 35 Atl. 310.

⁸⁷ *S. v. Shuford*, 69 N. C. 486, 1 *Green C. R.* 251.

⁸⁸ *Kaelin v. Com.*, 84 Ky. 354, 8 Ky. L. 293, 1 S. W. 594, 7 Am. C. R. 460.

⁸⁹ *Slattery v. P.*, 76 Ill. 221; *Underhill Cr. Ev.*, § 123.

clothes of the deceased and the defendant, are competent to be introduced in evidence.⁹⁰

§ 3132. Things taken from prisoner.—An officer making an arrest of a person charged with a criminal offense may take from him any property or thing connecting or tending to connect the accused with the crime charged, or which may be required as evidence.⁹¹

§ 3133. Weapon taken from accused.—The weapon with which it is claimed a homicide was committed may be introduced in evidence against the defendant if found in his possession or the possession of his criminal associates.⁹²

§ 3134. Seizing articles illegally.—Though papers and other articles of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue, unless the same were unlawfully seized by some order or process of the court, thereby compelling him to produce evidence against himself.⁹³ Articles of property found on the premises of the defendant and seized without search-warrant, may be introduced in evidence when otherwise competent, though procured by the trespass of the officer making the arrest, if the state or court had no hand in such unlawful seizure.⁹⁴

⁹⁰ *Painter v. P.*, 147 Ill. 466, 35 N. E. 64; *Smith v. S.* (Tex. Cr.), 58 S. W. 101; *Keating v. P.*, 160 Ill. 487, 43 N. E. 724; *P. v. Durrant*, 116 Cal. 179, 48 Pac. 75, 10 Am. C. R. 523; *Mitchell v. S.*, 38 Tex. Cr. 170, 41 S. W. 816; *Dorsey v. S.*, 106 Ala. 157, 18 So. 199; *Dorsey v. S.*, 110 Ala. 38, 20 So. 450; *Newell v. S.*, 115 Ala. 54, 22 So. 572; *Underhill Cr. Ev.*, § 48.

⁹¹ *S. v. Graham*, 74 N. C. 646, 1 Am. C. R. 183; *Rex v. O'Donnell*, 7 C. & P. 138; *Siebert v. P.*, 143 Ill. 582, 32 N. E. 431; *Com. v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Underhill Cr. Ev.*, § 48.

⁹² *Crawford v. S.*, 112 Ala. 1, 21 So. 214; *P. v. Sullivan*, 129 Cal. 557, 62 Pac. 101; *Siberry v. S.*, 133 Ind.

677, 33 N. E. 681; *Burton v. S.*, 107 Ala. 108, 18 So. 284; *Thomas v. S.*, 67 Ga. 460; *S. v. Cushing*, 14 Wash. 527, 45 Pac. 145; *S. v. Tippet*, 94 Iowa 646, 63 N. W. 445; *Underhill Cr. Ev.*, § 315.

⁹³ 1 Greenl. Ev. (Redf. ed.), § 254; *Siebert v. P.*, 143 Ill. 583, 32 N. E. 431; *Gindrat v. P.*, 138 Ill. 105, 27 N. E. 1085; *Boyd v. U. S.*, 116 U. S. 616, 6 S. Ct. 524; *Trask v. P.*, 151 Ill. 529, 38 N. E. 248; *Com. v. Dana*, 2 Metc. (Mass.) 329; 1 McClain Cr. L., § 405.

⁹⁴ *Gindrat v. P.*, 138 Ill. 110, 27 N. E. 1085; *Shields v. S.*, 104 Ala. 35, 16 So. 85, 9 Am. C. R. 152; *S. v. Flynn*, 36 N. H. 64; *Dillon v. O'Brien*, 16 Cox C. C. 245; *Com. v. Dana*, 2 Metc. (Mass.) 329.

§ 3135. **Defective warrant as evidence.**—A warrant by which the officer is attempting to arrest the defendant is competent, though defective in not containing the seal of the court, to show why the officer laid his hands on the defendant.⁹⁵

ARTICLE XII. MOTIVE; INTENTION.

§ 3136. **Evidence of motive or feeling.**—"Proof of motive is never indispensable to a conviction, but it is always competent against the defendant."⁹⁶ On the night before the killing a witness for the state had a quarrel with the defendant and said: "I will see you again and shoot a hole through you that a yellow dog can go through. I am all wool, a yard wide and hard to curry." This statement was competent evidence as showing the motive and feelings of the witness against the defendant and the court erred in excluding it.⁹⁷

ARTICLE XIII. OTHER OFFENSES; ACTS.

§ 3137. **Evidence of other offenses.**—Proof of another distinct offense is competent if it in any way tends to prove the accused guilty of the crime for which he is on trial; or where there is such a logical connection between the two that the one tends to establish the other, or where the two acts form but one transaction; or to prove motive and intent.⁹⁸ In an indictment for stealing pork, a loaf of bread

⁹⁵ *Palmer v. P.*, 138 Ill. 364, 28 N. E. 130.

⁹⁶ *Stitz v. S.*, 104 Ind. 359, 4 N. E. 145, 5 Am. C. R. 50; *S. v. Battle*, 126 N. C. 1036, 35 S. E. 624; 1 Bish. Cr. Proc. (3d ed.), § 1107; *Wills Cir. Ev.* 41; *Clifton v. S.*, 73 Ala. 473; *Pointer v. U. S.*, 151 U. S. 396, 14 S. Ct. 410; *S. v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; *Miller v. S.*, 68 Miss. 221, 8 So. 273; *P. v. Bennett*, 49 N. Y. 137; *Johnson v. U. S.*, 157 U. S. 320, 15 S. Ct. 614; *Sumner v. S.*, 5 Blackf. (Ind.) 579, 36 Am. D. 561; *P. v. Durrant*, 116 Cal. 179, 48 Pac. 75, 10 Am. C. R. 521; *S. v. O'Neil*, 51 Kan. 665, 33 Pac. 287; *Turner v. S.*, 70 Ga. 765; *Com. v. McManus*, 143 Pa. St. 64, 21 Atl. 1018, 22 Atl. 761; *S. v. Lentz*, 45 Minn. 180, 47 N. W. 720.

⁹⁷ *Bonnard v. S.*, 25 Tex. App. 173, 7 S. W. 862, 7 Am. C. R. 464; *Gaines v. Com.*, 50 Pa. St. 319, 326; 1 Greenl. Ev. (13th ed.), § 455.

⁹⁸ *Lyons v. P.*, 137 Ill. 612, 27 N. E. 677; *Scott v. P.*, 141 Ill. 213, 30 N. E. 329; *Hickam v. P.*, 137 Ill. 80, 27 N. E. 88; *West v. S.* (Fla.), 28 So. 430; 1 Greenl. Ev., § 53; *P. v. Pallister*, 138 N. Y. 601, 33 N. E. 741; *Com. v. Sawtelle*, 141 Mass. 140, 5 N. E. 312; *Maynard v. P.*, 135 Ill. 432, 25 N. E. 740; *Underhill Cr. Ev.*, § 321; *Moore v. U. S.*, 150 U. S. 57, 14 S. Ct. 26; *Thomas v. S.*, 103 Ind. 419, 2 N. E. 808; 3 Greenl. Ev., § 15; *Bloomer v. S.*, 48 Md. 521, 3 Am. C. R. 41; *Com. v. Choate*, 105 Mass. 451; *S. v. Walton*, 114 N. C. 783, 18 S. E. 945; *Underhill Cr. Ev.*, § 90; *S. v. Madigan*, 57 Minn. 425, 59 N. W. 490. See also *S. v. Kent*, 5 N. D. 516, 67 N. W. 1052; *P. v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Willingham v. S.*, 33 Tex. Cr. 98, 25 S. W. 424; *S. v. Seymour*, 94 Iowa 699, 63 N. W. 661; *Com. v. Corkin*, 136 Mass. 430; *Lamb v. S.*, 66 Md. 287, 7 Atl. 399; *Farris v. P.*, 129 Ill.

and some knives, it appeared that the accused entered a shop and ran away with the pork and in a few minutes returned and put the pork in a bowl which contained the knives and took away the whole together, and in half an hour returned and took the bread: Held that the taking of the bread was a distinct offense, and evidence of the taking of the bread was incompetent under the indictment.⁹⁹

§ 3138. Other offenses to prove intent.—It is not a valid objection to evidence, otherwise competent, that it tends to prove the prisoner guilty of a distinct and different offense. Evidence of other offenses is admissible to prove intent, motive, knowledge, malice and the like.¹⁰⁰

§ 3139. Other offenses, when incompetent.—The general rule is that evidence tending to prove other independent distinct offenses than that alleged in the indictment is incompetent and is reversible error, even in a clear case of guilt, on the measure of punishment, where the punishment is fixed by the jury.¹

§ 3140. Evidence of other acts.—On a charge of attempting to poison a person by putting poison in his cup, it is proper to show in

521, 21 N. E. 821; Reg. v. Cobden, 3 F. & F. 833; P. v. Dailey, 143 N. Y. 638, 37 N. E. 823, 73 Hun 16, 25 N. Y. Supp. 1050; 1 Greenl. Ev., § 108; Snapp v. Com., 82 Ky. 173, 6 Am. C. R. 187; Swan v. Com., 104 Pa. St. 218, 4 Am. C. R. 188; S. v. Vines, 34 La. 1079, 4 Am. C. R. 298; Williams v. P., 166 Ill. 134, 46 N. E. 749; S. v. Folwell, 14 Kan. 105; S. v. Greenwade, 72 Mo. 300, 20 Am. L. Reg. 552; Dawson v. S., 32 Tex. Cr. 535, 25 S. W. 21; Frazier v. S., 135 Ind. 38, 34 N. E. 817; P. v. Bidleman, 104 Cal. 608, 38 Pac. 502; Com. v. Robinson, 146 Mass. 571, 16 N. E. 452; S. v. Gainor, 84 Iowa 209, 50 N. W. 947; Underhill Cr. Ev., § 88.

⁹⁹ Snapp v. Com., 82 Ky. 173, 6 Am. C. R. 189.

¹⁰⁰ S. v. Palmer, 65 N. H. 216, 20 Atl. 6, 8 Am. C. R. 199; S. v. Kepper, 65 Iowa 745, 5 Am. C. R. 594, 23 N. W. 304; Ter. v. McGinnis (N. M.), 61 Pac. 208; Com. v. Corkin, 136 Mass. 429; Com. v. Choate, 105 Mass. 451; Com. v. Blood, 141 Mass. 575,

6 N. E. 769; Maynard v. P., 135 Ill. 432, 25 N. E. 740; Underhill Cr. Ev., § 89.

¹ Barton v. P., 135 Ill. 405, 25 N. E. 776; Farris v. P., 129 Ill. 521, 21 N. E. 821; Aiken v. P., 183 Ill. 215, 221, 55 N. E. 695; Baker v. P., 105 Ill. 452; 1 Bish. Cr. Proc. (3d ed.), § 1120; 1 Thomp. Trials, § 330; S. v. Moberly, 121 Mo. 604, 26 S. W. 364; Jackson v. P., 126 Ill. 148, 18 N. E. 286; Gifford v. P., 87 Ill. 214; 1 Greenl. Ev., § 52; Shears v. S., 147 Ind. 51, 46 N. E. 331; S. v. Stice, 88 Iowa 27, 55 N. W. 17, 9 Am. C. R. 363; S. v. Lapage, 57 N. H. 245, 2 Am. C. R. 559; Shaffner v. Com., 72 Pa. St. 60, 2 Green C. R. 508; Clapp v. S., 94 Tenn. 186, 30 S. W. 214; S. v. Jeffries, 117 N. C. 727, 23 S. E. 163; P. v. Fowler, 104 Mich. 449, 62 N. W. 572; Tyrrell v. S. (Tex. Cr.), 38 S. W. 1011; S. v. Murphy, 84 N. C. 742; Com. v. Jackson, 132 Mass. 16; S. v. Kelley, 65 Vt. 531, 27 Atl. 203; Meyer v. S., 59 N. J. L. 310, 36 Atl. 483.

evidence that a few days before on different occasions similar substance was found in his cup and saucer and that drinking from the cup made him sick.² Other acts than those alleged in the indictment may be shown in evidence for the purpose of showing the system or plan of the parties concerned in the transaction alleged in the indictment.³ Where other overt acts, different and distinct from that alleged in the indictment, form part of the *res gestae*, they may be given in evidence.⁴ But evidence of distinct offenses, not forming part of the same transaction charged, is not part of the *res gestae*, and is therefore incompetent.^{4a}

ARTICLE XIV. EXPERIMENTS, WHEN PROPER.

§ 3141. **Evidence of experiments.**—Experiments will not be permitted on the trial to contradict witnesses on material matters without first showing that the surroundings where the assault is alleged to have occurred were in identically the same condition as on the day of the difficulty.⁵ Evidence of experiments is likely to confuse and mislead the jury unless made with like means on the same kind of stuff or substance, or based on a similarity of conditions or circumstances, as the act or fact sought to be illustrated. Such evidence, under proper circumstances, is competent.⁶

§ 3142. **Experiments by jury.**—Permitting a pistol, which had been exhibited to the jury during the trial, but not put in evidence, to be sent to them without the consent of the accused, was improper, and especially so in that the jury experimented with it while considering of their verdict. The pistol should have been identified.⁷

² *Com. v. Kennedy*, 170 Mass. 18, 48 N. E. 770. See *P. v. Cuff*, 122 Cal. 589, 55 Pac. 407.

³ *Com. v. Price*, 10 Gray (Mass.) 472; *S. v. Bridgman*, 49 Vt. 202; *Whar. Cr. Ev.*, § 38; *Kramer v. Com.*, 87 Pa. St. 299; *Thayer v. Thayer*, 101 Mass. 111; *Guthrie v. S.*, 16 Neb. 667, 21 N. W. 455, 4 Am. C. R. 78; *Reg. v. Francis*, 12 Cox C. C. 612.

⁴ *McDonald v. P.*, 126 Ill. 150, 18 N. E. 817; *Reed v. Com.*, 98 Va. 817, 36 S. E. 399.

^{4a} *S. v. O'Donnell*, 36 Or. 222, 61 Pac. 892; *S. v. Hale*, 156 Mo. 102, 56 S. W. 881.

⁵ *P. v. Deitz*, 86 Mich. 419, 49 N. W. 296; *Jumpertz v. P.*, 21 Ill. 375; 1 *McClain Cr. L.*, § 407.

⁶ *S. v. Justus*, 11 Or. 178, 8 Pac. 337, 6 Am. C. R. 516; *Sullivan v. Com.*, 93 Pa. St. 285; *Com. v. Piper*, 120 Mass. 188; *Smith v. S.*, 2 Ohio St. 513; *Reg. v. Heseltine*, 12 Cox C. C. 404, 1 Green C. R. 106; *P. v. Levine*, 85 Cal. 39, 22 Pac. 969, 24 Pac. 631; *Underhill Cr. Ev.*, § 233; *Gillett Indirect & Col. Ev.*, § 66; *Starr v. P. (Colo., 1900)*, 63 Pac. 299 (conversation).

⁷ *Yates v. P.*, 38 Ill. 531.

ARTICLE XV. BEST EVIDENCE; DOCUMENTS.

§ 3143. **Document—Record is best evidence.**—The contents of a letter or other writing, which becomes material in proving the issues involved, can not be shown by oral testimony or by copy, until it is first shown that the original can not be produced or accounted for, the original being the best evidence.⁸ The best evidence to prove *autre fois convict* or *autre fois acquit* is the record of the court proceedings or a properly certified copy of such record, where provided for by statute.⁹

§ 3144. **Best evidence—Minor's age.**—Where the age of a minor becomes a material fact to be shown in a case the minor is a competent witness by whom to prove the fact of his age, even though his parents are living; nor is the entry of the age of the minor in the family Bible necessary to constitute the best evidence.¹⁰

§ 3145. **Best evidence as to telegrams.**—"Where the receiver of a telegraphic dispatch is the employer of the company, the writing delivered to the company's operator by the sender is the original. But where the company is the agent, not of the receiver, but of the sender of the dispatch, the written message which is delivered to the addressee is the original."¹¹

ARTICLE XVI. FORMER CONVICTION, EVIDENCE.

§ 3146. **Former conviction and other offense.**—On the trial of an indictment charging the accused with a former conviction, together with a subsequent criminal offense, the issues on both charges will be tried and submitted to the jury at the same time, unless otherwise provided by statute.¹² Where the indictment charges the accused with a former conviction, as well as a subsequent criminal offense, it must be clearly established on the trial that he is the identical person

⁸ S. v. Matthews, 88 Mo. 121; Underhill Cr. Ev., § 43, citing Peck v. Parchen, 52 Iowa 46, 2 N. W. 597.

⁹ Brown v. S., 72 Miss. 95, 16 So. 202; Walter v. S., 105 Ind. 589, 5 N. E. 735; Underhill Cr. Ev., § 195.

¹⁰ S. v. Woods, 49 Kan. 237, 30 Pac. 520; Dobson v. Cothran, 34 S. C. 518, 13 S. E. 679.

¹¹ Underhill Cr. Ev., § 44, citing S. v. Gritzner, 134 Mo. 512, 36 S. W. 39; Utley v. Donaldson, 94 U. S. 29. See Dunbar v. U. S., 156 U. S. 185, 195, 15 S. Ct. 325.

¹² S. v. Manicke, 139 Mo. 545, 41 S. W. 223; Underhill Cr. Ev., § 512. See Reg. v. Fox, 10 Cox C. C. 502.

mentioned in the record of such former conviction, but direct evidence of that fact is not necessary.¹³

§ 3147. Former conviction—Record essential.—The record of a former conviction or acquittal, or a properly certified copy thereof, where authorized by statute, is the only competent evidence of such former conviction or acquittal.¹⁴ Where a record of a former conviction is relied on to prove such conviction it must show the caption, the returning of an indictment by the grand jury, the arraignment, the impaneling or waiver of the jury, a verdict and judgment on the verdict.¹⁵

ARTICLE XVII. RECORD EVIDENCE.

§ 3148. Foreign records.—Exemplification of judgments of courts of record of other states, to be admissible under the act of congress, must be attested by the clerk under the seal of the court, with the certificate of the presiding judge that the attestation of the clerk is in due form.¹⁶ If the exemplification of the record of a case tried in a foreign state shows a want of jurisdiction to render judgment or decree, such record evidence is not competent.¹⁷

§ 3149. Proving records by copy.—The general doctrine, as stated by all the text-writers, substantially is, that records and entries of a public nature, in books required by law to be kept, may be proved by an examined copy and by a certified copy where the officer having charge of the record is authorized by law to make copies to be used as evidence, both for the sake of convenience and because of the public character of the facts they contain and the ease with which any fraud or error in the copy can be detected.¹⁸

¹³ *S. v. Haynes*, 35 Vt. 570; *Reg. v. Leng*, 1 F. & F. 77; *Kane v. Com.*, 109 Pa. St. 541.

¹⁴ *Walter v. S.*, 105 Ind. 589, 5 N. E. 735; *Bailey v. S.*, 26 Ga. 579; *Com. v. Evans*, 101 Mass. 25; *Brown v. S.*, 72 Miss. 95, 16 So. 202; *Com. v. Sullivan*, 150 Mass. 315, 23 N. E. 47; *S. v. Farmer*, 84 Me. 436, 24 Atl. 985; *S. v. Merriman*, 34 S. C. 16, 12 S. E. 619; *S. v. Adamson*, 43 Minn. 196, 45 N. W. 152; *S. v. Pratt*, 121 Mo. 566, 26 S. W. 556; *Boyd v. S.*, 94 Tenn. 505, 29 S. W. 901; *S. v. Alexis*, 45 La. 973, 13 So. 394; *Underhill Cr. Ev.*, § 514.

¹⁵ *Kirby v. P.*, 123 Ill. 438, 15 N. E. 33; *Bartholomew v. P.*, 104 Ill. 609; *Plumbly v. Com.*, 2 Metc. (Mass.) 413; *P. v. Carlton*, 57 Cal. 83; *Underhill Cr. Ev.*, § 510. See *Wood v. P.*, 53 N. Y. 511.

¹⁶ *Ducommun v. Hysinger*, 14 Ill. 249; *Spencer v. Langdon*, 21 Ill. 193; 1 *Roscoe Cr. Ev.* 169; *Wilburn v. Hall*, 16 Mo. 168.

¹⁷ *Tucker v. P.*, 122 Ill. 594, 13 N. E. 809.

¹⁸ *S. v. Frederic*, 69 Me. 400, 3 *Am. C. R.* 79; *Underhill Cr. Ev.*, § 40.

§ 3150. **Documents, as collateral evidence.**—Sometimes the contents of a book, document or writing have no direct bearing upon the material matters of fact in issue, but are merely evidence of some collateral fact; in such case oral evidence is competent to prove such collateral fact contained in the document or writing. For example, where proof of arrest of the defendant on some other charge than that for which he is on trial is competent, such arrest may be shown by the oral testimony of the officer who made the arrest without producing the warrant; or the fact that the prosecutrix in a seduction case made an assignation by a letter, may be shown by oral testimony without the production of the letter.¹⁹

§ 3151. **Ordinance as evidence.**—The proof failing to show that an ordinance was submitted to the voters of the town, and published as required by ordinance, is not competent evidence.²⁰

ARTICLE XVIII. DEFENDANT'S CHARACTER.

§ 3152. **Good character of defendant.**—In all criminal cases evidence of good character is admissible on the part of the accused, whether the case is doubtful or not.²¹ Evidence of the general reputation of the accused for peace and quiet is permissible in a prosecution for murder, though the murder may have been committed by poisoning.²² The old rule that evidence of the good character of the de-

¹⁹ S. v. McFarlain, 42 La. 803, 8 So. 600; S. v. Ferguson, 107 N. C. 841, 12 S. E. 574. See also Long v. S., 10 Tex. App. 186, 198; Tatum v. S., 82 Ala. 5, 2 So. 531.

²⁰ Schott v. P., 89 Ill. 197.

²¹ Jupitz v. P., 34 Ill. 521; Steele v. P., 45 Ill. 157; Hopps v. P., 31 Ill. 388; P. v. Vane, 12 Wend. (N. Y.) 78; Aneals v. P., 134 Ill. 401, 25 N. E. 1022; Com. v. Hardy, 2 Mass. 317; Com. v. Leonard, 140 Mass. 473, 7 Am. C. R. 598, 4 N. E. 96; Hall v. S., 132 Ind. 317, 31 N. E. 536; Kistler v. S., 54 Ind. 400, 2 Am. C. R. 21; Kee v. S., 28 Ark. 155, 2 Am. C. R. 271; 1 Greenl. Ev., § 55; 3 Greenl. Ev., § 25; Fields v. S., 47 Ala. 603, 1 Green C. R. 639; Stewart v. S., 22 Ohio St. 477, 1 Green C. R. 531; P. v. Ashe, 44 Cal. 288, 2 Green C. R. 401; S. v. McMurphy, 52 Mo. 251, 1 Green C. R. 640; S. v. Kinley,

43 Iowa 294; S. v. Schlegel, 50 Kan. 325, 31 Pac. 1105; Gillett Indirect & Col. Ev., § 298; Rex v. Stannard, 7 C. & P. 673; Hardtke v. S., 67 Wis. 552, 30 N. W. 723; Edgington v. U. S., 164 U. S. 361, 17 S. Ct. 72; Pate v. S., 94 Ala. 14, 10 So. 665; Gibson v. S., 89 Ala. 121, 18 Am. St. 96, 8 So. 98. See also Com. v. Cleary, 135 Pa. St. 64, 19 Atl. 1017; Com. v. Wilson, 152 Mass. 12, 25 N. E. 16; Wesley v. S., 37 Miss. 327, 75 Am. D. 62; S. v. Ward, 73 Iowa 532, 35 N. W. 617; S. v. Hice, 117 N. C. 782, 23 S. E. 357; Parrish v. Com., 81 Va. 1; S. v. Levigne, 17 Nev. 435, 30 Pac. 1084; Klehn v. Ter., 1 Wash. St. 584, 21 Pac. 31; P. v. Harrison, 93 Mich. 594, 53 N. W. 725; S. v. Donohoo, 22 W. Va. 761; S. v. Henry, 5 Jones (N. C.) 65.

²² Hall v. S., 132 Ind. 317, 31 N. E. 536; Carr v. S., 135 Ind. 1, 34

fendant is not to be considered by the jury unless the other evidence leaves their minds in doubt, has been much criticised, and the weight of authority is now against it.²³ But when all the evidence, taken together, establishes the guilt of the accused beyond a reasonable doubt, then he should be convicted, notwithstanding the evidence may clearly show that he had a good character for honesty and integrity, etc., before the commission of the crime.²⁴

§ 3153. How to prove character—Character never questioned.—

A defendant may prove his good character only by general reputation, and not by particular acts and transactions in which he may have been concerned.²⁵ To prove the general reputation of the person for or against whom the witness is called to testify he must first state that he knows what is said of him by "those among whom he is chiefly conversant."²⁶ The proper inquiry is whether the witness knows the general reputation of the person sought to be impeached or sustained, among his or her neighbors, for truth and veracity, which question must be answered in the affirmative before asking what that reputation is.²⁷ Evidence that the witness has long been acquainted with the defendant, or person whose character is at issue, and that he never heard it questioned, is competent, and to refuse such evidence is error.²⁸

§ 3154. Character—Weight as evidence.—In a case involving much doubt, the good character of the accused is entitled to great

N. E. 533, 9 Am. C. R. 81. See 3 Bl. Com. 120; 2 Greenl. Ev., § 84; Roscoe Cr. Ev. (8th ed.), 296.

²³ Com. v. Leonard, 140 Mass. 473, 4 N. E. 96, 7 Am. C. R. 599; S. v. Lindley, 51 Iowa 343, 1 N. W. 484; Whar. Cr. Ev. (9th ed.), § 66; 3 Greenl. Ev., § 25.

²⁴ Wagner v. S., 107 Ind. 71, 7 N. E. 896; S. v. Smith, 9 Houst. (Del.) 588, 33 Atl. 441; S. v. Brown, 34 S. C. 41, 48, 12 S. E. 662.

²⁵ Hirshman v. P., 101 Ill. 574; 1 Greenl. Ev., § 55; Evans v. S., 109 Ala. 11, 19 So. 535; S. v. Rose, 47 Minn. 47, 49 N. W. 404; Basye v. S., 45 Neb. 261, 63 N. W. 811; S. v. Lapage, 57 N. H. 245, 24 Am. R. 69; S. v. McGee, 81 Iowa 17, 46 N. W. 764; Stalcup v. S., 146 Ind. 270, 45 N. E. 334; Garner v. S., 28 Fla. 113, 9 So. 835, 29 Am. R. 232.

²⁶ Magee v. P., 139 Ill. 142, 28 N. E. 1077; 1 Greenl. Ev. (Redf. ed.), § 461.

²⁷ Gifford v. P., 148 Ill. 176, 35 N. E. 754; Gifford v. P., 87 Ill. 210; Laclede Bank v. Keeler, 109 Ill. 385.

²⁸ Gifford v. P., 148 Ill. 173, 35 N. E. 754; S. v. Bryan, 34 Kan. 63, 8 Pac. 260, 7 Am. C. R. 613; Lemons v. S., 4 W. Va. 755, 1 Green C. R. 669; Flemister v. S., 81 Ga. 768, 7 S. E. 642; Hussey v. S., 87 Ala. 121, 6 So. 420; Cole v. S., 59 Ark. 50, 26 S. W. 377; Bucklin v. S., 20 Ohio 18; S. v. Grate, 68 Mo. 22, 3 Am. C. R. 324; Lenox v. Fuller, 39 Mich. 268; Berneker v. S., 40 Neb. 810, 59 N. W. 372; S. v. Pearce, 15 Nev. 188; S. v. Lee, 22 Minn. 407, 2 Am. C. R. 63; S. v. Brandenburg, 118 Mo. 181, 23 S. W. 1080; P. v. Davis, 21 Wend. (N. Y.) 309.

weight.²⁹ Good character may, and no doubt often does, create such a reasonable doubt as will justify an acquittal.³⁰

§ 3155. Defendant's bad character.—The bad character of the defendant can not be put in issue by the prosecution, except where it is relevant: (1) as part of the *res gestae*; (2) as part of a system; (3) to prove guilty knowledge; (4) to prove intention; (5) to prove identity.³¹ It is a fundamental principle of the criminal law that the character of a defendant can not be impeached or attacked by the state unless he puts his character in issue, either by becoming a witness in his own behalf or by offering evidence in support of his character.³² The defendant was tried on a charge of murder. After the introduction of the evidence for the defense, the prosecution was permitted, over objection, to prove that her general character for chastity was bad. Held erroneous, the nature of the charge not involving an inquiry into her character for chastity; and she had offered no evidence as to her character in any respect.³³

§ 3156. Defendant's character presumed good.—Where a person is charged with crime, the failure to call witnesses to prove his general good character raises no presumption against it.³⁴

§ 3157. Defendant's disposition.—It has been held that the disposition of the accused for peace and quietness may be shown in evi-

²⁹ Walsh v. P., 65 Ill. 64. See Jackson v. S., 81 Wis. 127, 51 N. W. 89; Jupitz v. P., 34 Ill. 522; P. v. Vane, 12 Wend. (N. Y.) 78; P. v. Hurley, 60 Cal. 74, 44 Am. R. 55; Aiken v. P., 183 Ill. 215, 55 N. E. 695.

³⁰ Aneals v. P., 134 Ill. 415, 25 N. E. 1022; Wagner v. S., 107 Ind. 71, 7 N. E. 896, 57 Am. R. 79; Newsom v. S., 107 Ala. 133, 18 So. 206; S. v. Holmes, 65 Minn. 230, 68 N. W. 11; P. v. Brooks, 131 N. Y. 321, 30 N. E. 189, 15 N. Y. Supp. 362, 61 Hun 619; P. v. Van Dam, 107 Mich. 425, 65 N. W. 277; P. v. Hancock, 7 Utah 170, 25 Pac. 1093; S. v. Lindley, 51 Iowa 343, 1 N. W. 484, 33 Am. R. 139; Com. v. Wilson, 152 Mass. 12, 25 N. E. 16; S. v. Daley, 53 Vt. 442, 38 Am. R. 694; S. v. Lepere, 66 Wis. 355, 28 N. W. 376; Crawford v. S., 112 Ala. 1, 21 So. 214; Redd v. S., 99 Ga. 210, 25 S.

E. 268; P. v. Sweeney, 133 N. Y. 609, 30 N. E. 1005.

³¹ Whar. Cr. Ev. (8th ed.), § 65; S. v. Lapage, 57 N. H. 245, 24 Am. R. 69-75.

³² S. v. Hull, 18 R. I. 207, 26 Atl. 191, 10 Am. C. R. 428; P. v. Fair, 43 Cal. 137, 1 Green C. R. 221; S. v. Creson, 38 Mo. 372; S. v. Lapage, 57 N. H. 245, 290; Young v. Com., 6 Bush (Ky.) 312, 316; Reg. v. Rowton, 10 Cox C. C. 25, 30; 3 Greenl. Ev., § 25; Underhill Cr. Ev., §§ 66, 78.

³³ P. v. Fair, 43 Cal. 137, 1 Green C. R. 217.

³⁴ S. v. Dockstader, 42 Iowa 436, 2 Am. C. R. 470; Dryman v. S., 102 Ala. 130, 15 So. 433; S. v. Upham, 38 Me. 261; Donoghoe v. P., 6 Park. Cr. (N. Y.) 120; S. v. Saunders, 84 N. C. 728; Olive v. S., 11 Neb. 1, 7 N. W. 444; Underhill Cr. Ev., § 76.

dence by any one who knows it; that such disposition is quite as satisfactory evidence as general repute; that general repute is only evidence of disposition.³⁵

§ 3158. Defendant's character—How rebutted.—When the defendant chooses to call witnesses to prove his general character to be good, the prosecution may offer witnesses to disprove their testimony.³⁶ But the rebuttal evidence offered by the prosecution must go to the general reputation of the defendant, and not by particular acts of misconduct. To permit such rebuttal by particular acts is error.³⁷ The prosecution in rebuttal may prove that the deceased was of a peaceable character.³⁸ The defendant gave evidence of his good character, by general reputation; the prosecution in rebuttal was permitted to give in evidence particular acts of misconduct or crime, and rumors and reports against him. Held error.³⁹ If the prosecution brings out on cross-examination particular acts of a witness on the character of the defendant, the defense can not show what in detail did occur, being collateral.⁴⁰

ARTICLE XIX. CHARACTER OF DECEASED.

§ 3159. Reputation, specific acts.—Specific acts of violence by the deceased are not competent to prove his general reputation for quarrelsomeness and vindictiveness.⁴¹ "Where homicide is committed under such circumstances that it is doubtful whether the act was committed maliciously, or from well-grounded apprehension of danger, it is very proper that the jury should consider the fact that the deceased was turbulent, violent and desperate, and in the habit of

³⁵ *S. v. Lee*, 22 Minn. 407, 2 Am. C. R. 63. *Contra*, *Small v. Com.*, 91 Pa. St. 304, 1 Cr. L. Mag. 335; *Voght v. S.*, 145 Ind. 12, 43 N. E. 1049; *Underhill Cr. Ev.*, § 85.

³⁶ *P. v. Fair*, 43 Cal. 137, 1 Green C. R. 221; *Cluck v. S.*, 40 Ind. 263, 1 Green C. R. 735; 3 Greenl. Ev., §§ 24-26; 2 Russell Cr. 785; *Com. v. Hardy*, 2 Mass. 317.

³⁷ *McCarty v. P.*, 51 Ill. 231; *Aiken v. P.*, 183 Ill. 215, 221, 55 N. E. 695; *Stitz v. S.*, 104 Ind. 359, 4 N. E. 145, 5 Am. C. R. 48.

³⁸ *Davis v. P.*, 114 Ill. 86, 29 N. E. 192.

³⁹ *McCarty v. P.*, 51 Ill. 231; *Com.*

v. O'Brien, 119 Mass. 342; *Nelson v. S.*, 32 Fla. 244, 13 So. 361; *Drew v. S.*, 124 Ind. 9, 23 N. E. 1098. See *Underhill Cr. Ev.*, § 82; *P. v. Elliott*, 163 N. Y. 11, 57 N. E. 103, 60 N. Y. Supp. 1145.

⁴⁰ *Aneals v. P.*, 134 Ill. 412, 25 N. E. 1022. See *Underhill Cr. Ev.*, § 82.

⁴¹ *Ferrel v. Com.*, 15 Ky. L. 321, 23 S. W. 344; *P. v. Powell*, 87 Cal. 348, 25 Pac. 481; *S. v. Jones*, 134 Mo. 254, 35 S. W. 607; *Garrett v. S.*, 97 Ala. 18, 14 So. 327; *P. v. Druse*, 103 N. Y. 655, 8 N. E. 733; *Croom v. S.*, 90 Ga. 430, 17 S. E. 1003.

carrying arms, in determining whether the accused had reasonable cause to apprehend great personal injury to himself."⁴²

ARTICLE XX. SUSTAINING EVIDENCE.

§ 3160. Prosecution sustaining witness.—Permitting the prosecution to call witnesses and prove or attempt to prove the general reputation of the prosecutrix to be good is not only improper, but erroneous, in a case of rape, where the evidence is close or the facts conflicting.⁴³ The prosecution is not entitled to introduce original evidence as to the character of the deceased for peace and quietness.⁴⁴

ARTICLE XXI. COMPELLING DEFENDANT TO FURNISH EVIDENCE.

§ 3161. Exhibiting scar.—The prosecuting witness testified that the defendant shot him on the arm. It is proper, on request, to require him to exhibit his arm to the jury; and it is error to refuse the request.⁴⁵

§ 3162. Production of books.—The statute does not give the right to compel the submission of the books of a party to general inspection or examination for fishing purposes, or with a view to find evidence to be used in other suits or prosecutions.⁴⁶

§ 3163. Defendant compelled to give evidence.—Evidence that a witness forcibly placed defendant's foot in certain tracks near the scene of the burglary, and that they were of the same size, is not admissible. A defendant can not be compelled to criminate himself by acts or words. Nor has the court any right to compel the defendant

⁴² *S. v. Keene*, 50 Mo. 358; *P. v. Harris*, 95 Mich. 87, 54 N. W. 648; *Horbach v. S.*, 43 Tex. 242, 1 Am. C. R. 333; *Tiffany v. Com.*, 121 Pa. St. 165, 15 Atl. 462; *Keener v. S.*, 18 Ga. 221; *S. v. Dumphey*, 4 Minn. 446; *P. v. Murray*, 10 Cal. 309; *Gardner v. S.*, 90 Ga. 310, 35 Am. St. 202, 17 S. E. 86. See *Brownell v. P.*, 38 Mich. 732; *S. v. Graham*, 61 Iowa 608, 16 N. W. 743; *Allen v. S.*, 38 Fla. 44, 20 So. 807; *P. v. Stock*, 1 Idaho 218; *Smith v. U. S.*, 161 U. S. 85, 16 S. Ct. 483; *Alexander v. Com.*, 105 Pa. St. 1; *S. v. Keefe*, 54 Kan. 197, 38 Pac. 302; *P. v. Druse*, 103 N. Y. 655, 8 N. E. 733; *S. v. Dill*, 48

S. C. 249, 26 S. E. 567; *Underhill Cr. Ev.*, § 324.

⁴³ *Gifford v. P.*, 148 Ill. 176, 35 N. E. 754.

⁴⁴ *S. v. Potter*, 13 Kan. 414; *Ben v. S.*, 37 Ala. 103; *P. v. Bezy*, 67 Cal. 223, 7 Pac. 643; *S. v. Eddon*, 8 Wash. 292, 36 Pac. 139.

⁴⁵ *King v. S.*, 100 Ala. 85, 14 So. 878. See *Underhill Cr. Ev.*, §§ 53, 54.

⁴⁶ *Lester v. P.*, 150 Ill. 408, 420, 23 N. E. 387, 37 N. E. 1004; *Cutter v. Pool*, 54 How. Pr. (N. Y.) 311; *Whitman v. Weller*, 39 Ind. 515; 2 *Best on Ev.*, § 625.

to stand up and exhibit his person in any respect, in reference to how or where his leg was amputated.⁴⁷

ARTICLE XXII. EVIDENCE ON INSANITY.

§ 3164. **Evidence on insanity.**—Evidence of the acts, conduct and statements of the accused, after as well as before the homicide, may be shown in evidence as tending to show the mental condition of the accused, whether sane or insane.⁴⁸

§ 3165. **Insanity—Medical experts.**—Any practicing physician and surgeon who has had experience in treating cases of insanity is a competent witness to give his opinion on the question of the sanity or insanity of a person, although he has not made insanity a special study.⁴⁹

§ 3166. **Insanity—Common witness competent.**—A common or non-expert witness is competent to testify to the mental state of a person, whether sane or insane, and may give his opinion on the question. But he must first state the facts within his knowledge, upon which he bases his opinion. A non-expert witness can not give an opinion on facts related to him by somebody else.⁵⁰

§ 3167. **Insanity—Reputed to be insane.**—Insanity as a defense can not be shown by evidence that the accused was generally reputed

⁴⁷ *Blackwell v. S.*, 67 Ga. 76, 4 Am. C. R. 184; *S. v. Jacobs*, 5 Jones (N. C.) 259; *Underhill Cr. Ev.*, §§ 58, 337. *Contra*, *P. v. Gardner*, 144 N. Y. 119, 38 N. E. 1003, 9 Am. C. R. 87. See "Witnesses."

⁴⁸ *French v. S.*, 93 Wis. 325, 67 N. W. 706, 10 Am. C. R. 617; *Blume v. S.*, 154 Ind. 343, 56 N. E. 771 (letters); *S. v. Lewis*, 20 Nev. 333, 22 Pac. 241; *P. v. Wood*, 126 N. Y. 249, 27 N. E. 362; 2 *Greenl. Ev.*, § 371; *S. v. Newman*, 57 Kan. 705, 47 Pac. 881; *Underhill Cr. Ev.*, § 159; *S. v. Kelley*, 57 N. H. 549, 3 Am. C. R. 232; *S. v. Kring*, 64 Mo. 591, 2 Am. C. R. 315; *U. S. v. Guiteau*, 10 Fed. 161, 168. See *Com. v. Buceieri*, 153 Pa. St. 535, 26 Atl. 228; *Ragland v. S.*, 125 Ala. 12, 27 So. 983 (letter). See "Defenses."

⁴⁹ *Underhill Cr. Ev.*, § 163, citing *S. v. Reddick*, 7 Kan. 143, 151.

⁵⁰ *Phelps v. Com.*, 17 Ky. L. 706, 32 S. W. 470; *P. v. Strait*, 148 N. Y. 566, 42 N. E. 1045; *Ragland v. S.*, 125 Ala. 12, 27 So. 983; *Blume v. S.*, 154 Ind. 343, 56 N. E. 771; *Herndon v. S.*, 111 Ga. 178, 36 S. E. 634; *Hickman v. S.*, 38 Tex. 190; *P. v. Casey* (Mich.), 82 N. W. 883; *S. v. Williamson*, 106 Mo. 162, 17 S. W. 172; *S. v. Pennyman*, 68 Iowa 216, 26 N. W. 82; *Armstrong v. S.*, 30 Fla. 170, 11 So. 618; *S. v. Genz*, 57 N. J. L. 459, 31 Atl. 1037; *Ellis v. S.*, 33 Tex. Cr. 86, 24 S. W. 894; *S. v. Cross*, 72 Conn. 722, 46 Atl. 148; *Gillett Indirect & Col. Ev.*, § 214. But see *S. v. Holloway*, 156 Mo. 222, 56 S. W. 734. See § 3080; also "Witnesses;" "Defenses."

to be of unsound mind or that his reputation was that of a person of unsound mind, before the crime charged against him.⁵¹

ARTICLE XXIII. PREVIOUS THREATS.

§ 3168. **Previous threats by defendant.**—That evidence of previous threats made by the defendant is competent is too well settled to admit of serious discussion, and such threats may be shown during a long period of time.⁵² But it has been held that evidence of threats previously uttered is a kind of evidence which, under many circumstances, ought to be received with caution.⁵³

§ 3169. **Uncommunicated threats by deceased.**—The decided weight of authority holds that evidence of uncommunicated threats made by the deceased against the defendant is incompetent.⁵⁴ Evidence of threats to hang the accused, which he did not hear or know, could not have explained his conduct or movements, and hence it is not error to reject the same.⁵⁵

§ 3170. **Communicated threats by deceased.**—Evidence that the day before the killing the defendant had been pursued by the father of the deceased, armed with a deadly weapon, seeking to take his life, threatening to kill him on sight, was competent in mitigation of punishment, and it was held error to refuse it.⁵⁶

ARTICLE XXIV. EVIDENCE, WHERE SEVERAL DEFENDANTS.

§ 3171. **Evidence competent against some defendants.**—Evidence competent as to part of the defendants, and not competent as to the

⁵¹ *Brinkley v. S.*, 58 Ga. 296; *P. v. Pico*, 62 Cal. 50; *Cannon v. S.* (Tex. Cr.), 57 S. W. 351. See *Walker v. S.*, 102 Ind. 502, 1 N. E. 856; *Choice v. S.*, 31 Ga. 424; *Underhill Cr. Ev.*, § 160. *Contra*, *S. v. Windsor*, 5 Har. (Del.) 512.

⁵² *Painter v. P.*, 147 Ill. 462, 35 N. E. 64; *S. v. Edwards*, 34 La. 1012; *Jones v. S.*, 64 Ind. 473; *P. v. Duck*, 61 Cal. 387; *Everett v. S.*, 62 Ga. 65; *Redd v. S.*, 68 Ala. 492; *Ford v. S.*, 112 Ind. 373, 14 N. E. 241; *Griffin v. S.*, 90 Ala. 596, 8 So. 670; *Brooks v. Com.*, 98 Ky. 143, 17 Ky. L. 698, 32 S. W. 403; *Brooks v. Com.*, 100 Ky. 194, 18 Ky. L. 702, 37 S. W. 1043; *Linehan v. S.*, 113 Ala. 70, 21 So.

497; *Wilson v. S.*, 110 Ala. 1, 20 So. 415; *Allen v. S.*, 111 Ala. 80, 20 So. 490; *S. v. Larkins* (Idaho), 47 Pac. 945; *Mathis v. S.*, 34 Tex. Cr. 39, 28 S. W. 817; *Underhill Cr. Ev.*, § 328; *S. v. McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. C. R. 543.

⁵³ *Rafferty v. P.*, 72 Ill. 44.

⁵⁴ *S. v. Elliott*, 45 Iowa 486, 2 Am. C. R. 326. See *Burns v. S.*, 49 Ala. 370, 1 Am. C. R. 329; *S. v. Gregor*, 21 La. 473; *Coker v. S.*, 20 Ark. 53; *S. v. Dumphey*, 4 Minn. 438; *Underhill Cr. Ev.*, § 326.

⁵⁵ *Perteet v. P.*, 70 Ill. 176.

⁵⁶ *Nowacryk v. P.*, 139 Ill. 336, 28 N. E. 961; 1 McClain Cr. L., § 412.

others, should be admitted as to them against whom it is competent, and the jury directed not to apply it to the others; and it should be limited and restricted by instructions from the court.⁵⁷

ARTICLE XXV. ACCOMPLICES UNCORROBORATED.

§ 3172. **Testimony of uncorroborated accomplice.**—Convictions may be sustained on testimony of accomplices alone, although the court may in its discretion advise the jury not to convict on such uncorroborated testimony.⁵⁸ "The authorities agree and common sense teaches that the testimony of accomplices is liable to grave suspicion, and should be acted upon with the utmost caution."⁵⁹

§ 3173. **Accomplice—Corroboration required.**—Where by statute a conviction can not be had on the testimony of an accomplice unless corroborated, the corroborating circumstances must be such as connect the prisoners in some way with the crime—to some material matter in issue.⁶⁰

ARTICLE XXVI. DETECTIVE EVIDENCE.

§ 3174. **Evidence of detectives—Received with caution.**—The tes-

⁵⁷ 1 Bish. Cr. Proc., §§ 1034-1053; Crosby v. P., 137 Ill. 334, 27 N. E. 49; Sparf v. U. S., 156 U. S. 51, 15 S. Ct. 273, 10 Am. C. R. 174; 2 Thomp. Trials, §§ 2354, 2415; Williams v. S., 81 Ala. 1, 1 So. 179, 7 Am. C. R. 451; Bennett v. P., 96 Ill. 606. See S. v. Bowker, 26 Or. 309, 9 Am. C. R. 366, 38 Pac. 124; P. v. Maunsausau, 60 Mich. 15, 26 N. W. 797.

⁵⁸ Hoyt v. P., 140 Ill. 595, 30 N. E. 315; Friedberg v. P., 102 Ill. 164; Collins v. P., 98 Ill. 587; Cross v. P., 47 Ill. 159; Gray v. P., 26 Ill. 347; S. v. Watson, 31 Mo. 361; Parsons v. S., 43 Ga. 197; Honselman v. P., 168 Ill. 176, 48 N. E. 304; Conley v. P., 170 Ill. 592, 48 N. E. 911. See "Witnesses." S. v. Jarvis, 18 Or. 360, 8 Am. C. R. 367, 23 Pac. 251; Lee v. S., 21 Ohio St. 151; Lopez v. S., 34 Tex. 133; Sumpter v. S., 11 Fla. 247; Foster v. P., 18 Mich. 266; S. v. Stebbins, 29 Conn. 463; S. v. Potter, 42 Vt. 495; Best on Ev., § 170, p. 266; 1 Greenl. Ev., § 379; 1 Hale P. C. 304; 1 Roscoe Cr. Ev. 198, note

1, 201; Love v. P., 160 Ill. 502, 43 N. E. 710; Rider v. P., 110 Ill. 15; Campbell v. P., 159 Ill. 26, 42 N. E. 123; S. v. Chyo Chiagk, 92 Mo. 395, 4 S. W. 704, 7 Am. C. R. 418, 8 Cr. L. Mag. 6.

⁵⁹ Hoyt v. P., 140 Ill. 595, 30 N. E. 315; Friedberg v. P., 102 Ill. 164; White v. S., 52 Miss. 216; S. v. Jones, 64 Mo. 391; Lindsay v. P., 63 N. Y. 143; Conley v. P., 170 Ill. 592, 48 N. E. 911; Waters v. P., 172 Ill. 371, 50 N. E. 148; Carroll v. S., 5 Neb. 31; Keech v. S., 15 Fla. 591. See "Witnesses."

⁶⁰ Middleton v. S., 52 Ga. 527, 1 Am. C. R. 196; S. v. Scott, 28 Or. 331, 42 Pac. 1, 10 Am. C. R. 16; S. v. Callahan, 47 La. 444, 17 So. 50, 10 Am. C. R. 112. The evidence of an accomplice in the following cases was reviewed and held not sufficient to sustain convictions: Campbell v. P., 159 Ill. 26, 42 N. E. 123; Conley v. P., 170 Ill. 588, 48 N. E. 911; Waters v. P., 172 Ill. 370, 50 N. E. 148. See also S. v. Maney, 54 Conn. 178, 6 Atl. 401, 7 Am. C. R. 26, 8 Cr. L. Mag. 1, 8.

timony of detectives should be received with great caution and distrust.⁶²

ARTICLE XXVII. OPINION EVIDENCE.

§ 3175. **Opinions of common witnesses.**—Opinions of ordinary witnesses are, under certain circumstances, necessary and competent, —as, where facts which are made up of a great variety of circumstances and a combination of appearances which can not be properly described may be shown by witnesses who observed them; and where their observation is such as to justify it, they may state the conclusions of their own minds. In this category may be placed matters involving magnitude or quantities, portions of time, space, motion, gravitation, value; appearances of persons or things such as hope, fear, grief, joy, anger, excitement, etc.⁶³ An opinion must be based upon facts, knowledge or experience, examination or observation of a witness, before he or she is warranted in giving such testimony.⁶⁴

§ 3176. **Opinion on intoxication.**—A witness may not only state how the supposed intoxicated person acted, but he may also state whether he appeared to be intoxicated or not; he may give his opinion as to whether the person was intoxicated or not.⁶⁵

ARTICLE XXVIII. EXPERT EVIDENCE.

§ 3177. **Expert testimony, when incompetent.**—Whether or not wounds found upon the body of a dead person were such as could or could not have been made by a railroad train is not a proper subject permitting expert testimony by physicians who have seen the bodies of persons killed by moving trains.⁶⁶ Whenever the subject-matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education, moving in the ordinary walks of life, the rule is that the opinions of experts are

⁶² S. v. McKean, 36 Iowa 343, 2 Green C. R. 635; Needham v. P., 98 Ill. 277; Chapman v. Chapman, 129 Ill. 390, 21 N. E. 806; Underhill Cr. Ev., § 4. See "Witnesses."

⁶³ S. v. Baldwin, 36 Kan. 1, 12 Pac. 318; 7 Am. C. R. 383, citing Lawson Exp. & Opin. Ev., rule 64; 2 Best Ev., § 517.

⁶⁴ P. v. Olmstead, 30 Mich. 431, 1

Am. C. R. 303; S. v. Mims, 36 Or. 315, 61 Pac. 888. See § 3038.

⁶⁵ S. v. Mayberry, 33 Kan. 441, 6 Pac. 553, 5 Am. C. R. 372; 1 Greenl. Ev., § 440a; Lawson Exp. & Opin. Ev. 473; Rogers Exp. Test., § 5; P. v. Eastwood, 14 N. Y. 565.

⁶⁶ Hellyer v. P., 186 Ill. 550, 58 N. E. 245.

inadmissible.⁶⁷ The quantity and quality of the light of the moon are not the subject of expert testimony.^{67a}

§ 3178. Opinion of medical expert—Contradicting.—A medical expert, in support of his opinion, may state all the writers on the subject, so far as he knows, to support him in his opinion.⁶⁸ Where an expert assumes to base his opinion upon the work of a particular author, that work may be read in evidence to contradict him.⁶⁹

ARTICLE XXIX. SCIENTIFIC BOOKS.

§ 3179. Scientific books incompetent.—The weight of current authority is decidedly against the admission of scientific books in evidence before a jury; and such treatises can not be read from to contradict an expert witness, generally; nor read by counsel in his argument to the jury.⁷⁰

§ 3180. Result of examination of books.—The witness (an expert) was allowed to give the result of his examination of a mass of books and papers too voluminous to be conveniently examined in court, and in such cases it is competent for the witness to speak as to the result of the accounts, the books and papers being present on the trial and in evidence.⁷¹

ARTICLE XXX. WITNESS' FORMER TESTIMONY.

§ 3181. Witness' former testimony.—What a witness may have testified to on a former occasion about the same transaction (as at the coroner's inquest) is not competent evidence on the trial.⁷²

⁶⁷ *Hellyer v. P.*, 186 Ill. 550, 58 N. E. 245; *Rogers Exp. Test.*, § 8.

^{67a} *Green v. S.*, 154 Ind. 655, 57 N. E. 637. See *Clay v. S.* (Tex. Cr.), 56 S. W. 629.

⁶⁸ *S. v. Baldwin*, 36 Kan. 1, 12 Pac. 318, 7 Am. C. R. 391; *Carter v. S.*, 2 Ind. 617; *Collier v. Simpson*, 5 C. & P. 460. See "Witnesses."

⁶⁹ *City of Bloomington v. Shrock*, 110 Ill. 222; *Conn. Mutual Life Ins. Co. v. Ellis*, 89 Ill. 519; *Huffman v. Click*, 77 N. C. 55; *Ripon v. Bittel*, 30 Wis. 614; *Pinny v. Cahill*, 48 Mich. 584, 12 N. W. 862.

⁷⁰ *City of Bloomington v. Shrock*, 110 Ill. 221; *Whar. Cr. Ev.* (8th ed.), § 538; *Rogers Exp. Test.*, §§ 168, 169; *P. v. Hall*, 48 Mich. 482, 12 N.

W. 665, 4 Am. C. R. 363, 42 Am. R. 477; *S. v. Baldwin*, 36 Kan. 1, 12 Pac. 318, 7 Am. C. R. 390; *S. v. Peterson*, 110 Iowa 647, 82 N. W. 329; *Epps v. S.*, 102 Ind. 539, 1 N. E. 491, 5 Am. C. R. 525; 1 Greenl. Ev., § 497, and note; *Gillett Indirect & Col. Ev.*, § 85; *P. v. Wheeler*, 60 Cal. 581, 4 Am. C. R. 192; *Reg. v. Taylor*, 13 Cox C. C. 77; *S. v. O'Brien*, 7 R. I. 338.

⁷¹ 1 Greenl. Ev., § 93; *Hollingsworth v. S.*, 111 Ind. 289, 12 N. E. 490; *Whar. Cr. Ev.* (9th ed.), § 166; *S. v. Findley*, 161 Mo. 217, 14 S. W. 185, 8 Am. C. R. 194; *Underhill Cr. Ev.*, §§ 45, 291.

⁷² *Purdy v. P.*, 140 Ill. 52, 29 N. E. 700; *Ritter v. P.*, 130 Ill. 255, 22 N.

ARTICLE XXXI. IMPEACHING EVIDENCE.

§ 3182. **Impeaching witness—Infamous crime.**—The prosecution, in undertaking to discredit a witness because of his former conviction of some infamous crime, must make legal proof of that fact. Oral proof, or *mittimus* by which he is detained in prison, is not competent. The record of conviction is necessary.⁷³

ARTICLE XXXII. EVIDENCE OF ABSENT WITNESS.

§ 3183. **Testimony of absent or dead witness.**—The testimony given by an absent witness on a former trial can not be proved in a criminal trial. The courts allow such testimony when the witness is dead, but not upon the sole ground that he is absent from the state, and beyond the jurisdiction of the court.⁷⁴

ARTICLE XXXIII. HANDWRITING, EVIDENCE OF.

§ 3184. **Handwriting by comparison—Expert.**—The genuineness of handwriting can not be proved or disproved by allowing the jury to compare it with the handwriting of the party proved or admitted to be genuine.⁷⁵ But a comparison of handwritings may be made by the jury of different papers which are pertinent and introduced as evidence in the case.⁷⁶ And expert testimony may be introduced to show that two different names on two different documents in evidence were written by the same person.⁷⁷

ARTICLE XXXIV. ESTOPPEL NOT APPLICABLE.

§ 3185. **Estoppel not applicable.**—The doctrine of estoppel has no application to criminal causes. The accused may show the actual

E. 605; S. v. Row, 81 Iowa 138, 46 N. W. 872.

⁷³ Bartholomew v. P., 104 Ill. 608; Kirby v. P., 123 Ill. 438, 15 N. E. 33; 1 Greenl. Ev. (Redf. ed.), § 375. See "Witnesses."

⁷⁴ Collins v. Com., 12 Bush (Ky.) 271, 2 Am. C. R. 283; Thompson v. S., 106 Ala. 67, 17 So. 512; P. v. Newman, 5 Hill (N. Y.) 296; Bass v. S., 136 Ind. 165, 36 N. E. 124; S. v. Johnson, 12 Nev. 121; S. v. McNeil, 33 La. 1332. See "Witnesses."

⁷⁵ Jumpertz v. P., 21 Ill. 408; Kernin v. Hill, 37 Ill. 209. See P. v. Dorthy, 63 N. Y. Supp. 592, 14 N. Y.

Cr. 545. *Contra*, S. v. Thompson, 80 Me. 194, 7 Am. C. R. 169, 13 Atl. 892; Costelo v. Crowell, 139 Mass. 590, 2 N. E. 698; S. v. Hastings, 53 N. H. 452, 2 Green C. R. 341.

⁷⁶ Brobston v. Cahill, 64 Ill. 358; Thomas v. S., 103 Ind. 419, 2 N. E. 808; S. v. Clinton, 67 Mo. 380, 3 Am. C. R. 135; 3 Greenl. Ev. (Redf. ed.), § 106; Underhill Cr. Ev., § 429.

⁷⁷ Cross v. P., 47 Ill. 163; S. v. Clinton, 67 Mo. 380, 3 Am. C. R. 135; P. v. Schooley, 149 N. Y. 99, 43 N. E. 536; P. v. Parker, 67 Mich. 222, 34 N. W. 720.

state of facts, notwithstanding what he may have said or done.⁷⁸ A written warranty on the sale of property will not preclude the prosecution from showing the true state of facts, in proving fraudulent, criminal conduct.⁷⁹

ARTICLE XXXV. PHOTOGRAPHIC PICTURES.

§ 3186. **Evidence by photographic pictures.**—A photographic copy of a writing, having been taken because it was fading, may be used as parol evidence after the original has so faded as to become illegible, for the purpose of proving the original to be the same.⁸⁰ And a photograph taken from life of a person, and proved to resemble him, may be used to identify him in the absence of such person.⁸¹

ARTICLE XXXVI. "CHECKS," "SLIPS."

§ 3187. **"Check slips" for shipping.**—For the purpose of showing that the goods were placed on the cars and regularly trans-shipped from one car to another, until placed on the car from which it was claimed to have been stolen, "check slips" containing the number of the car to which the goods were transferred, and the descriptive marks on the goods, were offered in evidence, on the part of the state, together with the testimony of a witness at each trans-shipment that, in the regular course of business, it was the duty of the one placing goods in the cars to call the description of the goods; that it was the duty of the witness to check all freight so called to him; that he had no recollection of the goods in question, or the "check slips," but they were made in the regular course of business, in his own handwriting, at the time the goods must have passed into the cars. Held competent.⁸²

⁷⁸ *S. v. Hutchinson*, 60 Iowa 478, 4 Am. C. R. 163, 164, 15 N. W. 298; *Jackson v. P.*, 126 Ill. 144, 18 N. E. 286; *Gillett Indirect & Col. Ev.*, § 119.

⁷⁹ *Jackson v. P.*, 126 Ill. 144, 18 N. E. 286.

⁸⁰ *Duffin v. P.*, 107 Ill. 120.

⁸¹ *Udderzook v. Com.*, 76 Pa. St. 340, 1 Am. C. R. 313. See also *P. v. Jackson*, 111 N. Y. 362, 19 N. E. 54;

P. v. Webster, 139 N. Y. 73, 34 N. E. 730; *P. v. Durrant*, 116 Cal. 179, 48 Pac. 75, 10 Am. C. R. 525; *Wilson v. U. S.*, 162 U. S. 613, 16 S. Ct. 895; *S. v. O'Reilly*, 126 Mo. 597, 29 S. W. 577; *Underhill Cr. Ev.*, § 50; *Gillett Indirect & Col. Ev.*, § 82.

⁸² *Schriedley v. S.*, 23 Ohio St. 130, 2 Green C. R. 531; *Moots v. S.*, 21 Ohio St. 653.

ARTICLE XXXVII. FICTITIOUS PERSON—EVIDENCE OF.

§ 3188. **Fictitious person—Evidence.**—Where inquiries are to be made in regard to the residence or existence of any supposed party to a forged instrument, it is proper and usual to call the police officers, penny-postman or other persons well acquainted with the place and its inhabitants, but the results of inquiries made by strangers in the place are also competent.⁸³

ARTICLE XXXVIII. PROVING CORPORATION.

§ 3189. **Proof of corporation.**—A statute providing “that in all criminal prosecutions involving proof of the legal existence of a corporation, user shall be *prima facie* evidence of such existence,” is comprehensive enough to include all corporations organized under the laws of the state or the laws of other states and doing business in the state in which such statute exists.⁸⁴

§ 3190. **Proving acts of corporation.**—The defendant offered to prove that a majority of the board of trustees of a corporation of which he was a member assented to the removal of some trees, which he was indicted for willfully cutting and removing from premises which it controlled, which was excluded by the court. Held error, the general rule of proving the acts of corporations not applying.⁸⁵

ARTICLE XXXIX. REBUTTAL EVIDENCE.

§ 3191. **Evidence in rebuttal.**—The court may in its discretion allow evidence in rebuttal which strictly should have been offered in chief.⁸⁶

§ 3192. **Evidence rebutting suicide theory.**—A letter by the deceased, written to her mother just before her death and postmarked afterwards, clearly showed by its contents that she was in a healthful

⁸³ 3 Greenl. Ev., § 109; Com. v. Meserve, 154 Mass. 66, 27 N. E. 997; P. v. Sharp, 53 Mich. 523, 19 N. W. 168; P. v. Jones, 106 N. Y. 523, 13 N. E. 93.

⁸⁴ Kincaid v. P., 139 Ill. 216, 28 N. E. 1060. See Waller v. P., 175 Ill. 222, 51 N. E. 900; S. v. Thompson, 23 Kan. 328 32 Am. R. 165. See

generally S. v. Missio, 105 Tenn. 218, 53 S. W. 216.

⁸⁵ Mettler v. P., 135 Ill. 415, 25 N. E. 748.

⁸⁶ Simons v. P., 150 Ill. 76, 36 N. E. 1019. But see 1 Thomp. Trials, § 344. See P. v. Mayes, 113 Cal. 618, 45 Pac. 860; S. v. Jaggars, 58 S. C. 41, 36 S. E. 434 (threats).

condition of body and mind; she spoke of home affairs, noted the occurrences of the town; spoke hopefully of the future. The letter indicated cheerfulness and contentment, and its contents were wholly inconsistent with the theory of suicide, and for that reason and purpose it was admissible to disprove the theory of the defense.⁸⁷

ARTICLE XL. PROOF OF VENUE.

§ 3193. **Evidence proving venue.**—Where the evidence showed that the offense was committed on Washington street, in Peoria, Illinois, it was held sufficient proof of the commission of the offense in Peoria county.⁸⁸ Proof that a crime was committed in Chicago is sufficient proof that it was committed in "Cook county."⁸⁹ Proof that a crime was committed within fifty yards of a residence, and that the residence was within the county mentioned, is sufficient.⁹⁰

§ 3194. **Venue by circumstantial evidence.**—The venue must always be proved by the prosecution, but it may be shown by circumstantial evidence, and the doctrine of reasonable doubt does not apply.⁹¹

§ 3195. **Venue—Railroad offense.**—The statute of Illinois provides that where any offense is committed upon any railroad car passing over any railroad, and it can not be determined in what county the offense was committed, the accused may be indicted and tried in any county through or into which the car may pass or come. Held to be a transitory offense.⁹²

⁸⁷ *S. v. Baldwin*, 36 Kan. 1, 12 Pac. 318, 7 Am. C. R. 387; 3 Greenl. Ev., § 135.

⁸⁸ *Sullivan v. P.*, 114 Ill. 26, 28 N. E. 381; *Moore v. P.*, 150 Ill. 407, 37 N. E. 909; *S. v. Cantieny*, 34 Minn. 1, 24 N. W. 458, 6 Am. C. R. 420; *Cluck v. S.*, 40 Ind. 263, 1 Green C. R. 736.

⁸⁹ *Sullivan v. P.*, 122 Ill. 387, 13 N. E. 248. See *S. v. Dent*, 6 Rich. (S. C.) 383, 3 Am. C. R. 421; *P. v. Van Maren* (Mich.), 85 N. W. 240.

⁹⁰ *Gosha v. S.*, 56 Ga. 36, 2 Am. C. R. 590; *Franklin v. S.*, 5 Baxt. (Tenn.) 613; 1 McClain Cr. L., § 395.

⁹¹ *Cox v. S.*, 28 Tex. App. 92, 12 S. W. 493; *Clark v. S.*, 110 Ga. 911, 36 S. E. 297; *Boggs v. S.* (Tex. Cr.), 25 S. W. 770; *Wilson v. S.*, 62 Ark. 497, 36 S. W. 842; *Robson v. S.*, 83 Ga. 166, 9 S. E. 610; *S. v. Hawkins* (Neb.), 83 N. W. 198; *Tinney v. S.*, 111 Ala. 74, 20 So. 597; *Brooke v. P.*, 23 Colo. 375, 48 Pac. 502; *S. v. Cantieny*, 34 Minn. 1, 24 N. W. 458, 6 Am. C. R. 420; *Underhill Cr. Ev.*, §§ 35, 36; *Bloom v. S.*, 68 Ark. 336, 58 S. W. 41. *Contra*, *Rooks v. S.*, 65 Ga. 330, 4 Am. C. R. 484.

⁹² *Watt v. P.*, 126 Ill. 9, 18 N. E. 340.

§ 3196. Venue—Proof not sufficient.—The evidence must affirmatively show that the offense was committed in the county alleged in the indictment; the proof showing the crime was committed in Upper Alton is not sufficient to prove that the offense was committed “in Madison county.” Names of streets are not sufficient.⁹³

§ 3197. Date alleged immaterial.—The prosecution will not be restricted to the day alleged in the indictment on which the crime is charged to have been committed.⁹⁴

ARTICLE XLI. VARIANCE, WHEN.

§ 3198. When no variance—When variance.—“An indictment describing a thing by its generic term is supported by proof of a species which is clearly comprehended within such description.” Thus, if the charge be of poisoning by a certain kind of drug, and the proof be of poisoning by another drug; or if the charge be of felonious assault with a staff, and the proof be of such assault with a stone; or if the charge be a wound with a sword, and the proof be a wound with an ax, there is no variance.⁹⁵ An indictment alleging that the defendant struck the deceased with a piece of brick, giving him a mortal wound, and the proof that the blow was given with the fist by the defendant, and from such blow the deceased fell upon a piece of brick, was held a fatal variance.⁹⁶

§ 3199. Variance—Grand jury knew.—The burden is on the defendant to show that the grand jury, at the particular time of finding the indictment, knew the names of the parties described in the indictment as unknown, if he would take advantage of that point.⁹⁷

§ 3200. Variance—Different assault.—Under an indictment charging but a single assault and battery, the prosecution, having intro-

⁹³ Moore v. P., 150 Ill. 406, 407, 37 N. E. 909; Rice v. P., 38 Ill. 435-6; Jackson v. P., 40 Ill. 405; Sattler v. P., 59 Ill. 68; Dougherty v. P., 118 Ill. 163, 8 N. E. 673; Rooks v. S., 65 Ga. 330, 4 Am. C. R. 484; S. v. Hartnett, 75 Mo. 251, 4 Am. C. R. 573; P. v. Parks, 44 Cal. 105, 2 Green C. R. 398; Jones v. S., 58 Ark. 390, 24 S. W. 1073.

⁹⁴ S. v. Dawkins, 32 S. C. 17, 10 S. E. 772.

⁹⁵ 1 Greenl. Ev. (Redf. ed.), § 65; 3 Greenl. Ev. (Redf. ed.), § 140.

⁹⁶ Guedel v. P., 43 Ill. 228; Underhill Cr. Ev., § 32. See “Variance.”

⁹⁷ Guthrie v. S., 16 Neb. 667, 21 N. W. 455, 4 Am. C. R. 80; Com. v. Hill, 11 Cush. (Mass.) 137; Com. v. Gallagher, 126 Mass. 54.

duced evidence of an assault and battery upon the prosecuting witness, committed on a certain occasion, can not afterwards introduce evidence of any subsequent distinct or separate assault and battery committed by the defendant on the same person. The prosecution is bound by the evidence of the first assault and battery.⁹⁸

§ 3201. **Variance—Gaming case.**—The indictment alleges that the defendant, “on the first day of January, in the year of our Lord, etc., and on divers other days and times before and since that day, at the county aforesaid, unlawfully did keep and deal and permit to be kept and dealt in a building under his control, a certain game of chance, played with cards, for money and other representatives of value, commonly called and known as poker, contrary,” etc. Held but a single offense was charged and evidence of only one act competent, and when such single offense has been fixed (by the evidence) as to time and place, the proof should be confined to it alone.⁹⁹

ARTICLE XLII. JURY TO WEIGH EVIDENCE.

§ 3202. **Jury must weigh evidence.**—Where there is any testimony which has any legal effect it would be error in the court to determine the weight of it, or the fact which it did or did not ascertain. But whether the evidence tends to prove anything pertinent to the issue is a question for the court.¹⁰⁰ At common law the judge of the court sums up and comments upon the evidence, and may express his own opinion as to its weight, but by statutory provisions, in perhaps all of the states, this rule or practice has been changed.¹

§ 3203. **Jury viewing premises.**—The court may in its discretion permit the jury to visit and view the premises where it is alleged a crime was committed, not for the purpose of furnishing evidence upon which a verdict is to be found, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court.²

⁹⁸ Richardson v. S., 63 Ind. 192, 3 Am. C. R. 303; Fields v. Ter., 1 Wyo. 78, 3 Am. C. R. 320; S. v. Bates, 10 Conn. 372; 2 Greenl. Ev., § 624.

⁹⁹ Fields v. Ter., 1 Wyo. 78, 3 Am. C. R. 320.

¹⁰⁰ S. v. Rheams, 34 Minn. 18, 24

N. W. 302, 6 Am. C. R. 541; 1 Greenl. Ev. (14th ed.), § 49.

¹ Chambers v. P., 105 Ill. 417; Com. v. Child, 10 Pick. (Mass.) 252.

² Chute v. S., 19 Minn. 271, 1 Green C. R. 575; Com. v. Knapp, 9 Pick. (Mass.) 515; Gillett Indirect & Col. Ev., § 86.

ARTICLE XLIII. CIRCUMSTANTIAL EVIDENCE.

§ 3204. **Two kinds—Certain, and uncertain—Sufficiency.**—Circumstantial evidence is of two kinds: 1. Certain, where a conclusion necessarily follows. 2. Uncertain, where the conclusion is probable and is reached by a process of reasoning.³ Circumstantial evidence alone is sufficient to warrant a conviction of any criminal offense, however heinous, provided the evidence convinces the jury of the guilt of the accused beyond a reasonable doubt.⁴ “What circumstances amount to proof of an offense can never be a matter of general definition. The test is the sufficiency of evidence to satisfy the understanding and conscience of the jury.”⁵

§ 3205. **To be acted upon cautiously.**—“All presumptive evidence should be acted upon cautiously, for the law holds that it is better that ten guilty persons escape than that one innocent suffer.”⁶

ARTICLE XLIV. RULES AS TO CIRCUMSTANTIAL EVIDENCE.

§ 3206. **Weight of “each link.”**—Where circumstantial evidence alone is relied upon for a conviction, each necessary link and each and every material fact upon which a conviction depends must be proved beyond a reasonable doubt.⁷

§ 3207. **Facts must be consistent.**—It has always been held, in cases of purely circumstantial evidence, that if any of the essential facts or circumstances be absolutely inconsistent with the hypothesis

³Gannon v. P., 127 Ill. 520, 21 N. E. 525; 1 Greenl. Ev. (14th ed.), § 13a.

⁴Carlton v. P., 150 Ill. 187, 37 N. E. 244; P. v. Daniels (Cal.), 34 Pac. 233; S. v. Avery, 113 Mo. 475, 21 S. W. 193; S. v. Slingerland, 19 Nev. 135, 141, 7 Pac. 280; S. v. Hunter, 50 Kan. 302, 32 Pac. 37; S. v. Elsham, 70 Iowa 531, 31 N. W. 66.

⁵Bonardo v. P., 182 Ill. 417, 55 N. E. 519, citing Raggio v. P., 135 Ill. 533, 26 N. E. 377; Carlton v. P., 150 Ill. 181, 37 N. E. 244.

⁶4 Bl. Com. 359; 1 Roscoe Cr. Ev. 24.

⁷P. v. Aiken, 66 Mich. 460, 33 N.

W. 821, 7 Am. C. R. 363; S. v. Kruger (Idaho), 61 Pac. 36; Bressler v. P., 117 Ill. 438, 8 N. E. 62; P. v. Fairchild, 48 Mich. 37, 11 N. E. 773; Burrill Cir. Ev. 773, 736; 2 Thomp. Trials, § 2511; 1 Roscoe Cr. Ev. 27; Graves v. P., 18 Colo. 170, 32 Pac. 63; Marion v. S., 16 Neb. 349, 20 N. W. 289; Com. v. Webster, 5 Cush. (Mass.) 295; P. v. Phipps, 39 Cal. 333; P. v. Anthony, 56 Cal. 397; S. v. Gleim, 17 Mont. 17, 10 Am. C. R. 52, 41 Pac. 998; S. v. Furney, 41 Kan. 115, 8 Am. C. R. 137, 21 Pac. 213; Kollock v. S., 88 Wis. 663, 60 N. W. 817.

of guilt, that hypothesis can not be true. The hypothesis of guilt is to be compared with the facts proved, and with all of them.⁸

§ 3208. Facts consistent with guilt.—In all cases of circumstantial evidence the rule is now established by a great preponderance of authorities that it is necessary not only that the circumstances shall all concur to show that the prisoner committed the crime, but that they are all inconsistent with any other rational conclusion.⁹ Where a criminal charge is to be proved by circumstantial evidence, the proof ought to be not only consistent with the prisoner's guilt, but inconsistent with every other rational conclusion.¹⁰

§ 3209. Facts must exclude other theory.—"Where the evidence is entirely circumstantial, then the rule is that before a conviction can be properly had the guilt of the accused must be so thoroughly established as to exclude every other reasonable theory."¹¹

§ 3210. Facts shall lead to certainty.—In order to warrant a conviction on circumstantial evidence, the circumstances, taken together, should be of a conclusive nature and tendency, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no one else, committed the offense charged.¹²

§ 3211. Facts leading to inference.—All facts and circumstances upon which any reasonable inference or presumption can be founded,

⁸ *P. v. Aiken*, 66 Mich. 460, 7 Am. C. R. 363, 33 N. W. 821; *Wills Cir. Ev.* (3d ed.), 17; *Whar. Cr. Ev.* (9th ed.), § 18; *Burrill Cir. Ev.* 736.

⁹ 3 Greenl. Ev. (Redf. ed.), § 137; 1 Roscoe Cr. Ev. (8th ed.), 25; *P. v. Bennett*, 49 N. Y. 139; 1 McClain Cr. L., § 409; *Schusler v. S.*, 29 Ind. 394; *Gillett Indirect & Col. Ev.*, § 53.

¹⁰ 1 Greenl. Ev. (Redf. ed.), § 34; *P. v. Davis*, 64 Cal. 440, 1 Pac. 889, 4 Am. C. R. 515; *Smith v. S.*, 35 Tex. Cr. 618, 34 S. W. 960; *Carlton v. P.*, 150 Ill. 181, 37 N. E. 244; *S. v. David*, 131 Mo. 380, 33 S. W. 28; *Lancaster v. S.*, 91 Tenn. 267, 18 S. W. 777; *S. v. Asbell*, 57 Kan. 398, 46 Pac. 770; *P. v. Foley*, 64 Mich.

148, 31 N. W. 94; *Howard v. S.*, 108 Ala. 571, 18 So. 813; *Underhill Cr. Ev.*, § 6.

¹¹ *Purdy v. P.*, 140 Ill. 48, 29 N. E. 700; *Marzen v. P.*, 173 Ill. 62, 50 N. E. 249; *P. v. Kennedy*, 32 N. Y. 141; *P. v. Strong*, 30 Cal. 151; *Coleman v. S.*, 26 Fla. 61, 7 So. 367; *Com. v. Webster*, 5 Cush. (Mass.) 313; *Crow v. S.*, 33 Tex. App. 264, 26 S. W. 209; *Thomp. Trials*, § 2505; *Dreessen v. S.*, 38 Neb. 375, 56 N. W. 1024; 1 *Starkie Ev.* 577; *Burrill Cir. Ev.* 728-738; *P. v. Cunningham*, 6 Park. Cr. (N. Y.) 608.

¹² *Dunn v. P.*, 158 Ill. 593, 42 N. E. 47; *Carlton v. P.*, 150 Ill. 187, 37 N. E. 244.

as to the truth or falsity of the issue or of a disputed fact, are admissible in evidence.¹³ A fact may be inferred from the proof of other facts; but a presumption of fact is not warranted unless it rests upon a fact proven.¹⁴ Motives to commit crime, declarations or acts indicative of guilty consciousness or intention, or preparation for the commission of crime, are circumstances which may be judicially considered as leading to important and well-grounded presumption.¹⁵

§ 3212. Facts tending to prove issue.—Evidence of tracks in the lane leading from the road to the house, corresponding to the track of the defendant, coupled with previous threats of the defendant and his declarations in the nature of threats, are competent evidence and properly admissible with the other circumstances, though not of themselves convincing of guilt.¹⁶

§ 3213. Degree of certainty.—Absolute, metaphysical and demonstrative certainty is not essential to proof of circumstances.¹⁷ In no case ought the force of circumstantial evidence to warrant conviction be inferior to the evidence of a single eye-witness.¹⁸

¹³ *Tenney v. Smith*, 63 Vt. 520, 22 Atl. 659; *S. v. Burpee*, 65 Vt. 1, 25 Atl. 964, 9 Am. C. R. 537.

¹⁴ *Robbins v. P.*, 95 Ill. 178; *Graves v. Colwell*, 90 Ill. 612; *Hamilton v. P.*, 29 Mich. 195. See *Carlton v. P.*, 150 Ill. 181, 37 N. E. 244.

¹⁵ *Carlton v. P.*, 150 Ill. 187, 37 N. E. 244; *Willis Cir. Ev.* 39; *Stitz v. S.*, 104 Ind. 359, 4 N. E. 145, 5 Am. C. R. 50.

¹⁶ *Carlton v. P.*, 150 Ill. 187, 37 N. E. 244; *S. v. Melick*, 65 Iowa 614, 22 N. W. 895, 5 Am. C. R. 52; *Shannon v. S.*, 57 Ga. 482, 2 Am. C. R. 57; *Whar. Cr. Ev.* (8th ed.), § 756.

¹⁷ 1 *Starkie Ev.*, § 79; *Otmer v. P.*, 76 Ill. 149; *Com. v. Goodwin*, 14 Gray (Mass.) 55; 1 *Greenl. Ev.* (Redf. ed.), § 13a; *Costley v. Com.*, 118 Mass. 1; *Whar. Cr. Ev.* (8th ed.), § 21; *Carlton v. P.*, 150 Ill. 181, 191, 37 N. E. 244.

¹⁸ 2 *Thomp. Trials*, § 2501. The evidence in the following cases was entirely circumstantial, and was held sufficient to sustain convictions: *Carroll v. P.*, 136 Ill. 457, 27 N. E. 18 (larceny); *Gannon v. P.*, 127 Ill. 510, 21 N. E. 525.

CHAPTER LXXXV.

VARIANCE.

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ARTICLE I. PERSONS UNKNOWN.

§ 3214. **Principal “unknown”**—Principal and accessory.—Where there are two counts, one charging the principal to be known, and the other charging him to be unknown, it is sufficient if either is proven.¹

¹ *Spies v. P.*, 122 Ill. 1, 12 N. E. 112 Pa. St. 220, 5 Atl. 309; *S. v. 865*, 17 N. E. 898, 6 Am. C. R. 692; *Green*, 26 S. C. 105, 128; *Reg. v. Ritzman v. P.*, 110 Ill. 362; *Brennan Tyler*, 8 C. & P. 616; 1 *Bish. Cr. L.*, v. P., 15 Ill. 516; *Pilger v. Com.*, §§ 651, 677.

If, on an indictment of a principal and an accessory, it be alleged in the indictment that the principal is unknown, and the proof on the trial shows that he was known, there is a fatal variance.²

§ 3215. Injured person unknown.—Where a grand jury finds an indictment against a defendant and alleges the offense with reference to some person unknown to the grand jury, the defendant can be convicted only of an offense concerning some person who was in fact unknown to the grand jury, and whose name had not been disclosed to them.³

ARTICLE II. PERSON INJURED: NAME.

§ 3216. Name of person injured.—The indictment alleging the murder of "Patrick Fitz Patrick" will not be supported by proof of the murder of "Patrick Fitzpatrick."⁴ An allegation of the killing of "Robert Kain" is not supported by evidence of the killing of "Kain." There is a fatal variance.⁵ Charging the defendant with adultery with "Mary Hite" is not supported by evidence of that offense with "May Hyde."⁶

ARTICLE III. DESCRIPTION OF PROPERTY.

§ 3217. Description of property—Name.—An indictment alleged the larceny of a "Smith & Weston" revolver, and the revolver introduced in evidence was a "Smith & Wesson." Held a variance.⁷

ARTICLE IV. NAME OF CORPORATION.

§ 3218. Name of corporation.—The indictment alleged that the defendant defrauded the "Merchants' Loan and Trust Company," or-

² Presley v. S., 24 Tex. App. 494, 6 S. W. 540, 7 Am. C. R. 244; Reese v. S., 90 Ala. 626, 8 So. 818; 3 Greenl. Ev., § 22; Morgenstern v. Com., 27 Gratt. (Va.) 1018, 2 Am. C. R. 477; Merwin v. P., 26 Mich. 298, 1 Green C. R. 351; Hays v. S., 13 Mo. 246; Lane v. S. (Tex. Cr.), 45 S. W. 693. See Guthrie v. S., 16 Neb. 667, 21 N. W. 455, 4 Am. C. R. 80.

³ S. v. Brooks, 33 Kan. 708, 7 Pac. 591, 6 Am. C. R. 304; Spies v. P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 6 Am. C. R. 692; 1 Bish. Cr. Proc.,

§§ 546, 553; Rex v. Blick, 4 C. & P. 377.

⁴ Moynahan v. P., 3 Colo. 367. See McFarland v. S., 154 Ind. 442, 56 N. E. 910.

⁵ Penrod v. P., 89 Ill. 150; Perry v. S., 4 Tex. App. 566; McFarland v. S., 154 Ind. 442, 56 N. E. 910; Underhill Cr. Ev., § 316.

⁶ S. v. Williams (Ark.), 57 S. W. 792. See Little v. P., 157 Ill. 156, 42 N. E. 389.

⁷ Morgan v. S., 61 Ind. 447, 3 Am. C. R. 246.

ganized by the laws of Illinois. The proof showed the name of the corporation was "The Merchants' Savings, Loan and Trust Company." Held to be a clear and material variance.⁸

ARTICLE V. HUSBAND OR WIFE OWNER.

§ 3219. **Husband or wife owner.**—The indictment alleged the owner of the stolen property to be "Clarence Roberts." The evidence proved that "Florence Roberts," the wife of Clarence Roberts, was the owner. Held that a conviction was contrary to the evidence. Such conviction might, possibly, have been sustained under the common law, when the husband owned all the personal property of his wife.⁹

ARTICLE VI. NAME OF DECEASED AND OF DEFENDANT.

§ 3220. **Name of deceased; and defendant.**—The indictment charged the accused with the murder of "Wesley Johnson," and the witnesses referred to him as Johnson, the barber; and it appeared there was but one such person at the place of the killing. Held no variance.¹⁰ The name of the defendant needs no proof unless it be put in issue by a plea in abatement.¹¹

ARTICLE VII. SAME NAME, WHEN NOT.

§ 3221. **When not same name—Initials.**—The name "Otha Carr" varies from "Oatha Carr" where the indictment alleges the name under and by the word "tenor," calling for the strictest proof.¹² "Mary Danner" and "Mary Dannaher" do not differ sufficiently to cause a variance in the proof and allegation.¹³ The indictment alleged the name of the person assaulted to be Isaac R. Randolph, and the proof showed his name to be Isaac B. Randolph. Held no variance, the middle letter being no part of the name.¹⁴

⁸ Sykes v. P., 132 Ill. 32, 23 N. E. 391; White v. S., 24 Tex. App. 231, 5 S. W. 857; S. v. Sharp, 106 Mo. 106, 17 S. W. 225; McGary v. P., 45 N. Y. 153 (arson case). See S. v. Savage, 36 Or. 191, 60 Pac. 610, 61 Pac. 1128.

⁹ Stevens v. S., 44 Ind. 469, 2 Green C. R. 717.

¹⁰ Shepherd v. P., 72 Ill. 481; P. v. McGilver, 67 Cal. 55, 7 Pac. 49, 6 Am. C. R. 107. See Bonardo v. P., 182 Ill. 411, 55 N. E. 519.

¹¹ 3 Greenl. Ev., §§ 22, 152.

¹² Brown v. P., 66 Ill. 346; S. v. Pease, 74 Ind. 263; S. v. Smith, 31 Mo. 120. See Underhill Cr. Ev., § 33.

¹³ Gahan v. P., 58 Ill. 160; Com. v. Warren, 143 Mass. 568, 10 N. E. 178; McLaughlin v. S., 52 Ind. 279; S. v. Havely, 21 Mo. 498.

¹⁴ Miller v. P., 39 Ill. 463; P. v. Lockwood, 6 Cal. 205; S. v. English, 67 Mo. 136; Com. v. Buckley, 145 Mass. 181, 13 N. E. 368; Jones v. S.,

ARTICLE VIII. OWNER OF PROPERTY.

§ 3222. **Name of owner of property.**—The indictment alleged the owner of the stolen property to be “Dougal McGinnis,” and his real name was in fact “Dugald McInnis.” Held no variance.¹⁵ The owner of the property alleged to have been stolen was “Thornton F. Downey,” but he was as well known by the name of “Thorn Downey.” Held no variance.¹⁶

ARTICLE IX. NAME BY INITIALS.

§ 3223. **Name by initials.**—The use of initial letters in place of the full Christian name has become general among all classes of people, and a judgment of conviction, otherwise free from error, ought not to be reversed because the evidence fails to disclose the full Christian name of the owner of the property stolen, instead of the initial letters.¹⁷

ARTICLE X. SELLING OR GIVING.

§ 3224. **“Selling” varies from “giving.”**—“Selling intoxicating liquors” and “giving” the same are distinct offenses, and the proof of “selling” will not sustain a charge of “giving,” and *vice versa*.¹⁸

ARTICLE XI. PRINCIPAL AND AGENT.

§ 3225. **Principal and agent.**—In a case of forgery, a check on its face purported to be drawn by an agent for the principal; and it was contended that the indictment should have alleged the authority of the agent to draw it. Held no variance.¹⁹

ARTICLE XII. DESCRIPTIVE AVERMENTS.

§ 3226. **Descriptive averments.**—It is a general rule that all descriptive averments must be proved as laid; otherwise there would be a

25 Tex. App. 621, 8 S. W. 801; Tucker v. P., 122 Ill. 583, 13 N. E. 809; S. v. Williams, 20 Iowa 98. *Contra*, S. v. English, 67 Mo. 136.

¹⁵ Barnes v. P., 18 Ill. 52; Powers v. S., 87 Ind. 97; S. v. Collins, 115 N. C. 716, 20 S. E. 452; S. v. France, 1 Tenn. 434; S. v. Wheeler, 35 Vt. 261; Rex v. Berriman, 5 C. & P. 601.

¹⁶ Hix v. P., 157 Ill. 384, 41 N. E. 862.

¹⁷ Little v. P., 157 Ill. 156, 42 N. E. 389; Thompson v. S., 48 Ala. 166; Whar. Cr. Pl. & Pr., § 102.

¹⁸ Humpeler v. P., 92 Ill. 400; Birr v. P., 113 Ill. 645, 649. See also King v. S., 54 Ga. 184, 1 Am. C. R. 426.

¹⁹ Cross v. P., 47 Ill. 155; Whar. Cr. Ev. (8th ed.), § 696.

variance between the proof and allegations.²⁰ The indictment, in substance, charged that the defendant set up against the side of a house, near a public road, a board, on which was a painting or picture of a human head and ear; a nail was driven through the ear and a pair of shears was hung on the nail. The evidence was that the figure was inscribed or cut in the board by means of some instrument. Held to be a fatal variance.²¹

§ 3227. **Variance as to color—Day and night.**—In an indictment for stealing a black horse, the animal is necessarily mentioned, but the color need not be stated; yet, if it is stated, it is made descriptive of the particular animal stolen, and a variance in the proof of the color is fatal.²² In case where the allegation is the commission of a burglary, “in the night time,” and the proof shows the burglary was committed in the day time, it was held a variance.²³

ARTICLE XIII. DESCRIPTION OF MONEY.

§ 3228. **Description of money.**—The indictment alleging that the prosecutor was robbed of twenty dollars in paper money of the United States will not be supported by evidence of fifteen dollars in silver money.²⁴ The indictment alleged that the defendants, “for their own gain, knowingly and feloniously received one gold coin of the value of ten dollars, one national bank bill of the value of five dollars.” The evidence by the witness was: “I found on Mose Williams ten dollars, and on Frank Lewis fifteen dollars and some small change amounting to twenty-five cents.” Held a fatal variance.²⁵

§ 3229. **“Money” varies from “note.”**—The accused was indicted for winning the sum of five dollars by a wager on an election. The evidence showed that the parties to the bet staked each his promissory note to the other for five dollars. Held a variance.²⁶

²⁰ Bromley v. P., 150 Ill. 302, 37 N. E. 209; Black v. S., 57 Ind. 109; Morgan v. S., 61 Ind. 447, 3 Am. C. R. 246; Guynes v. S., 25 Tex. App. 584, 8 S. W. 667; Turner v. S., 3 Heisk. (Tenn.) 452, 1 Green C. R. 355; Waters v. S., 53 Ga. 567; 3 Greenl. Ev., § 10; 1 Bish. Cr. Proc. 579.

²¹ S. v. Powers, 12 Ired. (N. C.) 5.

²² Turner v. S., 3 Heisk. (Tenn.)

452, 1 Green C. R. 355; 1 Greenl. Ev., § 65.

²³ Bromley v. P., 150 Ill. 297, 37 N. E. 209; S. v. McPherson, 70 N. C. 239, 2 Green C. R. 738.

²⁴ Harris v. S., 34 Tex. Cr. 497, 30 S. W. 221.

²⁵ Williams v. P., 101 Ill. 385; Keating v. P., 160 Ill. 485, 43 N. E. 724.

²⁶ Tate v. S., 5 Blackf. (Ind.) 174; 2 McClain Cr. L., § 1292.

ARTICLE XIV. STRIKING OR OTHER MEANS.

§ 3230. **Striking a man or horses.**—The complaint alleged the striking and beating of a man; the proof showed the striking of the man's horses while he was loading corn in his wagon: Held a variance.²⁷

ARTICLE XV. DIFFERENT INTENT.

§ 3231. **Proof showing different intent.**—The intent must be proved as alleged. If the act is alleged to have been done with intent to commit one felony, and the evidence be of an intent to commit another, though it be of the like kind, the variance is fatal.²⁸

ARTICLE XVI. POISONING; SHOOTING.

§ 3232. **Poisoning varies from shooting—Pistol or gun.**—"And if a person be indicted for one species of killing, as by poisoning, he can not be convicted by evidence of a totally different species of death, as by shooting with a pistol or starving."²⁹ On a charge of homicide, the substance of the crime being the felonious killing, proof of the killing in any manner or by any means that corresponds substantially with the indictment, is sufficient, as, proof of shooting with a pistol will sustain an averment of shooting with a gun.³⁰

ARTICLE XVII. SEX OF ANIMALS.

§ 3233. **Sex of animal.**—The indictment alleged the larceny of "one bay mare mule," and the only evidence in the record as to the sex of the animal was that the witnesses, when making any reference to the animal, employed the pronoun "him." Held a fatal variance.³¹

ARTICLE XVIII. SERIES OF NUMBERS.

§ 3234. **Series of numbers.**—The indictment alleged that the defendant stole five certificates of shares of stock, so called, of the number 7056 of the Savings Mining Company; that is, a series of certi-

²⁷ Kirland v. S., 43 Ind. 146, 13 Am. R. 386, 2 Green C. R. 708.

²⁸ 3 Greenl. Ev., § 17.

²⁹ 4 Bl. Com. 196.

³⁰ Underhill Cr. Ev., § 314, citing Rodgers v. S., 50 Ala. 102, 104; Tur-

ner v. S., 97 Ala. 57, 12 So. 54; S. v. Smith, 32 Me. 369, 373; S. v. Lantenschlager, 22 Minn. 514, 522.

³¹ Turner v. S., 3 Heisk. (Tenn.) 452, 1 Green C. R. 355.

cates, such certificates bearing the number 7056. It therefore became necessary for the prosecution to prove that the defendant stole one or more of this series of certificates. The proof upon this point, however, was that the certificate actually claimed to have been stolen was not one of the series alleged in the indictment; that the certificate which was the subject of the supposed larceny was single, there being but one of that number: Held to be a variance.³²

ARTICLE XIX. COMMITTING AND ATTEMPTING TO COMMIT.

§ 3235. **Committing and attempt to commit crime.**—Under an indictment for an attempt to commit a crime named, proof of the actual commission of the crime will not sustain a conviction; as, for example, where the indictment alleges that the defendant did attempt to obtain money of another by means of the confidence game, proof that he actually committed the crime of obtaining the money by means of the confidence game will not sustain the indictment.³³

ARTICLE XX. VARIANCE, WHEN AVAILABLE.

§ 3236. **Variance, when available.**—A variance between the proof and allegations will be of no avail to the party seeking to take advantage of the same unless he makes objection on the trial and preserves the point by bill of exceptions.³⁴

³² P. v. Coon, 45 Cal. 672, 2 Green C. R. 425; cited in 1 McClain Cr. L., § 592.

³³ Graham v. P., 181 Ill. 490, 55 N. E. 179, citing Queen v. Nicholls, 2 Cox C. C. 182; Sullivan v. P., 14 N. Y. Weekly Dig. 239; Com. v.

Roby, 12 Pick. (Mass.) 496. *Contra*, S. v. Shepard, 7 Conn. 54; Com. v. Cooper, 15 Mass. 187.

³⁴ Cross v. P., 47 Ill. 157; Greene v. P., 182 Ill. 278, 55 N. E. 341; Rountree v. S. (Tex. Cr.), 58 S. W. 106.

CHAPTER LXXXVI.

INSTRUCTIONS.

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ARTICLE I. USE OF INSTRUCTIONS.

§ 3237. **Object of instructions.**—"The object of instructions is to convey to the minds of the jury correct principles of law as applicable to the evidence which has been laid before them, and nothing should be given them unless it will promote that object."¹

ARTICLE II. WRITTEN OR ORAL.

§ 3238. **To be in writing—May be waived.**—The statute requiring the court to instruct the jury in writing is mandatory, and to instruct orally, though relating only to the form of the verdict in fixing the punishment, is error.² The statute requires that instructions to the jury shall be given in writing, but this requirement may be waived by the parties to the cause; and such a waiver is binding on minor defendants as well as on adults.³

ARTICLE III. "GIVEN" OR "REFUSED."

§ 3239. **"Given" or "refused."**—An instruction not marked "given" or "refused," and not read to the jury, amounts to a refusal of such instruction.⁴

¹ *Baxter v. P.*, 3 Gilm. (Ill.) 381; *Montag v. P.*, 141 Ill. 81, 30 N. E. 337.

² *Ellis v. P.*, 159 Ill. 340, 42 N. E. 873. See *S. v. Bybee*, 17 Kan. 462, 2 Am. C. R. 450; *S. v. Potter*, 15 Kan. 302; *S. v. Cooper*, 45 Mo. 64; *Feriter v. S.*, 33 Ind. 283; *P. v. Sanford*, 43 Cal. 29, 1 Green C. R. 682;

Gile v. P., 1 Colo. 60; *Hopt v. Utah*, 104 U. S. 631, 4 Am. C. R. 368; *Helm v. P.*, 186 Ill. 153, 57 N. E. 886.

³ *Cutter v. P.*, 184 Ill. 395, 56 N. E. 412.

⁴ *Duffin v. P.*, 107 Ill. 122; *Tobin v. P.*, 101 Ill. 123; *S. v. Hellekson*, 13 S. D. 242, 83 N. W. 254.

ARTICLE IV. PARTY MUST PREPARE INSTRUCTIONS.

§ 3240. **Party desiring instructions must prepare them.**—If the defendant desires instructions as to the form of the verdict, or on any phase of the case, to be given to the jury, it is his duty to prepare and present such instructions.⁵

ARTICLE V. MUST BE HYPOTHETICAL.

§ 3241. **Instructions given hypothetically.**—Instructions should be given hypothetically, and be so drawn as to state the law upon a supposed state of facts to be found by the jury.⁶ An instruction, stating a legal proposition hypothetically need not make reference to the evidence; that is, “from the evidence in the case.”⁷

ARTICLE VI. FEW INSTRUCTIONS; FULL INSTRUCTIONS.

§ 3242. **Few instructions for prosecution.**—The state’s attorney should ask very few instructions, and those as plain and simple as language can make them. Asking so many instructions upon every conceivable phase of the case tends to confuse the jury and incurber the record, and is a vicious practice.⁸

§ 3243. **Full instructions for defendant.**—It is the duty of the trial judge to so fully instruct the jury upon every degree and kind of crime of which the accused may be convicted, under the indictment, as to give him the benefit of having the evidence considered by the jury under a full knowledge of the law as to the essential characteristics of each kind and degree of crime for which a verdict may be returned against him.⁹ The accused has a right to a full and correct statement of the law by the court, applicable to the evidence

⁵ Dacey v. P., 116 Ill. 575, 6 N. E. 165; Dunn v. P., 109 Ill. 646; McDonnall v. P., 168 Ill. 98, 48 N. E. 86; Williams v. P., 164 Ill. 483, 45 N. E. 987; P. v. Rodundo, 44 Cal. 538, 2 Green C. R. 412; Williams v. S., 3 Heisk. (Tenn.) 376, 1 Green C. R. 257; Philamalee v. S., 58 Neb. 320, 78 N. W. 625; Bennett v. S., 40 Tex. Cr. 445, 50 S. W. 946. See Douthitt v. Ter., 7 Okl. 55, 54 Pac. 312.

⁶ Bond v. P., 39 Ill. 27; Hopkinson v. P., 18 Ill. 264; Sherman v. Dutch, 16 Ill. 285.

⁷ Belt v. P., 97 Ill. 473.

⁸ Miller v. P., 39 Ill. 466; Gilmore v. P., 124 Ill. 383, 15 N. E. 758; Barr v. P., 113 Ill. 471; Dunn v. P., 109 Ill. 646.

⁹ S. v. Meyer, 58 Vt. 457, 3 Atl. 195, 7 Am. C. R. 435.

in his case, and any misdirection by the court, in point of law, on matters material to the issue, is ground for a new trial.¹⁰

§ 3244. **Instructions—When not full.**—The reading of the statute by the court, declaring what is murder in the first degree, and that all other kinds of murder shall be murder in the second degree, was not sufficient explanation of the two degrees.¹¹ The court defined what constituted murder in the first degree and then instructed as to the punishment in the other degrees, but did not undertake to define what constituted them. This was manifest error. Whenever the evidence shows that a defendant may well be convicted of either degree, the jury should be informed in what those degrees consist.¹²

§ 3245. **Instructions not full—On alibi.**—The accused relied for his defense upon an *alibi*. The court omitted any special instructions as to it, but gave the jury general directions to consider all the facts in the case and give the defendant the benefit of a doubt arising upon all the evidence. Held proper.¹³ It has been repeatedly held that a cause will not be reversed because the instructions did not cover all the points which arose upon the trial, provided the instructions were correct so far as they may have gone.¹⁴

ARTICLE VII. INTIMATING COURT'S OPINION.

§ 3246. **Intimating court's opinion.**—The court, in charging the jury, should not express or intimate an opinion as to the facts or weight of the evidence which might influence the jury in determining the facts. The jury are the sole judges of the facts and credibility of the witnesses.¹⁵ But in the federal courts the judge may in his

¹⁰ *Muscoe v. Com.*, 86 Va. 443, 10 S. E. 534, 8 Am. C. R. 607.

¹¹ *S. v. Meyer*, 58 Vt. 457, 3 Atl. 195, 7 Am. C. R. 434.

¹² *S. v. Bryant*, 55 Mo. 75, 2 Green C. R. 612.

¹³ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 224; *S. v. Sutton*, 70 Iowa 268, 30 N. W. 567. But see § 3249.

¹⁴ *Foxwell v. S.*, 63 Ind. 539, 3 Am. C. R. 298.

¹⁵ *Andrews v. P.*, 60 Ill. 354; *S. v. Pepo*, 23 Mont. 473, 59 Pac. 721; *Logg v. S.*, 92 Ill. 598; *S. v. Kerns* (W. Va., 1899), 34 S. E. 734; *Delvin v. P.*, 104 Ill. 504; *S. v. Mitchell*, 56

S. C. 524, 35 S. E. 210; *P. v. Travers*, 88 Cal. 233, 26 Pac. 88; *S. v. Rose*, 47 Minn. 47, 49 N. W. 404; *S. v. Hahn*, 38 La. 169; *Stephens v. S.*, 10 Tex. App. 120; *Barnett v. Com.*, 84 Ky. 449, 1 S. W. 722; *Starr v. U. S.*, 153 U. S. 614, 14 S. Ct. 919; *Chapman v. S.*, 109 Ga. 157, 34 S. E. 369; *P. v. Plyler*, 126 Cal. 379, 58 Pac. 904; *Williams v. S.*, 46 Neb. 704, 65 N. W. 783; *Merritt v. S.*, 107 Ga. 675, 34 S. E. 361; *S. v. Austin*, 109 Iowa 118, 80 N. W. 303; *P. v. Ferraro*, 161 N. Y. 365, 55 N. E. 931, 15 N. Y. Cr. 266; *S. v. Schnepel*, 23 Mont. 523, 59 Pac. 927.

discretion express an opinion on the facts in the trial of a criminal cause.¹⁶

ARTICLE VIII. EVIDENCE MUST SUPPORT INSTRUCTIONS.

§ 3247. **Evidence supporting instruction.**—It is a familiar principle that there must be evidence upon which to base an instruction; otherwise it should not be given.¹⁷

ARTICLE IX. RELATING TO INCLUDED OFFENSE.

§ 3248. **On lesser, included offense.**—Where there is evidence tending to prove a lesser offense included in the greater, as alleged in the indictment, the court, if requested, should give instruction in reference to such lesser offense.¹⁸ To instruct the jury in a criminal case that the defendant can not properly be convicted of a crime less than that charged, or to refuse to instruct them in respect to the lesser offenses which might, under some circumstances, be included in the one so charged—there being no evidence whatever upon which any verdict could be properly returned except one of guilty or one of not guilty of the particular offense charged—is not error.¹⁹ An indictment contained four counts, the first two charging burglary in the night-time under the proviso division of the statute, the penalty for which is not less than five nor more than twenty years' imprisonment, and the last two counts charge simply burglary (omitting the "night-time" element), the penalty for which is from one to twenty years' imprisonment in the penitentiary. The evidence was conclusive and undisputed that the burglary was committed in the night time. The court, therefore, committed only harmless error in giving an instruction to the jury in effect withdrawing from their consideration the discretion vested in them of applying the evidence to the last two counts of the indictment and directing them to apply it to the first

¹⁶ U. S. v. Schneider, 21 D. C. 381; Allis v. U. S., 155 U. S. 117, 15 S. Ct. 36; U. S. v. Connelly, 1 Fed. 779, 9 Biss. 338.

¹⁷ Birr v. P., 113 Ill. 648; Rice v. P., 38 Ill. 436; P. v. Williams, 43 Cal. 344, 1 Green C. R. 416.

¹⁸ S. v. Desmond, 109 Iowa 72, 80 N. W. 214; S. v. Lucas, 124 N. C. 825, 32 S. E. 962; S. v. Estep, 44 Kan. 572, 24 Pac. 986.

¹⁹ Sparf v. U. S., 156 U. S. 51, 10

Am. C. R. 215, 15 S. Ct. 273; P. v. McNutt, 93 Cal. 658, 29 Pac. 243; Clark v. Com., 123 Pa. St. 555, 16 Atl. 795; S. v. Lane, 64 Mo. 319, 324; McCoy v. S., 27 Tex. App. 415, 11 S. W. 454; S. v. McKinney, 111 N. C. 683, 16 S. E. 235; S. v. Musick, 101 Mo. 260, 270, 14 S. W. 212; S. v. Estep, 44 Kan. 575, 24 Pac. 986; S. v. Casford, 76 Iowa 332, 41 N. W. 32; Jones v. S., 52 Ark. 346, 12 S. W. 704; McClernan v. Com., 11

two, although it was applicable to the last two counts.²⁰ Where there was no evidence to authorize an instruction to the jury in regard to any crime except that of murder in the first degree, the court in giving an instruction defining murder in the second degree, erred, there being no evidence to support it.²¹

ARTICLE X. INSTRUCTIONS SUPPORTING THEORY.

§ 3249. **Fairly supporting theory, though slight.**—It is error to refuse an instruction fairly presenting the theory of a defendant, if based on the evidence, though it be a summary one, or on the evidence of the defendant alone.²² Even though the evidence be slight in support of the theory of the accused, he is entitled to an instruction on his theory, if requested.²³ The prosecution or plaintiff is only obliged to present the law correctly, in his instructions, applicable to his theory of the case, and is not bound in every instruction to anticipate and exclude every possible defense.²⁴ If the defendant introduces evidence tending to prove an alibi, it is the duty of the court to give an instruction relating to such defense.²⁵

ARTICLE XI. INSTRUCTIONS ASSUMING FACTS.

§ 3250. **Instruction assuming facts.**—"It is better for the court, in charging the jury in a criminal case, to avoid assuming any material fact as proved, however clear to the mind of the court such fact may seem to be established, because it is the province of the jury, unaided by the judge, to say whether a fact is proved or otherwise."²⁶

Ky. L. 301, 12 S. W. 148; O'Brien v. Com., 89 Ky. 354, 11 Ky. L. 534, 12 S. W. 471; Robinson v. S., 84 Ga. 674, 11 S. E. 544.

²⁰ Schwabacher v. P., 165 Ill. 623-625, 46 N. E. 809.

²¹ S. v. Mahly, 68 Mo. 315, 3 Am. C. R. 183-4; Bugg v. Com., 18 Ky. L. 844, 38 S. W. 684.

²² Trask v. P., 104 Ill. 569. See Johnson v. Com., 90 Ky. 53, 12 Ky. L. 20, 13 S. W. 520, 8 Am. C. R. 116; Ladwig v. S., 40 Tex. Cr. 585, 51 S. W. 390; Miller v. S., 77 Ala. 41, 5 Am. C. R. 106; P. v. Keefer, 65 Cal. 232, 3 Pac. 818, 5 Am. C. R. 8; Sullivan v. P., 114 Ill. 27, 28 N. E. 381; Stanton v. S. (Tex. Cr.), 29 S. W. 476.

²³ S. v. Alley, 68 Mo. 124; Batten v. S., 80 Ind. 394; Johnson v. S., 72 Ga. 679; Schultz v. S., 30 Tex. App. 94, 16 S. W. 756; S. v. Hayes, 111 N. C. 727, 16 S. E. 410.

²⁴ Logg v. P., 92 Ill. 598, 604.

²⁵ S. v. Conway, 55 Kan. 323, 40 Pac. 661; S. v. Bryant, 134 Mo. 246, 35 S. W. 597; Burton v. S., 107 Ala. 108, 18 So. 284; Anderson v. S., 34 Tex. Cr. 546, 31 S. W. 673; Smith v. S. (Tex. Cr., 1899), 50 S. W. 362; Joy v. S. (Tex. Cr., 1899), 51 S. W. 935. But see § 3246.

²⁶ P. v. Dick, 32 Cal. 216; S. v. Whitney, 7 Or. 386; S. v. Mackey, 12 Or. 154, 6 Pac. 648, 5 Am. C. R. 536-7.

Where an instruction assumes disputed facts as having been proven, it is error to give the same, in a case where the evidence is conflicting.²⁷ An instruction which assumes the defendant to be the assailant, and that his conduct prior to the shooting had been such as to make it his duty to decline further struggle before he could invoke the right of self-defense, is erroneous.²⁸ An instruction conveying the idea that the danger must be actual and positive, before the defendant can act in self-defense, is reversible error.²⁹

§ 3251. Explaining claims of parties.—To enable the jurors to act intelligently, the court may properly explain to them the respective claims of the parties to the suit.³⁰ Facts about which there is no dispute, and concerning which no issue is made, may properly be called to the attention of the jury, in the discretion of the court, in charging the jury as to the law of the case.³¹

§ 3252. Suggesting a presumption—Error.—“If the proof shows conclusively that the defendant placed the timbers upon the tracks of the railroad in question, in such a manner as to obstruct the passage of the trains of cars over said road, the rule of law is that every man intends the necessary consequences of his acts, and the presumption

²⁷ *Eller v. P.*, 153 Ill. 347, 38 N. E. 660; *S. v. Mackey*, 12 Or. 154, 5 Am. C. R. 536, 6 Pac. 648; *S. v. Wheeler*, 79 Mo. 366; *S. v. Lewis*, 56 Kan. 374, 43 Pac. 265; *Com. v. McMahon*, 145 Pa. St. 413, 22 Atl. 971; *Cannon v. P.*, 141 Ill. 282, 30 N. E. 1027; *Hoge v. P.*, 117 Ill. 46, 6 N. E. 796; *Metz v. S.*, 46 Neb. 547, 65 N. W. 190; *Hopkinson v. P.*, 18 Ill. 264; *P. v. Bowkus*, 109 Mich. 360, 67 N. W. 319; *Barr v. P.*, 113 Ill. 473; *Newton v. S. (Miss.)*, 12 So. 560; *Hellyer v. P.*, 186 Ill. 550, 58 N. E. 245; *Chambers v. P.*, 105 Ill. 417; *P. v. Hertz*, 105 Cal. 660, 39 Pac. 32; *Leiber v. Com.*, 9 Bush (Ky.) 11, 1 Am. C. R. 309; *Underhill Cr. Ev.*, § 279.

²⁸ *Ritter v. P.*, 130 Ill. 259, 22 N. E. 605; *Cannon v. P.*, 141 Ill. 270, 30 N. E. 1027; *Robinson v. S. (Miss.)*, 16 So. 201.

²⁹ *Panton v. P.*, 114 Ill. 508, 2 N. E. 411; *Campbell v. P.*, 16 Ill. 17;

Schnier v. P., 23 Ill. 24; *Steinmeyer v. P.*, 95 Ill. 383; *Enright v. P.*, 155 Ill. 35, 39 N. E. 561.

³⁰ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 219; *P. v. Worden*, 113 Cal. 569, 45 Pac. 844; *Pritchett v. S.*, 92 Ga. 65, 18 S. E. 536; *Hawes v. S.*, 88 Ala. 37, 7 So. 302; *S. v. Smith*, 65 Conn. 283, 31 Atl. 206.

³¹ *S. v. Ward*, 61 Vt. 153, 17 Atl. 483, 8 Am. C. R. 219; *Davis v. P.*, 114 Ill. 86, 29 N. E. 192; *Williams v. P.*, 164 Ill. 483, 45 N. E. 987; *Holliday v. S.*, 35 Tex. Cr. 133, 32 S. W. 538; *S. v. Gorham*, 67 Vt. 365, 31 Atl. 845, 10 Am. C. R. 28; *Hanrahan v. P.*, 91 Ill. 142; *S. v. Day*, 79 Me. 120, 8 Atl. 544; *P. v. Sternberg*, 111 Cal. 3, 43 Pac. 198; *S. v. Horne*, 9 Kan. 119, 1 Green C. R. 722; *S. v. Aughtry*, 49 S. C. 285, 26 S. E. 619, 27 S. E. 199; *Hawkins v. S.*, 136 Ind. 630, 36 N. E. 419; *Underhill Cr. Ev.*, § 277.

is that the act was willfully and maliciously done." Held improper as directing the jury to make or apply a mere presumption of fact.³²

ARTICLE XII. INSTRUCTIONS NOT WARRANTED.

§ 3253. **Reciting damaging facts where no evidence.**—An instruction which recites facts damaging in their nature, where there is no evidence to authorize the giving of the same, is erroneous and prejudicial.³³

ARTICLE XIII. SINGLING OUT FACTS; SUMMARY.

§ 3254. **Singling out facts—Summary.**—The court, in giving instructions, should not designate any particular part or branch or fact of a case and tell the jury that unless it is proved beyond a reasonable doubt they should acquit.³⁴ In a summary instruction, "singling out particular portions of the evidence and directing the jury to consider such portions, to the exclusion of other parts of the testimony equally important," has often been condemned.³⁵ An instruction which purports to summarize the principal facts, but directs the attention of the jury only to those favorable to one of the parties, is bad. It should not give prominence to some of the facts and omit others quite as material.³⁶

ARTICLE XIV. CONTRADICTORY INSTRUCTIONS.

§ 3255. **Contradictory instructions.**—Where the evidence in a case is close in its facts or conflicting on a vital point, the law should be

³² Allison v. S., 42 Ind. 354, 2 Green C. R. 683.

³³ Cannon v. P., 141 Ill. 283, 36 N. E. 1027; Montag v. P., 141 Ill. 80, 30 N. E. 337; Belk v. P., 125 Ill. 584, 17 N. E. 744; Birr v. P., 113 Ill. 648; S. v. Robinson, 52 La. 616, 27 So. 124; Healy v. P., 163 Ill. 383, 45 N. E. 230; P. v. Matthews, 126 Cal. 17, 58 Pac. 371; Wallace v. S., 41 Fla. 547, 26 So. 713.

³⁴ Mullins v. P., 110 Ill. 42; Davis v. P., 114 Ill. 86, 29 N. E. 192; Leigh v. P., 113 Ill. 372; Crews v. P., 120 Ill. 317, 11 N. E. 404; Hornish v. P., 142 Ill. 626, 32 N. E. 677; S. v. Smith, 53 Mo. 267, 2 Green C. R. 600; Ball v. S. (Tex. Cr.), 36 S. W. 448; Morgan v. S., 48 Ohio St. 371, 27 N. E. 710; McLeroy v. S., 120 Ala. 274, 25 So. 247.

³⁵ Scott v. P., 141 Ill. 210, 30 N.

E. 329; Chambers v. P., 105 Ill. 417; Campbell v. P., 109 Ill. 576; Logg v. P., 92 Ill. 602; Coon v. P., 99 Ill. 371; Kennedy v. P., 44 Ill. 285; Coffman v. Com., 10 Bush (Ky.) 495, 1 Am. C. R. 294; Preston v. S. (Tex. Cr., 1899), 53 S. W. 881; S. v. Rutherford, 152 Mo. 124, 53 S. W. 417.

³⁶ Sanders v. P., 124 Ill. 226, 16 N. E. 81; Evans v. George, 80 Ill. 51; Hoge v. P., 117 Ill. 46, 6 N. E. 796; P. v. Hawes, 98 Cal. 648, 33 Pac. 791; Morgan v. S., 48 Ohio St. 377, 27 N. E. 710; Grant v. S., 97 Ala. 35, 11 So. 915; Goley v. S., 85 Ala. 333, 5 So. 167; P. v. Caldwell, 107 Mich. 374, 65 N. W. 213; Miller v. S., 107 Ala. 40, 19 So. 37; Hicks v. S., 99 Ala. 169, 13 So. 375; Cooper v. S., 88 Ala. 107, 7 So. 47; Banks v. S., 89 Ga. 75, 14 S. E. 927; Dobson v. S. (Neb.), 85 N. W. 843.

accurately given to the jury by the court. An error in such case, caused in giving a wrong instruction, will not be cured in giving the law correctly in another instruction, either for the people or for the defendant; the jury may have disregarded the correct one, and followed the erroneous.³⁷ "We have frequently decided that an erroneous instruction can not be corrected by an instruction which is not erroneous, unless the erroneous instruction be withdrawn."³⁸ When the evidence is so evenly balanced that the jury might be justified in finding either way, it is highly important that the law should be accurately given to the jury.³⁹

ARTICLE XV. IRRELEVANT INSTRUCTIONS.

§ 3256. **Irrelevant instructions.**—If an irrelevant instruction be given, although it be unobjectionable as an abstract proposition of law, which is calculated to mislead the jury and affect their conclusion upon the issue submitted to them, it will be error.⁴⁰ The court, at the request of the people, gave to the jury instructions in the language of the statute, on self-defense, and defense of habitation, when such was not the defense, and no evidence whatever was offered on the theory of self-defense, or defense of habitation, but that the deceased, who had been arrested, was killed to prevent escape from the defendants, who were police officers. Held error and cause for reversal.⁴¹

ARTICLE XVI. INSTRUCTIONS—ARBITRARY RULE.

§ 3257. **Instruction containing arbitrary rule.**—Such instructions should not be given to the jury that, by an arbitrary rule laid down

³⁷ *Smith v. P.*, 142 Ill. 123, 31 N. E. 599; *Kirland v. S.*, 43 Ind. 146, 13 Am. R. 386, 2 Green C. R. 712; *P. v. Westlake*, 124 Cal. 452, 57 Pac. 465; *S. v. Peel*, 23 Mont. 358, 59 Pac. 169; *S. v. Evans*, 12 S. D. 473, 81 N. W. 893; *Hoge v. P.*, 117 Ill. 46, 6 N. E. 796; *Steinmeyer v. P.*, 95 Ill. 388; *Wilbur v. Wilbur*, 129 Ill. 392, 21 N. E. 1076; *Holloway v. Johnson*, 129 Ill. 369, 21 N. E. 798; *Eller v. P.*, 153 Ill. 346, 38 N. E. 660; *S. v. Pugsley*, 75 Iowa 744, 38 N. W. 498, 8 Am. C. R. 108; *P. v. Bush*, 65 Cal. 129, 5 Am. C. R. 464, 3 Pac. 590; *Yates v. S.*, 37 Tex. 202, 1 Am. C. R. 434; *Enright v. P.*, 155 Ill. 32, 39

N. E. 561; *Criner v. S.* (Tex. Cr., 1899), 53 S. W. 873; *P. v. Anderson*, 44 Cal. 65, 2 Green C. R. 397; *Sweeney v. S.*, 59 Neb. 269, 80 N. W. 815; *Howell v. S.* (Neb.), 85 N. W. 289.

³⁸ *Guetic v. S.*, 63 Ind. 278, 3 Am. C. R. 233.

³⁹ *Shaw v. P.*, 81 Ill. 150; *Waters v. P.*, 172 Ill. 371, 50 N. E. 148; *Adams v. P.*, 179 Ill. 637, 54 N. E. 296.

⁴⁰ *Coughlin v. P.*, 18 Ill. 268, citing *Baxter v. P.*, 3 Gilm. (Ill.) 368.

⁴¹ *Healy v. P.*, 163 Ill. 383, 45 N. E. 230.

to them, they might feel warranted in finding one way or the other, without their minds being satisfied as to the facts in dispute.⁴²

ARTICLE XVII. HARMLESS INSTRUCTIONS.

§ 3258. **Erroneous instructions harmless.**—While some of the instructions may not state the law with precise accuracy, yet if the court can see that such instructions are qualified by others, so that the jury were not likely to be misled, the error will be obviated.⁴³ A case may be so clear under the evidence that no other verdict could have been given than that which was rendered. In such case a court of review will refuse to reverse for mere error in giving instructions, the error being harmless.⁴⁴ “When a series of instructions embrace the law of the case, when taken and considered together, though some of them may be erroneous, still for such error a judgment will not be reversed, provided it shall appear from the whole record that substantial justice has been done and no prejudice has resulted by reason of such erroneous instructions.”⁴⁵

§ 3259. **Instructions stating harmless principle.**—An instruction merely announcing a principle of law, and having no proper place in the case, is erroneous, but will not be grounds to reverse on, unless it appears the accused was prejudiced thereby.⁴⁶ If it shall appear from the whole record that substantial justice has been done and no prejudice has resulted by reason of erroneous instructions, and that the law of the case has been fully given to the jury, such erroneous instruction will be regarded as harmless.⁴⁷

ARTICLE XVIII. REPEATING INSTRUCTIONS.

§ 3260. **Repeating the rules.**—The court having once given to the jury the rule of law contended for clearly and adequately is under no

⁴² *Peak v. P.*, 76 Ill. 294, citing *Parker v. Johnson*, 25 Ga. 577; *Mays v. Williams*, 27 Ala. 268; *Long v. Hitchcock*, 9 C. & P. 619; *S. v. Bybee*, 17 Kan. 462, 2 Am. C. R. 450.

⁴³ *Spies v. P.*, 122 Ill. 245, 12 N. E. 865, 17 N. E. 898; *S. v. Maloy*, 44 Iowa 104; *P. v. Cleveland*, 49 Cal. 577.

⁴⁴ *Thompson v. P.*, 125 Ill. 261, 17 N. E. 749.

⁴⁵ *Dacey v. P.*, 116 Ill. 576, 6 N. E. 165; *Wilson v. P.*, 94 Ill. 327; *Dunn v. P.*, 109 Ill. 646; *Ritzman v. P.*,

110 Ill. 362; *Leach v. P.*, 53 Ill. 311; *Meyer v. S.* (Tex. Cr., 1899), 49 S. W. 600; *McIntosh v. S.*, 151 Ind. 251, 51 N. E. 354.

⁴⁶ *Bandalow v. P.*, 90 Ill. 218; *Moore v. P.*, 190 Ill. 338; *Needham v. P.*, 98 Ill. 280; *Healy v. P.*, 163 Ill. 383, 45 N. E. 230; *Cook v. P.*, 177 Ill. 146, 52 N. E. 273. See *Underhill Cr. Ev.*, § 278.

⁴⁷ *Kennedy v. P.*, 40 Ill. 497; *Berry v. S.*, 31 Ohio St. 225; *Edelhoff v. S.*, 5 Wyo. 19, 36 Pac. 627, 9 Am. C. R. 262.

obligation to repeat the rule in other instructions.⁴⁸ The rule of reasonable doubt need not be repeated in every instruction given.⁴⁹

ARTICLE XIX. INSTRUCTIONS, HOW CONSTRUED.

§ 3261. **Instructions construed together.**—It is well settled that in construing instructions they should all be considered together, especially all relating to the same subject. All of the instructions, taken together, constitute one charge to the jury.⁵⁰

ARTICLE XX. ON INTENT; DOUBT.

§ 3262. **Instruction on intent.**—"Every person is presumed to intend what his acts indicate his intention to have been, and if the defendant fired a loaded pistol at the deceased and killed him the law presumes that the defendant intended to kill the deceased, and unless the defendant can show that his intention was other than his act indicated the law will not hold him guiltless." Held proper.⁵¹

§ 3263. **Reasonable doubt defined.**—"The reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not as to any particular fact in the case." Held proper.⁵² Held error to refuse the following

⁴⁸ Spahn v. P., 137 Ill. 545, 27 N. E. 688; Martin v. P., 54 Ill. 226; S. v. Reed, 117 Mo. 604, 23 S. W. 886; S. v. Reno, 41 Kan. 674, 21 Pac. 803; Van Houton v. P., 22 Colo. 53, 43 Pac. 137; Thompson v. P., 26 Colo. 496, 59 Pac. 51; P. v. Hettick, 126 Cal. 425, 58 Pac. 918; S. v. Magers, 36 Or. 38, 53 Pac. 892; S. v. Grant, 152 Mo. 57, 53 S. W. 432; Buel v. S., 104 Wis. 132, 80 N. W. 78; S. v. Harper, 149 Mo. 514, 51 S. W. 89; Kastner v. S., 58 Neb. 767, 79 N. W. 713; Cornell v. S., 104 Wis. 527, 80 N. W. 745; Turner v. S. (Tex. Cr., 1900), 55 S. W. 53; Lyons v. P., 137 Ill. 602, 27 N. E. 677; P. v. Schmitt, 106 Cal. 48, 39 Pac. 204; P. v. Weaver, 108 Mich. 649, 66 N. W. 567; Bush v. S., 47 Neb. 642, 66 N. W. 638; Schintz v. P., 178 Ill. 320, 52 N. E. 903; S. v. Staley, 45 W. Va. 792, 32 S. E. 198; Com. v. Magoon, 172 Mass. 214, 51 N. E. 1082.

⁴⁹ Peri v. P., 65 Ill. 25; Kennedy v. P., 44 Ill. 285; P. v. Flynn, 73 Cal. 511, 7 Am. C. R. 128, 15 Pac. 102.

⁵⁰ Bonardo v. P., 182 Ill. 418, 55 N. E. 519; Kennedy v. S., 107 Ind. 144, 6 N. E. 305, 7 Am. C. R. 426; Boykin v. P., 22 Colo. 496, 45 Pac. 419; S. v. McCoy, 15 Utah 136, 49 Pac. 420; McCoy v. P., 175 Ill. 230, 51 N. E. 777; Thrawley v. S., 153 Ind. 375, 55 N. E. 95; Williams v. S. (Tex. Cr.), 55 S. W. 500; Small v. S., 105 Ga. 669, 31 S. E. 571.

⁵¹ P. v. Langton, 67 Cal. 427, 7 Am. C. R. 439, 7 Pac. 843.

⁵² Carlton v. P., 150 Ill. 181, 37 N. E. 244; Mullins v. P., 110 Ill. 42; Davis v. P., 114 Ill. 86, 29 N. E. 192; Leigh v. P., 113 Ill. 372; Bressler v. P., 117 Ill. 422, 8 N. E. 62; Miller v. P., 39 Ill. 457; May v. P., 60 Ill. 119; Hoge v. P., 117 Ill. 35, 6 N. E. 796. *Contra*, S. v. Gleim, 17 Mont. 17, 41 Pac. 998, 10 Am. C. R. 52.

instruction: "That if, upon a review of the whole case and a consideration of all the circumstances connected with it, the jury have a reasonable doubt as to the guilt of the defendant, they will find him not guilty." In this case the assault charged was not admitted so as to leave the issue of sanity or insanity the only issue to be tried. The assault was attempted to be proved only by circumstantial evidence and it was denied. Hence the instruction should have been given.⁵³

ARTICLE XXI. ON "EACH LINK."

§ 3264. **Instruction as to "each link."**—"The court instructs the jury that the rule requiring the jury to be satisfied of the defendant's guilt beyond a reasonable doubt in order to warrant a conviction does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt; it is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the state has proven each material fact charged, and that the defendant is guilty." Held proper.⁵⁴

ARTICLE XXII. RELATING TO CERTAIN WORDS.

§ 3265. **Instruction on "serious," "difficulty."**—The use of the word "serious" instead of the statutory word "great," as to the law of self-defense, will not vitiate an instruction.⁵⁵ The term "difficulty" is in general use, and when used in drawing instructions it is expressive of a group or collection of ideas.⁵⁶

§ 3266. **Meaning of "ought," "must" and "may."**—The word "ought," used in an instruction, means, in its ordinary sense, to be held or bound in duty or moral obligation.⁵⁷ On the use of the words "must" and "may," if the jury believe the witness has testified

⁵³ S. v. Smith, 53 Mo. 267, 2 Green C. R. 598.

⁵⁴ Bradshaw v. S., 17 Neb. 147, 22 N. W. 361, 5 Am. C. R. 499, 505; Gott v. P., 187 Ill. 249, 287, 58 N. E. 293; Allen v. S., 60 Ala. 19; Morgan v. S., 51 Neb. 672, 71 N. W. 788; Sumner v. S., 5 Blackf. (Ind.) 579, 36 Am. D. 561; S. v. Hayden, 45 Iowa 11; Rudy v. Com., 128 Pa. St.

500, 18 Atl. 344; Underhill Cr. Ev., § 14.

⁵⁵ Lawlor v. P., 74 Ill. 228; McDonald v. S., 89 Tenn. 161, 14 S. W. 487; S. v. Murdy, 81 Iowa 603, 47 N. W. 867. But see Reins v. P., 30 Ill. 275.

⁵⁶ Gainey v. P., 97 Ill. 279.

⁵⁷ Otmer v. P., 76 Ill. 152.

falsely, the court holds that the jury may disregard the testimony of such witness, but is not bound to so disregard.⁵⁸

ARTICLE XXIII. RELATING TO SELF-DEFENSE.

§ 3267. **Relating to self-defense.**—Where the accused sought to show that he was justified or excused in committing a homicide, in self-defense, he is not required to establish such defense to the “satisfaction” of the jury. It is enough that the jury shall believe, from the evidence, that the essential facts are true.⁵⁹ “Even if the defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle before the homicide was committed, the killing might be justified in self-defense.” Held proper.⁶⁰

§ 3268. **Instruction—Burden as to self-defense.**—“If you find that the defendant inflicted the blow upon the deceased that caused his death, then the burden of proof is upon the defendant to show that he did it in self-defense.” This instruction is clearly erroneous; it requires the defendant to establish by a preponderance of the evidence that he acted in self-defense, depriving him of the benefit of the rule of reasonable doubt.⁶¹

ARTICLE XXIV. RELATING TO INSANITY.

§ 3269. **Insanity—Burden to “satisfy” jury.**—“The law is that where the killing is admitted, and insanity or want of legal responsibility is alleged as an excuse, it is the duty of the defendant to satisfy the jury that insanity actually existed at the time of the act, and a doubt as to such insanity will not justify a jury in acquitting upon that ground.” Held proper.⁶² As to the defense of insanity the court instructed the jury as follows: “Was the defendant a free agent in forming the purpose to kill the deceased? Was he, at the time the act was committed, capable of judging whether that act was right or wrong? And did he at the time know

⁵⁸ Hoge v. P., 117 Ill. 46, 6 N. E. 796.

⁵⁹ Wacasser v. P., 134 Ill. 442, 25 N. E. 564; Alexander v. P., 96 Ill. 96; Jackson v. P., 18 Ill. 270; Hoge v. P., 117 Ill. 44, 6 N. E. 796.

⁶⁰ P. v. Simons, 60 Cal. 72; P. v.

Bush, 65 Cal. 129, 3 Pac. 590, 5 Am. C. R. 463.

⁶¹ S. v. Porter, 34 Iowa 131, 1 Green C. R. 246.

⁶² Ortwein v. Com., 76 Pa. St. 414, 1 Am. C. R. 297.

it was an offense against the laws of God and man?" Held proper.⁶³

§ 3270. **Sanity as separate issue.**—It is not error to refuse an instruction submitting to the jury the issue as to the defendant's sanity as a separate issue, and to instruct that if, on consideration of the evidence, they had a reasonable doubt as to his sanity, they should acquit.⁶⁴

ARTICLE XXV. INSTRUCTIONS ON DRUNKENNESS.

§ 3271. **Relating to drunkenness.**—As between murder in the second degree and manslaughter, the drunkenness of the offender can form no legitimate matter of inquiry, for manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation.⁶⁵ An instruction that drunkenness is no excuse for crime, but rather an aggravation of it, is erroneous.⁶⁶

ARTICLE XXVI. IMPEACHMENT OF WITNESSES.

§ 3272. **Relating to impeachment of witness.**—The refusal to instruct the jury that they would not be warranted in disregarding the statements of certain witnesses, unless their testimony had been sufficiently impeached, was proper.⁶⁷

§ 3273. **False in one, false in all.**—"The maxim, *falsus in uno, falsus in omnibus*, should only be applied in cases where a witness willfully and knowingly gives false testimony."⁶⁸

ARTICLE XXVII. DISREGARDING EVIDENCE.

§ 3274. **On disregarding testimony.**—The jury have no right to disregard the evidence of a witness because he may have testified falsely to a matter wholly immaterial to any issue in the case, and

⁶³ Blackburn v. S., 23 Ohio St. 146, 2 Green C. R. 537, 540; Clark v. S., 12 Ohio 494.

⁶⁴ Hornish v. P., 142 Ill. 626, 32 N. E. 677; Webb v. S., 9 Tex. App. 490; 2 Bish. Cr. Proc. (3d ed.), § 669.

⁶⁵ P. v. Langton, 67 Cal. 427, 7 Am.

C. R. 440, 7 Pac. 843; Pirtle v. S., 9 Humph. (Tenn.) 663.

⁶⁶ McIntyre v. P., 38 Ill. 520.

⁶⁷ Martin v. P., 54 Ill. 226.

⁶⁸ Brennan v. P., 15 Ill. 517. *Contra*, P. v. Treadwell, 69 Cal. 226, 10 Pac. 502, 7 Am. C. R. 162.

this is so well understood that it will not require the citation of authorities.⁶⁹

ARTICLE XXVIII. RELATING TO DEFENDANT.

§ 3275. Referring to defendant's testimony.—An instruction directing attention of the jury to the testimony of the defendant is recognized by statute and the practice of the courts.⁷⁰ An instruction "that if the jury believe from the evidence that the defendant has been contradicted on a material point, then the jury have a right to disregard his whole testimony, unless corroborated by other testimony," is erroneous.⁷¹ An instruction that the jury has the right to take into consideration the demeanor and conduct of the accused "during the trial" is erroneous.⁷²

§ 3276. Defendant same as other witnesses.—While the jury, when the defendant testifies in his own behalf, may rightfully take into consideration his interest in the result of the suit as affecting his credibility, the law does not authorize the court to place him in a separate and inferior class from all other witnesses by telling the jury they are not bound to treat his testimony the same as the testimony of other witnesses.⁷³

§ 3277. On defendant not testifying.—An instruction was asked by the defendant to the effect that no presumption of guilt should be indulged against him because he had not testified in his own behalf, but was refused; this was held to be reversible error.⁷⁴

ARTICLE XXIX. ON PRESUMPTION.

§ 3278. Instruction on presumption.—The jury were instructed that "when all the circumstances proved raise a strong presump-

⁶⁹ Dacey v. P., 116 Ill. 575, 6 N. E. 165. See McMahon v. P., 120 Ill. 584, 11 N. E. 883. See "Witnesses."

⁷⁰ Padfield v. P., 146 Ill. 663, 35 N. E. 469; Bressler v. P., 117 Ill. 422, 8 N. E. 62; Hirschman v. P., 101 Ill. 568. See Underhill Cr. Ev., § 58; Dryman v. S., 102 Ala. 130, 15 So. 433; Doyle v. P., 147 Ill. 394, 35 N. E. 372.

⁷¹ Gullihier v. P., 82 Ill. 146; Brennan v. P., 15 Ill. 517. See Higgins v. P., 98 Ill. 522. Compare S. v.

Holloway, 117 N. C. 730, 23 S. E. 168; S. v. Collins, 118 N. C. 1203, 24 S. E. 118.

⁷² Vale v. P., 161 Ill. 311, 43 N. E. 1091; Purdy v. P., 140 Ill. 49, 29 N. E. 700.

⁷³ Hellyer v. P., 186 Ill. 550, 58 N. E. 245. See Hicks v. U. S., 150 U. S. 442, 14 S. Ct. 144.

⁷⁴ Farrell v. P., 133 Ill. 247, 24 N. E. 423; S. v. Evans, 9 Kan. App. 889, 58 Pac. 240. *Contra*, Morrison v. S., 40 Tex. Cr. 473, 51 S. W. 358.

tion of the guilt of the accused, his failure to offer any explanation where in his power to do so tends to confirm the presumption of his guilt." Held clearly erroneous.⁷⁶

ARTICLE XXX. GIVING FURTHER INSTRUCTIONS.

§ 3279. **Giving further instructions.**—After the jury had retired to consider of their verdict they sent a written request for further instructions, that is, as to the law and punishment for manslaughter in the third degree, and the presiding judge, while the court was in session and the jury in their room deliberating, without the knowledge of counsel for the state, sent to the jury in their room, and without their coming into court, further instruction in answer to the request of the jury: Held error.⁷⁶

ARTICLE XXXI. REFUSING ALL INSTRUCTIONS.

§ 3280. **Refusing instructions.**—It has been repeatedly held that if any part of a single instruction ought not to have been given, the action of the trial court in rejecting the whole will be affirmed, and this result must follow when any part of a single instruction is so worded that it may have a tendency to mislead the jury.⁷⁷ Where the court throws aside all the instructions asked by one or both of the parties, and prepares written instructions of its own, the latter must fairly and fully instruct the jury on all legal questions involved in the case and see that no injury has been done to the party by the refusal of the instructions asked.⁷⁸ The judge may instruct the jury at his discretion, if he reduces his instruction to writing.⁷⁹

ARTICLE XXXII. ON "NINETY AND NINE."

§ 3281. **On "ninety and nine."**—It is not error to refuse an instruction which asserts "that it is the policy of the law that it is bet-

⁷⁶ *Clem v. S.*, 42 Ind. 420, 2 Green C. R. 696, 13 Am. R. 369; *Com. v. Hardiman*, 9 Gray (Mass.) 136; *Gordon v. P.*, 33 N. Y. 501; *Com. v. Pease*, 110 Mass. 412.

⁷⁸ *S. v. Patterson*, 45 Vt. 308, 1 Green C. R. 492; *Taylor v. Betsford*, 13 Johns. (N. Y.) 487; *Sargent v. Roberts*, 1 Pick. (Mass.) 337. And it is also error to send the jury a

copy of the statutes: *Burrows v. Unwin*, 3 C. & P. 310; *Merrill v. Nary*, 10 Allen (Mass.) 416.

⁷⁷ *P. v. Davis*, 64 Cal. 440, 1 Pac. 889, 4 Am. C. R. 515.

⁷⁸ *Wacaser v. P.*, 134 Ill. 442, 25 N. E. 564; *Hill v. Parsons*, 110 Ill. 107.

⁷⁹ *Spies v. P.*, 122 Ill. 244, 12 N. E. 865, 17 N. E. 898.

ter that ninety and nine, or any number of guilty persons, should escape than that one innocent man should be convicted.”⁸⁰

ARTICLE XXXIII. ON CHARACTER.

§ 3282. **On good character.**—The following instruction invades the province of the jury: “Evidence of good character is entitled to great weight when the evidence against the accused is weak or doubtful, but is entitled to very little weight when the proof is strong.”⁸¹

ARTICLE XXXIV. ACCOMPLICE UNCORROBORATED.

§ 3283. **Accomplice uncorroborated.**—In some jurisdictions a conviction can not be had on the uncorroborated testimony of accomplices, and it is error for the court to refuse to so instruct the jury.⁸² Although the jury may convict on the evidence of accomplices alone, still the law is that they shall not do so arbitrarily; they must act on the testimony of accomplices with great caution, and it is error in the court to refuse to so instruct the jury.⁸³

ARTICLE XXXV. INSTRUCTIONS EMBODYING STATUTE.

§ 3284. **Instruction quoting statute.**—An instruction quoting the entire statute, containing various phases or modes of committing an offense, not alleged in the indictment, is erroneous. It should be restricted to the charge set out in the indictment.⁸⁴

ARTICLE XXXVI. CIRCUMSTANTIAL EVIDENCE.

§ 3285. **On circumstantial evidence**—“Each link.”—Where the evidence on which the prosecution relies for a conviction is wholly cir-

⁸⁰ *Adams v. P.*, 109 Ill. 451; *Seacord v. P.*, 121 Ill. 631, 13 N. E. 194; *Devlin v. P.*, 104 Ill. 505.

⁸¹ *Vincent v. S.*, 37 Neb. 672, 56 N. W. 320.

⁸² *Martin v. S.*, 36 Tex. Cr. 632, 36 S. W. 587, 38 S. W. 194; *S. v. Reavis*, 71 Mo. 419; *Stewart v. S.*, 35 Tex. Cr. 174, 32 S. W. 766.

⁸³ *Hoyt v. P.*, 140 Ill. 588, 596, 30 N. E. 315, 16 L. R. A. 239; *S. v. Dana*, 59 Vt. 614, 10 Atl. 727; *S. v. Woolard*, 111 Mo. 248, 20 S. W. 27. See *Tuberson v. S.*, 26 Fla. 472, 7

So. 858; *P. v. Sternberg*, 111 Cal. 11, 43 Pac. 201; *Shiver v. S.*, 41 Fla. 631, 27 So. 36; *S. v. Kennedy*, 154 Mo. 268, 55 S. W. 293.

⁸⁴ *Whitcomb v. S.*, 30 Tex. App. 269, 17 S. W. 258. Compare *P. v. McGonegal*, 62 Hun 622, 17 N. Y. Supp. 147. See *Simons v. S.* (Tex. Cr.), 34 S. W. 619. The case of *Whitcomb v. State* is one of Sunday violation where the statute enumerates different ways of violating the Sunday law.

cumstantial an instruction to the jury that each link in the chain of circumstances relied upon and essential to establish the guilt of the defendant must be proven beyond a reasonable doubt, is proper, and it is error for the court to refuse such an instruction.⁸⁵

ARTICLE XXXVII. RELATING TO JURY'S DUTY.

§ 3286. **Each juror should be satisfied.**—Each juror should be satisfied from the evidence beyond a reasonable doubt of the guilt of the defendant.⁸⁶ An instruction that a juror “is not at liberty to disbelieve as a juror what he believes as a man,” has been condemned.⁸⁷

ARTICLE XXXVIII. JURY AS JUDGES.

§ 3287. **Jury judge of law.**—Under a statute making the jury the judges of the law as well as the facts, the following instruction was held proper: “The court instructs the jury that they are the judges of the law as well as of the facts, but the jury are further instructed that it is the duty of the jury to accept and act upon the law as laid down to you by the court, unless you can say upon your oaths that you are better judges of the law than the court; and, if you can say upon your oaths that you are better judges of the law than the court, then you are at liberty to so act.”⁸⁸

⁸⁵ *Graves v. P.*, 18 Colo. 170, 32 Pac. 63; *Kollock v. S.*, 88 Wis. 663, 60 N. W. 817; *P. v. Aiken*, 66 Mich. 460, 33 N. W. 821; *S. v. Moxley*, 102 Mo. 374, 14 S. W. 969, 15 S. W. 556; *Davis v. S.*, 74 Ga. 869; *Arismendis v. S.* (Tex. Cr., 1899), 54 S. W. 599. See *S. v. Calder*, 23 Mont. 504, 59 Pac. 903; *S. v. Cohen*, 108 Iowa 208, 78 N. W. 857; *P. v. McArron*, 121 Mich. 1, 79 N. W. 944.

⁸⁶ *Parker v. S.*, 136 Ind. 284, 35 N. E. 1105; *Grimes v. S.*, 105 Ala. 86, 17 So. 184. *Contra, S. v. Young*, 105 Mo. 634, 16 S. W. 408; *Little v. P.*, 157 Ill. 153, 157, 42 N. E. 389; *U. S. v. Schneider*, 21 D. C. 381; *Fogarty v. S.*, 80 Ga. 450, 5 S. E. 782.

⁸⁷ *P. v. Johnson*, 140 N. Y. 350, 35 N. E. 604; *Cross v. S.*, 132 Ind. 65, 31 N. E. 473; *Lawhead v. S.*, 46 Neb. 607, 65 N. W. 779; *P. v. Wayman*, 128 N. Y. 585, 27 N. E. 1070; *S. v. Pierce*, 65 Iowa 85, 21 N. W. 195; *Fanton v. S.*, 50 Neb. 351, 69 N. W. 953; *S. v. Bridges*, 29 Kan. 138; *Underhill Cr. Ev.*, § 12; *Adams v. S.*, 135 Ind. 571, 34 N. E. 956.

⁸⁸ *Davison v. P.*, 90 Ill. 221; *Spies v. P.*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 893. See *Jackson v. S.*, 91 Ga. 271, 18 S. E. 298; *Walker v. S.*, 136 Ind. 663, 36 N. E. 356; *Mullinix v. P.*, 76 Ill. 215.

CHAPTER LXXXVII.

PENALTY.

ART.	I. When Felony or Misdemeanor, . . .	§§ 3288-3289
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ARTICLE I. WHEN FELONY OR MISDEMEANOR.

§ 3288. **Felony defined.**—The term "felony," in the general acceptance of the English law, comprised every species of crime which at common law occasioned a total forfeiture of lands or goods, or both, and to which might be superadded capital or other punishment, according to the degree of guilt.¹ "Felonious" includes "willful."²

§ 3289. **When a misdemeanor—Age an element.**—Where a statute provides the penalty for an offense to be imprisonment in the penitentiary or fine, or both, the offense is a misdemeanor only, under the stat-

¹ P. v. Lyon, 99 N. Y. 210, 1 N. E. 673, 5 Am. C. R. 12; 4 Bl. Com. 94. ² S. v. McDaniel, 45 La. 686, 12 So. 751.

ute of Illinois.³ Where the defendant is under the statutory age barring him from being punished as a felon, a conviction on a felony charge is only a misdemeanor, and his punishment should be fixed by the court and not the jury.⁴ Under a statute making imprisonment the penalty without stating whether in the penitentiary or county jail, that construction must be given to the statute most favorable to the defendant.⁵

ARTICLE II. STATE REFORMATORY IMPRISONMENT.

§ 3290. State reformatory punishment.—The state reformatory statute of the state of Illinois is a criminal enactment, and the detention of minors therein is imprisonment for criminal offenses.⁶

ARTICLE III. FINE; PLEA OF GUILTY.

§ 3291. Extent of fine—Court fixes punishment.—Where a statute reads that for the first offense the fine shall be not less than one hundred dollars, the court by implication has power to assess a fine of more than that sum.⁷ On a plea of guilty entered by the defendant, the court has the same power in fixing the extent of the punishment as the jury.⁸

ARTICLE IV. MAXIMUM PUNISHMENT.

§ 3292. Maximum punishment—Statute.—A statute fixing the maximum penalty as the punishment for a second offense is not unconstitutional.⁹ Although the sentence in the reformatory act is a "general sentence" not to exceed the maximum term provided by law, for the crime for which the prisoner was convicted and sentenced, and embodied in the judgment, this is construed to be a sentence and judgment for such maximum term, and is not unconstitutional.¹⁰

³ *Lamkin v. P.*, 94 Ill. 504; *Baits v. P.*, 123 Ill. 429, 16 N. E. 483; *Herman v. P.*, 131 Ill. 597, 22 N. E. 471; *Thomas v. P.*, 113 Ill. 531. See *P. v. Lyon*, 99 N. Y. 210, 1 N. E. 673, 5 Am. C. R. 14; *S. v. Hill*, 91 N. C. 561. *Contra*, *S. v. Waller*, 43 Ark. 381, 5 Am. C. R. 632; *Smith v. S.*, 33 Me. 48; *P. v. War*, 20 Cal. 117; *Johnston v. S.*, 7 Mo. 183; *S. v. Melton*, 117 Mo. 618, 23 S. W. 889. The punishment for a misdemeanor may be fixed at imprisonment in the penitentiary: *P. v. Murphy*, 185 Ill. 623, 627, 57 N. E. 820.

⁴ *Creed v. P.*, 81 Ill. 565. See also

Henderson v. P., 165 Ill. 607, 46 N. E. 711; *Monoughan v. P.*, 24 Ill. 341.

⁵ *Brooks v. P.*, 14 Colo. 413, 24 Pac. 553. See *P. v. Watson*, 75 Mich. 582, 42 N. W. 1005.

⁶ *P. v. Illinois State Reformatory*, 148 Ill. 419, 36 N. E. 76; *Henderson v. P.*, 165 Ill. 607, 46 N. E. 711.

⁷ *Hankins v. P.*, 106 Ill. 633.

⁸ *Coates v. P.*, 72 Ill. 303; *Hamilton v. P.*, 71 Ill. 499.

⁹ *Kelly v. P.*, 115 Ill. 587, 4 N. E. 644. See *P. v. Stanley*, 47 Cal. 113, 2 Green C. R. 438; *P. v. Raymond*, 96 N. Y. 38, 4 Am. C. R. 124.

¹⁰ *P. v. Illinois State Reformatory*,

ARTICLE V. PENALTY FOR SECOND OFFENSE.

§ 3293. **Punishment for second offense.**—Where the indictment alleges a former conviction, with a view of increasing the penalty for a subsequent offense, the offender, on conviction, is not subjected to increased punishment for the first violation, nor is he a second time put in jeopardy for it. The heavier punishment is for persisting in the wrong by repeating the offense.¹¹ It is a general proposition that whenever a statute makes a second offense a felony, the first being a misdemeanor, or punishes the second more severely than the first, this must be enlarged to mean after a conviction for the first, and not merely after it is committed.¹² Alleging in the indictment a former conviction of the accused of an entirely different offense is not charging him with an offense with respect to such former offense. The averment as to such former offense is only a fact which goes to the punishment of the case in hand.¹³

§ 3294. **Pardon a defense to second offense.**—The statute provides that when a person is convicted of an offense and sentenced to confinement therefor in the penitentiary, and it appears in the manner prescribed that he has before been sentenced in the United States to a like punishment, a term of five years' confinement shall be added to the term for which he is or would be otherwise sentenced: Held that a pardon of the former conviction is a good defense to such additional penalty on a second conviction.¹⁴

148 Ill. 420, 36 N. E. 76; Bartley v. P., 156 Ill. 241, 40 N. E. 831. See Henderson v. P., 165 Ill. 609, 46 N. E. 711. See also George v. P., 167 Ill. 417, 47 N. E. 741.

¹¹ S. v. Adams, 64 N. H. 440, 13 Atl. 785, 7 Am. C. R. 239; Plumbly v. Com., 2 Metc. (Mass.) 413; P. v. Stanley, 47 Cal. 113, 2 Green C. R. 437; Ross' Case, 2 Pick. (Mass.) 165; Rand v. Com., 9 Gratt. (Va.) 743. See also Ingalls v. S., 48 Wis. 647, 4 N. W. 785; Blackburn v. S., 50 Ohio St. 428, 36 N. E. 18; Com. v. Tabor, 138 Mass. 496; Maguire v. S., 47 Md. 485; S. v. Benson, 28 Minn. 424, 10 N. W. 471; Underhill Cr. Ev., § 507; S. v. Hodgson, 66 Vt. 134, 157, 28 Atl. 1089; P. v. Lewis, 64 Cal. 401,

1 Pac. 490; Moore v. Missouri, 159 U. S. 673, 16 S. Ct. 179.

¹² Long v. S., 36 Tex. 6, 1 Green C. R. 642; P. v. Butler, 3 Cow. (N. Y.) 347; Rand v. Com., 9 Gratt. (Va.) 738; Plumbly v. Com., 2 Metc. (Mass.) 413; Hawk. P. C., ch. 40, § 3.

¹³ Moore v. Missouri, 159 U. S. 673, 16 S. Ct. 179; P. v. Stanley, 47 Cal. 113, 17 Am. R. 401; Ross' Case, 2 Pick. (Mass.) 165; Ingalls v. S., 48 Wis. 647, 4 N. W. 785; Reg. v. Clark, 6 Cox C. C. 210; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Johnson v. P., 55 N. Y. 512; Kelly v. P., 115 Ill. 583, 56 Am. R. 184, 4 N. E. 644.

¹⁴ Edwards v. Com., 78 Va. 39, 4 Am. C. R. 460. But see Mount v. Com., 2 Duv. (Ky.) 93.

ARTICLE VI. UNLAWFUL PUNISHMENT.

§ 3295. **Punishment less than fixed by law—Penalty greater.**—If the penalty be made less than the statutory requirement the verdict will be sustained, being favorable to the defendant.¹⁵ But if the punishment be made greater or more severe than that prescribed by statute it is erroneous; as, for example, where, in addition to imprisonment, "hard labor" is made a part of the penalty, when "hard labor" is not authorized by statute.^{15a}

ARTICLE VII. PUNISHMENT FIXED BY JURY.

§ 3296. **Jury shall fix punishment.**—By statute of Kentucky it is made the duty of the jury in rendering verdicts of guilty to fix the degree of punishment "to be inflicted, unless the same be fixed by law." The penalty for setting up, exhibiting or keeping faro banks shall be a fine of five hundred dollars and costs and imprisonment until the same is paid, or imprisonment not more than one year, or both such fine and imprisonment. On conviction for a violation of such statute it is the duty of the jury to fix the punishment instead of rendering a general verdict of guilty and leaving the penalty to be fixed by the court.¹⁶ By the common law a defendant has no constitutional right to have his term of imprisonment fixed by the jury; nor does the constitution of Illinois give him such right. At common law the jury returns a verdict of guilty or not guilty; the punishment is fixed by the court.¹⁷

ARTICLE VIII. COSTS; FINE NOT "DEBT."

§ 3297. **Costs follow judgment.**—The costs in a criminal proceeding follow the judgment and are part of it, and do not arise out of an implied contract.¹⁸ Each defendant is liable for all the costs of prosecution where convicted together, as a part of the penalty.¹⁹

¹⁵ *Cole v. P.*, 84 Ill. 218; *McQuoid v. P.*, 3 Gilm. (Ill.) 81; *Campbell v. S.*, 16 Ala. 144; *P. v. Bauer*, 37 Hun (N. Y.) 407; *Wattingham v. S.*, 5 Sneed (Tenn.) 64; *Hoskins v. S.*, 27 Ind. 470; *P. v. Burrige*, 99 Mich. 343, 58 N. W. 319, 9 Am. C. R. 71. *Contra*, *Rice v. Com.*, 12 Metc. (Mass.) 246; *Taff v. S.*, 39 Conn. 82; *Brown v. S.*, 47 Ala. 47, 1 Green C. R. 532; *Whitehead v. Reg.*, 7 Q. B. 582; *Jones v. Com.*, 20 Gratt. (Va.) 848.

^{15a} *Haynes v. U. S.*, 101 Fed. 817; *Jackson v. U. S.*, 102 Fed. 473.

¹⁶ *Herron v. Com.*, 79 Ky. 38, 4 Am. C. R. 238.

¹⁷ *George v. P.*, 167 Ill. 447, 457; 47 N. E. 741; 4 Bl. Com. 361.

¹⁸ *Kennedy v. P.*, 122 Ill. 653, 13 N. E. 213; *Morgan v. S.*, 47 Ala. 34; *Caldwell v. S.*, 55 Ala. 133; *Ex parte Howard*, 26 Vt. 205; *United States v. Walsh*, 1 Abb. (C. C.) 66; 1 Bish. Cr. Proc. (3d ed.), § 1321.

¹⁹ *Moody v. P.*, 20 Ill. 319. Costs

§ 3298. **Fine is not debt.**—A fine imposed as the penalty for a criminal offense is not a debt within the meaning of the law forbidding imprisonment for debt.²⁰

ARTICLE IX. INFAMOUS, CRUEL PUNISHMENT.

§ 3299. **Indictment for infamous punishment.**—When the accused is in danger of being subjected to an infamous punishment, if convicted, he has the right to insist that he shall not be put upon his trial, except on the accusation of a grand jury. For more than a century imprisonment at hard labor in the state prison or penitentiary, or other similar institution, has been considered an infamous punishment in England and America.²¹

§ 3300. **Cruel punishment.**—“Excessive bail should not be required nor excessive fines imposed, nor cruel or unusual punishments inflicted.”²² The “cruel and unusual punishment” forbidden by the United States constitution (article 8, Amendments) has no application to crimes against the laws of a state.²⁴

ARTICLE X. IMPRISONMENT IN MITIGATION.

§ 3301. **Imprisonment—In mitigation.**—Where a person has already suffered some punishment on account of an alleged offense he ought to be entitled to prove such punishment in mitigation of any other punishment which might be inflicted on a subsequent trial for the same offense. So, where a defendant has been imprisoned in the county jail, on a criminal charge, previous to his trial, he is entitled to prove that imprisonment on the trial in mitigation.²²

ARTICLE XI. EX POST FACTO PENALTY.

§ 3302. **Statute not ex post facto.**—Statutes increasing the punishment of habitual criminals for a second or subsequent offense can

were unknown at common law in criminal cases: 1 Bish. New Cr. Proc., § 1313.

²⁰ Lee v. S., 75 Ala. 29; S. v. Leach, 75 Ala. 36; Ex parte Robertson, 27 Tex. App. 628, 11 S. W. 669. See P. v. Foster, 104 Ill. 156.

²¹ Ex parte Wilson, 114 U. S. 417,

5 S. Ct. 935, 4 Am. C. R. 288; 4 Bl. Com. 377.

²² Kistler v. S., 54 Ind. 400, 2 Am. C. R. 21.

²³ See S. v. Driver, 78 N. C. 423, 2 Am. C. R. 487.

²⁴ Com. v. Murphy, 165 Mass. 66, 42 N. E. 504, 10 Am. C. R. 68; Com. v. Hitchings, 5 Gray (Mass.) 482.

not be regarded as retrospective in their action, nor are they *ex post facto* laws.²⁵ If the law by which punishment is to be inflicted is changed to the prejudice of the defendant after the commission of the crime, it is *ex post facto*, and invalid as to such offense.²⁶ Where the punishment for manslaughter, under the statute of Illinois, at the time of the commission of the crime, was imprisonment in the penitentiary for life or for a number of years, and under the new law, called the indeterminate sentence act of 1895, the punishment could not be less than the minimum, and might extend to the maximum,—it was held that the law of 1895 was *ex post facto*, and that the accused should have been punished under the law as it stood at the time of the commission of the crime.²⁷

ARTICLE XII. DEATH PENALTY; EXECUTION.

§ 3303. **Place of execution—Death penalty.**—Where the punishment is fixed at death, the defendant shall be executed in the county where he was convicted.²⁸

§ 3304. **“Quick with child”—Execution stayed.**—By the common law, if a woman in a capital case is “quick with child,” the court will order a stay of execution “till a reasonable time after her delivery or until the ensuing session.”²⁹

ARTICLE XIII. PUNISHMENT, COMMENCES WHEN.

§ 3305. **When punishment commences.**—The sheriff shall take a prisoner to the penitentiary within a reasonable time after the adjournment of court.³⁰

ARTICLE XIV. SECURING FINE, WHEN UNLAWFUL.

§ 3306. **Securing fine by order of commitment.**—To secure the collection of a fine, the sentence, by the common law and by statutes

²⁵ P. v. Raymond, 96 N. Y. 38; Sturtevant v. Com., 158 Mass. 598, 33 N. E. 648; Ex parte Gutierrez, 45 Cal. 429.

²⁶ Johnson v. P., 173 Ill. 133, 50 N. E. 321; Kring v. Missouri, 107 U. S. 221, 2 S. Ct. 443; Shepherd v. P., 25 N. Y. 406; Garvey v. P., 6 Colo. 559.

²⁷ Johnson v. P., 173 Ill. 133, 50 N. E. 321.

²⁸ Jackson v. P., 18 Ill. 273.

²⁹ 1 Hale P. C. 368; 2 Hawk. P. C., ch. 51. See 4 Bl. Com. 395. A plea of pregnancy for delay of sentence is to be submitted to a jury of matrons: 2 Hale P. C. 413. See Holeman v. S., 13 Ark. 105.

³⁰ Morton v. P., 47 Ill. 476.

in many of the states, should contain the order that the defendant stand committed till it is paid.³¹ Giving an officer security for a fine, such as a note and mortgage, is not good in payment or discharge of a fine, and such note is not collectible, because not authorized by statute.³²

ARTICLE XV. ENGLISH COMMON LAW.

§ 3307. **English criminal law.**—The English criminal laws may be truly characterized as written in blood. When Blackstone wrote his commentaries there were one hundred and sixty kinds of felonies, for the commission of which the offenders expiated their crimes on the gallows. Stealing the value of one shilling was a capital offense.³³

³¹ 1 Bish. New Cr. Proc., § 1301, citing *Rex v. Hord*, Say. 176; *Reg. v. Layton*, 1 Salk. 353; *Ex parte Tuichner*, 69 Iowa 393, 28 N. W. 655; *Kennedy v. P.*, 122 Ill. 649, 13 N. E. 213; *Ex parte Maule*, 19 Neb. 273, 27 N. W. 119; *S. v. Myers*, 44 Iowa 580;

S. v. Boynton, 75 Iowa 753, 38 N. W. 505.

³² *Schlieff v. S.*, 38 Ark. 522; *Clark v. S.*, 3 Tex. App. 338.

³³ *McKinney v. P.*, 2 Gilm. (Ill.) 549.

CHAPTER LXXXVIII.

NEW TRIAL.

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ARTICLE I. ORIGIN AND EFFECT OF MOTION.

§ 3308. **Origin of motion for new trial—Rules.**—The origin of the motion for a new trial is of extremely ancient date, “concealed in the night of time,” and consequently involved in some obscurity.¹ The same rules relating to a new trial govern in both civil and criminal cases.²

§ 3309. **Effect of motion—Arrest of judgment.**—At common law the motion for a new trial suspends the judgment and all its effects until it is disposed of. This rule has been adopted in Kentucky and

¹ 2 Thomp. Trials, § 2709, citing ² 2 Thomp. Trials, § 2709.
³ Bl. Com. 387, 388.

Illinois.³ The office of the motion in arrest of judgment is to direct the attention of the trial court to substantial defects in the indictment, or to errors appearing on the face of the record proper; it can not take the place of a motion for a new trial.⁴

ARTICLE II. MOTION—GENERAL.

§ 3310. **Motion without stating reasons.**—Where a motion for a new trial is submitted without any statement in writing of the grounds therefor, without objection, such statement will be treated as waived, and the want of it can not be urged in the higher court.⁵

ARTICLE III. OBJECT OF MOTION.

§ 3311. **Object of motion.**—Applying for and securing a new trial relates to the charge upon which the accused was convicted, and not as to counts or charges upon which he was acquitted.⁶

ARTICLE IV. WHEN TO BE MADE.

§ 3312. **When motion must be entered.**—There should be no delay in entering the motion for a new trial. It should be made at the first opportunity, and any cause for delay should be explained by affidavit upon which the application is founded.⁷

ARTICLE V. VERIFICATION OF MOTION; COUNTER AFFIDAVITS.

§ 3313. **Motion must be verified—Counter affidavits.**—In some jurisdictions, the motion for a new trial must be supported by affidavit of the moving party, or some person for him, setting out in detail all the facts and reasons therefor, that the court may be able to ascertain its credibility and relevancy and whether diligence has been shown.⁸ Affidavits of the witnesses who are expected to give the newly discov-

³ 2 Thomp. Trials, § 2730, citing *Turner v. Booker*, 2 Dana (Ky.) 335; *Wright v. Haddock*, 7 Dana (Ky.) 254; *P. v. Gary*, 105 Ill. 264; *Hearson v. Grandine*, 87 Ill. 115.

⁴ *S. v. Koerner*, 51 Mo. 174; *S. v. Miller*, 36 La. 158; *McClerkin v. S.*, 20 Fla. 879.

⁵ *Bromley v. P.*, 150 Ill. 297, 37 N. E. 209; *Ottawa R. Co. v. McMath*, 91 Ill. 104.

⁶ *Brennan v. P.*, 15 Ill. 518; *Hurt v. S.*, 25 Miss. 378; *Slaughter v. S.*, 6 Humph. (Tenn.) 410.

⁷ *Cochlin v. P.*, 93 Ill. 410.

⁸ *S. v. Nagel*, 136 Mo. 45, 37 S. W. 821; *Dean v. S.*, 93 Ga. 184, 18 S. E. 557; *P. v. Eppinger*, 114 Cal. 350, 46 Pac. 97; *S. v. Moses*, 139 Mo. 217, 40 S. W. 883; *Mingia v. P.*, 54 Ill. 278; *Vick v. S.* (Tex. Cr., 1899), 51 S. W. 1117.

ered evidence should be taken, setting out the facts in detail, or the absence of such witnesses accounted for.⁹ That the people may file counter affidavits on a motion for a new trial is recognized as proper practice.¹⁰

ARTICLE VI. MOTION, WHEN UNNECESSARY.

§ 3314. **When motion not essential.**—A party is not bound to enter a motion for a new trial where the errors of law can be reached by a motion in arrest of judgment, as where the error appears in the pleadings or on the face of the judgment and the like.¹¹

§ 3315. **Overruling motion indirectly.**—The court, in rendering final judgment without disposing of a motion for a new trial or a motion in arrest, in effect overrules such motion.¹²

ARTICLE VII. NEW TRIAL DISCRETIONARY.

§ 3316. **New trial, discretionary with court.**—The granting of a new trial upon motion, on the grounds of newly discovered evidence since the verdict, is in the discretion of the court, and its action will not be reversed by a court of review, unless it clearly appears that the exercise of such discretion was abused.¹³

ARTICLE VIII. IMPEACHING VERDICT.

§ 3317. **Jurors can not impeach verdict.**—Jurymen can not give evidence to impeach their own verdict in a case, on motion for a new trial; nor can any other person who got his information from the jurymen.¹⁴

ARTICLE IX. INFLUENCING JURY; DISQUALIFICATION.

§ 3318. **Jury improperly influenced.**—The jury, while deliberating on their verdict, had a volume of opinions containing a report of a

⁹ *S. v. Nettles*, 153 Mo. 464, 55 S. W. 70.

¹⁰ *Yates v. P.*, 38 Ill. 527; *Keenan v. P.*, 104 Ill. 385; *P. v. Cesena*, 90 Cal. 381, 27 Pac. 300; *Smith v. S.*, 143 Ind. 685, 42 N. E. 913.

¹¹ *S. v. Phares*, 24 W. Va. 657; *Henderson v. Henderson*, 55 Mo. 534.

¹² *McIntyre v. P.*, 38 Ill. 521.

¹³ *Com. v. Ruisseau*, 140 Mass. 363,

5 N. E. 166; *P. v. Trezza*, 128 N. Y. 529, 8 N. Y. Cr. 283; *P. v. Demasters*, 109 Cal. 607, 42 Pac. 236; *Harless v. U. S.*, 92 Fed. 353; *S. v. Brockhaus*, 72 Conn. 109, 43 Atl. 850. See *P. v. Phelan*, 123 Cal. 551, 56 Pac. 424.

¹⁴ *Allison v. P.*, 45 Ill. 38. See "Verdict."

previous trial of the same case. Held a sufficient ground for a new trial, it not appearing that they did not read the report of the case therein reported.¹⁵ After the jury had retired to consider of their verdict, a pistol which had been shown to them on the trial, but not identified as the one used in the killing, was sent to the jury without the prisoner's consent. Held error.¹⁶

§ 3319. **Disqualified juror.**—The fact that one of the jurors who tried the cause was, after verdict, discovered to be disqualified—that is, that he could have been rejected for cause—does not necessarily entitle the defendant to a new trial. The court will exercise a discretion in such case.¹⁷ When a new trial is asked on the ground of the disqualification of a juror, it must affirmatively appear that the accused had no knowledge of the disqualifications until after the jury had been impaneled, when it was too late to take the objection by challenge.¹⁸

§ 3320. **Disqualified juror—When error.**—A juror having on his examination stated that he was a citizen of the United States, the defendant had a right to rely on the truthfulness of such statement; but after verdict it was discovered that the juror was not a citizen of the United States. Held that the defendant did not waive the disqualification of such juror.¹⁹ Where the accused has exhausted all his peremptory challenges and a disqualified juror has been forced upon him by overruling his challenge for cause, a new trial will be granted.²⁰

ARTICLE X. HEARING OF MOTION BY JUDGE.

§ 3321. **Same judge to hear motion.**—Where a motion for a new trial is made upon the minutes of the court, it is imperative that such motion should be heard by the judge who tried the cause, unless the party making the motion consents that it may be heard by some other judge.²¹

¹⁵ Jones v. S., 89 Ind. 82. *Contra*, S. v. Harris, 34 La. 118.

¹⁶ Yates v. P., 38 Ill. 527.

¹⁷ S. v. Harrison, 36 W. Va. 729, 15 S. E. 982, 9 Am. C. R. 631; P. v. Reece, 3 Utah 72, 2 Pac. 61, 4 Am. C. R. 527.

¹⁸ P. v. Scott, 56 Mich. 154, 22 N. W. 274, 6 Am. C. R. 349; S. v. Moats, 108 Iowa 13, 78 N. W. 701; S. v. Bussamus, 108 Iowa 11, 78 N. W. 700.

¹⁹ P. v. Reece, 3 Utah 72, 2 Pac. 61, 4 Am. C. R. 527; Quinn v. Halbert, 52 Vt. 365; Hill v. P., 16 Mich. 351. See S. v. Giron, 52 La. 491, 26 So. 985.

²⁰ Spies v. P., 122 Ill. 1, 12 N. E. 865, 17 N. E. 898.

²¹ Ohms v. S., 49 Wis. 415, 3 Am. C. R. 368, 5 N. W. 827; U. S. v. Harding, 1 Wall. Jr. 127; Warrain v. Smith, 2 Buls. 136.

ARTICLE XI. NEW EVIDENCE, CUMULATIVE.

§ 3322. **New evidence only cumulative.**—A new trial will not be granted on newly discovered evidence which is merely cumulative, and not conclusive in its character.²² Newly discovered evidence which tends to destroy or impeach the testimony on which a conviction was had can not be regarded as merely cumulative.²³

ARTICLE XII. NATURE OF NEW EVIDENCE.

§ 3323. **New evidence should change result.**—The nature of the newly discovered evidence should be of such a kind and quantity as, when considered with all the other evidence, would probably have resulted in a verdict of not guilty, had it been introduced on the trial. It should be of a conclusive character.²⁴ If the newly discovered evidence is of a different kind or character from that adduced on the trial, and of a conclusive character, a new trial should be granted.²⁵ A new trial should have been granted in a case where (the evidence being purely circumstantial) the defendant was wrongfully impeached by testimony discovered to be untrue, as to being able to enter a railroad car without breaking the seal.²⁶

²² *Spahn v. P.*, 137 Ill. 545, 27 N. E. 688; *Bulliner v. P.*, 95 Ill. 394; *Wallace v. S.*, 110 Ga. 284, 34 S. E. 852; *Higgins v. P.*, 98 Ill. 519; *McCollom v. Indianapolis, etc.*, St. R. Co., 94 Ill. 534; *Abrahams v. Weiller*, 87 Ill. 179; *S. v. Lejeune*, 52 La. 463, 26 So. 992; *Langdon v. P.*, 133 Ill. 409, 24 N. E. 874; *Hayne New Trial and Appeal*, §§ 90-92; *Dyer v. P.*, 84 Ill. 625; *Underhill Cr. Ev.*, § 522; *Adams v. P.*, 47 Ill. 381; *P. v. McDonell*, 47 Cal. 134, 2 Green C. R. 442; *Williams v. P.*, 164 Ill. 484, 45 N. E. 987; *Read v. Com.*, 22 Gratt. (Va.) 924, 1 Green C. R. 280; *P. v. Urquidas*, 96 Cal. 239, 31 Pac. 52; *Stalcup v. S.*, 129 Ind. 519, 28 N. E. 1116; *S. v. Johnson*, 72 Iowa 393, 34 N. W. 177; *P. v. Demasters*, 109 Cal. 607, 42 Pac. 236; *Casey v. S.*, 20 Neb. 138, 29 N. W. 264; *Smith v. S.*, 143 Ind. 685, 42 N. E. 913; *S. v. Whitmer*, 77 Iowa 557, 42 N. W. 442; *Tripp v. S.*, 95 Ga. 502, 20 S. E. 248; *P. v. Peacock*, 5 Utah 240, 14 Pac. 334; *S. v. Starnes*, 97 N. C. 423, 2 S. E. 447;

Scruggs v. S., 35 Tex. Cr. 622, 34 S. W. 951; *S. v. Tyson*, 56 Kan. 686, 44 Pac. 609.

²³ *Dennis v. S.*, 103 Ind. 142, 2 N. E. 349, 5 Am. C. R. 476; *Underhill Cr. Ev.*, § 519.

²⁴ *Bean v. P.*, 124 Ill. 576, 16 N. E. 656; *Grant v. S.*, 97 Ga. 789, 25 S. E. 399; *Klein v. P.*, 113 Ill. 596; *Baker v. S.*, 111 Ga. 141, 36 S. E. 607; *S. v. Tall*, 43 Minn. 273, 45 N. W. 449; *Hall v. S.*, 110 Ga. 314, 35 S. E. 153; *Clark v. S.*, 38 Tex. Cr. 30, 40 S. W. 992; *P. v. Benham*, 63 N. Y. Supp. 923, 14 N. Y. Cr. 434; *Field v. Com.*, 89 Va. 690, 16 S. E. 865; *S. v. Cushenberry*, 157 Mo. 168, 56 S. W. 737; *S. v. Armstrong*, 48 La. 314, 19 So. 146; *S. v. Foster*, 79 Iowa 726, 45 N. W. 385; *Williams v. U. S.*, 137 U. S. 113, 11 S. Ct. 43; *Prewett v. S. (Tex. Cr.)*, 53 S. W. 879.

²⁵ *Fletcher v. P.*, 117 Ill. 190, 7 N. E. 80; *Dennis v. S.*, 103 Ind. 142, 5 Am. C. R. 476, 2 N. E. 349; *Long v. S.*, 54 Ga. 564.

²⁶ *Keenan v. P.*, 104 Ill. 386.

§ 3324. **Witness admitting perjury; no ground.**—The mere fact that a witness, upon whose testimony principally a conviction was procured, admits, after giving his testimony, that he deliberately testified falsely on matters material, will not necessarily be ground for a new trial. The court is the judge of the credibility of the witnesses giving the newly discovered evidence, and for the purpose of testing their credibility may examine them in open court.²⁷

ARTICLE XIII. NEW EVIDENCE ONLY IMPEACHING.

§ 3325. **New evidence merely impeaching.**—It is not error to refuse a new trial where the testimony introduced as newly discovered is merely in the nature of impeaching evidence.²⁸

ARTICLE XIV. NEGLIGENCE OF PARTY.

§ 3326. **Party guilty of negligence.**—Where the newly discovered evidence is such that the defendant or his counsel could have discovered it by ordinary diligence or prudence before the trial, and no sufficient reasons appearing to prevent them from having made such discovery, then a new trial will not be granted on that ground.²⁹ Evidence mentioned in the application as additional evidence can not be regarded as newly discovered if known to the defense at or before the trial.³⁰ When newly discovered evidence is presented as grounds for a new trial, it must appear that such evidence has been discovered

²⁷ *Dennis v. S.*, 103 Ind. 142, 2 N. E. 349, 5 Am. C. R. 476; *Moore v. S.*, 96 Tenn. 209, 33 S. W. 1046; *P. v. Shea*, 38 N. Y. Supp. 821, 16 Misc. 111; *Shackelford v. S.* (Tex. Cr.), 53 S. W. 884.

²⁸ *Grady v. P.*, 125 Ill. 126, 16 N. E. 654; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 395; *Gilmore v. P.*, 124 Ill. 383, 15 N. E. 758; *Fletcher v. P.*, 117 Ill. 189, 7 N. E. 80; *Friedberg v. P.*, 102 Ill. 165; *Shilling v. S.* (Tex. Cr.), 51 S. W. 240; *Tobin v. P.*, 101 Ill. 124; *Womble v. S.*, 107 Ga. 666, 33 S. E. 630; *Whitney v. S.*, 154 Ind. 573, 57 N. E. 398; *Wright v. S.*, 44 Tex. 645; *S. v. Potter*, 108 Mo. 424, 22 S. W. 89; *Pease v. S.*, 91 Ga. 18, 16 S. Ct. 113; *Meurer v. S.*, 129 Ind. 587, 29 N. E. 392; *Hudspeth v. S.*, 55 Ark. 323, 18 S. W. 183; *S. v. Chambers*, 43 La. 1108, 10 So. 247;

Grate v. S., 23 Tex. App. 458, 5 S. W. 245; *Underhill Cr. Ev.*, § 521; *Ford v. S.*, 40 Tex. Cr. 280, 51 S. W. 935.

²⁹ *Klein v. P.*, 113 Ill. 596; *Bean v. P.*, 124 Ill. 576, 16 N. E. 656; *S. v. Ernest*, 150 Mo. 347, 51 S. W. 688; *Isaacs v. P.*, 118 Ill. 538, 8 N. E. 821; *Howell v. P.*, 178 Ill. 181, 52 N. E. 873; *S. v. Lejeune*, 52 La. 463, 26 So. 992; *Dansley v. S.* (Tex. Cr., 1899), 53 S. W. 105; *P. v. Soap*, 127 Cal. 408, 59 Pac. 771; *S. v. Joseph*, 51 La. 1309, 26 So. 275.

³⁰ *Langdon v. P.*, 133 Ill. 409, 24 N. E. 874; *P. v. Moore*, 62 N. Y. Supp. 252, 14 N. Y. Cr. 387; *Wolf v. S.* (Tex. Cr., 1899), 53 S. W. 108; *Sanders v. S.* (Tex. Cr., 1900), 55 S. W. 50; *Hardin v. S.*, 107 Ga. 718, 33 S. E. 700; *P. v. Griner*, 124 Cal. 19, 56 Pac. 625.

since the trial, and that the party has not been guilty of negligence in not discovering and producing it on the former trial.³¹ If the defendant's witness is sick, he should make application to continue if he desires to avail himself of the testimony of such witness. Not having done so, he can not assign such sickness as ground for a new trial.³²

ARTICLE XV. REVERSAL, WHEN.

§ 3327. **Reversal on evidence—When.**—A new trial, on the ground that the verdict is contrary to the evidence, ought not to be granted only in case of a plain deviation, and not in a doubtful one, merely because the court would have given a different verdict, since that would be to assume the province of the jury.³³ To justify a reversal on the grounds that the evidence was insufficient, it must appear that the finding of the jury was not sustained by the evidence, or that it was palpably contrary to the weight of the evidence.³⁴

ARTICLE XVI. EXAMINING OTHER WITNESSES.

§ 3328. **Examining witnesses without notice.**—Indorsing witnesses' names on the indictment after going to trial, without leave of the court, is ground for a new trial.³⁵

³¹ *Spahn v. P.*, 137 Ill. 544, 27 N. E. 688; *Isaacs v. P.*, 118 Ill. 538, 8 N. E. 821; *Klein v. P.*, 113 Ill. 596; *S. v. Hall*, 97 Iowa 400, 66 N. W. 725; *Williams v. P.*, 164 Ill. 483, 45 N. E. 987; *Feinberg v. P.*, 174 Ill. 609, 51 N. E. 798; *Gaddis v. S.*, 91 Ga. 148, 16 S. E. 936; *S. v. Gunagy*, 84 Iowa 177, 50 N. W. 882; *S. v. Moses*, 139 Mo. 217, 40 S. W. 883; *Klink v. P.*, 16 Colo. 467, 27 Pac. 1062; *S. v. Keaveny*, 49 La. 667, 21 S. W. 730; *Ford v. S.*, 91 Ga. 162, 17 S. E. 103; *Washington v. S.*, 35 Tex. Cr. 154, 32 S. W. 693; *Field v. Com.*, 89 Va. 690, 16 S. E. 865; *S. v. Crawford*, 99 Mo. 74, 12 S. E. 354; *S. v. Reinheimer*, 109 Iowa 624, 80 N. W. 669; *S. v.*

Magers, 36 Or. 38, 58 Pac. 892; *Liggett v. P.*, 26 Colo. 364, 58 Pac. 144.

³² *Tobin v. P.*, 101 Ill. 124.

³³ *Read v. Com.*, 22 Gratt. (Va.) 924, 1 Green C. R. 278; *Brugh v. Shanks*, 5 Leigh (Va.) 598; *Bell v. Alexander*, 21 Gratt. (Va.) 1; *S. v. Zeigler*, 40 W. Va. 593, 10 Am. C. R. 476, 21 S. E. 763.

³⁴ *Steffy v. P.*, 130 Ill. 99, 22 N. E. 861, citing *Gainey v. P.*, 97 Ill. 270; *Hanrahan v. P.*, 91 Ill. 142; *Rogers v. P.*, 98 Ill. 581; *Rafferty v. P.*, 72 Ill. 37; *Mooney v. P.*, 111 Ill. 388.

³⁵ 1 *Roscoe Cr. Ev.* 239; *P. v. Moran*, 48 Mich. 639; *Stevens v. S.*, 19 Neb. 647, 28 N. W. 304.

CHAPTER LXXXIX.

SENTENCE.

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ARTICLE I. DEFENDANT'S PRESENCE.

§ 3329. **Defendant's presence essential.**—The defendant can not be lawfully sentenced on the verdict of a jury, in a felony case, in his absence.¹ If there is to be imprisonment or any other punishment higher than a fine, whether in treason, felony or misdemeanor, the defendant must be personally present at every stage of the trial, including sentence on the verdict.² No presumption will be indulged in that the prisoner was present when sentenced if the record fails to show it.³

¹ Harris v. P., 138 Ill. 65, 27 N. E. 706; Harris v. P., 130 Ill. 460, 22 N. E. 826; Ball v. U. S., 140 U. S. 118, 11 S. Ct. 761; Dougherty v. Com., 69 Pa. St. 286; Mapes v. S., 13 Tex. App. 85. See Fanning v. Com., 120 Mass. 388. See "Trial and Incidents."

826; Rolls v. S., 52 Miss. 391; S. v. Davenport, 33 La. 231; Hooker v. Com., 13 Gratt. (Va.) 763; Cook v. S., 60 Ala. 39, 3 Am. C. R. 304; Fielden v. P., 128 Ill. 599, 21 N. E. 584; S. v. Cross, 27 Mo. 332. *Contra*, Jackson v. S., 49 N. J. L. 252, 9 Atl. 740, 7 Am. C. R. 80.

² Harris v. P., 130 Ill. 460, 22 N. E.

³ French v. S., 85 Wis. 400, 9 Am.

§ 3330. **Defendant absconding before verdict.**—Where the defendant voluntarily abandons the court room after the trial is entered upon, and refuses to appear, it is held that he waives his right to be present, and the court may proceed to final judgment in his absence.*

§ 3331. **Presence, when not essential.**—The defendant is not required to be present when any orders are entered in his case in the supreme court. The presence of the defendant is only required in the trial court.⁵ The presence of the defendant is not necessary at the time of sentence where the penalty to be imposed is only a fine.⁶

ARTICLE II. ASKING DEFENDANT.

§ 3332. **Asking defendant before sentence.**—A failure to ask the defendant if he has anything to say why sentence should not be pronounced against him is no ground for error, unless in capital cases.⁷

ARTICLE III. SENTENCE, WHEN.

§ 3333. **Sentence at term of conviction unless continued.**—The defendant having been found guilty generally, upon an indictment alleging several distinct offenses, and sentenced thereunder upon some of the counts, and imprisoned, he can not thereafter, at a future term, be sentenced on the other counts, where the cause was not continued for that purpose, even though the first sentence was erroneous.⁸ The court may enter judgment in part (to pay costs) and continue, and the sentence may be passed on the defendant at a future term, if a

C. R. 353, 55 N. W. 566. But see *Williams v. S.*, 41 Fla. 295, 27 So. 869; *Sudduth v. S.*, 124 Ala. 32, 27 So. 487; *Lewis v. S.* (Fla.), 28 So. 397.

⁴ *Sahlinger v. P.*, 102 Ill. 246; *Harris v. P.*, 130 Ill. 461, 22 N. E. 826; *Ross v. S.*, 20 Ohio 33; *Hill v. S.*, 17 Wis. 697; *Stubbs v. S.*, 49 Miss. 716, 1 Am. C. R. 609.

⁵ *Fielden v. P.*, 128 Ill. 601, 21 N. E. 584; *Com. v. Costello*, 121 Mass. 371; *P. v. Clark*, 1 Park. Cr. (N. Y.) 360.

⁶ *Harris v. P.*, 130 Ill. 460, 22 N. E. 826; *Young v. S.*, 39 Ala. 357; *Gordon v. S.*, 13 Tex. App. 196.

⁷ *Gannon v. P.*, 127 Ill. 521, 21 N. E. 525; *Warner v. S.*, 56 N. J. L. 686,

29 Atl. 505, 9 Am. C. R. 532; *S. v. Hoyt*, 47 Conn. 518; *Gillespie v. P.*, 176 Ill. 246, 52 N. E. 250; *S. v. Ball*, 27 Mo. 324; 4 Bl. Com. 375; *Bressler v. P.*, 117 Ill. 444, 8 N. E. 62. Right waived: *Gannon v. P.*, 127 Ill. 507, 21 N. E. 525, 11 Am. R. 157; *S. v. Hoyt*, 47 Conn. 518, 36 Am. R. 89. See also *McCue v. Com.*, 78 Pa. St. 185, 1 Am. C. R. 272; *Jones v. S.*, 51 Miss. 718; *Messner v. P.*, 45 N. Y. 1; *Sarah v. S.*, 28 Ga. 576. *Contra*, *Ball v. U. S.* 140 U. S. 118, 11 S. Ct. 761; 2 Hale P. C. 401; *Crocker v. S.*, 47 Ala. 53.

⁸ *Com. v. Foster*, 122 Mass. 317, 23 Am. R. 326; *P. v. Kennedy*, 58 Mich. 372, 25 N. W. 318.

general order of continuance of all undisposed-of cases is entered. Such general order holds the jurisdiction.⁹ Sentence may be pronounced at a future term after conviction if in the meantime the case is continued from term to term.¹⁰ A general order of continuance of all cases not otherwise disposed of will continue a case not docketed if the defendant is on bail.¹¹ Where a record does not show a continuance from one term to another, in the absence of such showing, the presumption is that such cause was continued in the manner allowed by the statute and for the reasons therein specified.¹²

§ 3334. **Sentence at future term.**—Where the defendant enters a plea of guilty, the court may defer sentence until the next term without losing jurisdiction. The court is not bound to sentence the defendant at the term at which he pleads guilty. But the cause should be continued for that purpose.¹³ Judgment was postponed at the request of the defendant from the 18th to the 22d of December (December term) to enable his counsel to move for a new trial and arrest of judgment. On that day (22d) he did not appear to make his motion; hence he must have consented to the delay—to the next term. The jurisdiction was not defeated.¹⁴ Defendant was tried and convicted at the November term, 1882, and he appealed to the supreme court. The cause was stricken from the docket of that court because the record failed to show a final judgment. Thereafter, at the June term, 1885, of the trial court, the defendant being on bail, was sentenced on the previous verdict. Held the court had power; that the continued delay was caused by the defendant.¹⁵ Defendant entered a plea of guilty, and the court suspended sentence until the first day of the next term, giving the defendant his liberty on his own recognizance. At the October term next another judge holding the court sentenced the defendant. Held error.¹⁶

⁹ *Ex parte Williams*, 26 Fla. 310, 8 So. 425; *S. v. Davis*, 31 La. 249; *Brown v. Rice*, 57 Me. 55. See *P. v. Felker*, 61 Mich. 110, 27 N. W. 869, 8 Cr. L. Mag. 821; *Com. v. Mayloy*, 57 Pa. St. 291.

¹⁰ *Clanton v. S.*, 96 Ala. 111, 11 So. 299; *Gibson v. S.*, 68 Miss. 241, 8 So. 329; *S. v. Cotten*, 36 La. 980; *P. v. Felix*, 45 Cal. 163.

¹¹ *Ex parte Williams*, 26 Fla. 310, 8 So. 425.

¹² *Grady v. P.*, 125 Ill. 125, 16 N. E. 654.

¹³ *Ledgerwood v. S.*, 134 Ind. 81, 33 N. E. 631; *Gray v. S.*, 107 Ind. 177, 8 N. E. 16; *Thurman v. S.*, 54 Ark. 120, 15 S. W. 84; *P. v. Felix*, 45 Cal. 163; *P. v. Reilly*, 53 Mich. 260, 18 N. W. 849.

¹⁴ *P. v. Everhardt*, 104 N. Y. 591, 11 N. E. 62.

¹⁵ *S. v. Watson*, 95 Mo. 411, 8 S. W. 383.

¹⁶ *Weaver v. P.*, 33 Mich. 296, 1 Am. C. R. 552.

ARTICLE IV. CHANGING PENALTY.

§ 3335. **Changing the penalty.**—The court may, until the term ends, revise, correct and change the sentence. But steps taken under the sentence as a part of the execution will cut off the right to alter it even during the term. And with the expiration of the term the power expires.¹⁷ Defendant was sentenced to the industrial school on a plea of guilty to a charge of burglary, as being under the age of eighteen, and was shortly thereafter committed to the school. During the same term of such sentence the court vacated and set aside the judgment on the grounds of mistake as to his age, and sentenced him to the penitentiary. Held, the court had no jurisdiction to vacate the original judgment or pronounce the second sentence.¹⁸ By the common law, if a defendant has been sentenced and paid his fine, or commenced his term of imprisonment, the court has no power to change the sentence, even at the same term; nor has the court any power to amend the record of a cause after the lapse of the term.¹⁹ The defendant entered a plea of guilty, whereupon he was sentenced to pay a fine of ten dollars and costs and to stand committed until said fine and costs were paid. These proceedings were had on May 12, 1874, but no steps were taken to carry the sentence into execution. Three days afterwards, during the same term, and before the defendant had paid the fine or costs, the court changed the penalty, increasing the fine and adding imprisonment. Held the court committed no error, and had power to make such change.²⁰

ARTICLE V. SENTENCE, SEVERAL COUNTS.

§ 3336. **Sentence—On several cases.**—The propriety of making a sentence for one offense commence at the expiration of the imprison-

¹⁷ Bish. Cr. Proc., § 1298; *Ex parte Friday*, 43 Fed. 916, 8 Am. C. R. 355; *S. v. Gray*, 37 N. J. L. 368, 1 Am. C. R. 556; *Ex parte Williams*, 26 Fla. 310, 8 So. 425; *Ex parte Bell*, 56 Miss. 282; *S. v. Daugherty*, 70 Iowa 439, 30 N. W. 685; *Ex parte Gilmore*, 71 Cal. 624, 12 Pac. 800; *P. v. Dane*, 81 Mich. 36, 45 N. W. 655.

¹⁸ *In re Jones*, 35 Neb. 499, 53 N. W. 468; *In re Mason*, 8 Mich. 70; *Brown v. Rice*, 57 Me. 55; *S. v. Cannon*, 11

Or. 312, 2 Pac. 191; *P. v. Liscomb*, 60 N. Y. 589; *Ex parte Lange*, 18 Wall. (U. S.) 163; *P. v. Meservey*, 76 Mich. 223, 42 N. W. 1133.

¹⁹ *P. v. Whitson*, 74 Ill. 25; *Ex parte Lange*, 18 Wall. (U. S.) 163; *P. v. Kelley*, 79 Mich. 320, 44 N. W. 615.

²⁰ *Lee v. S.*, 32 Ohio St. 113, 3 Am. C. R. 376; *Basset v. U. S.*, 9 Wall. (U. S.) 39.

ment for another offense in another and different case of the same court can not be questioned.²¹

§ 3337. **Sentence on several counts—Place of imprisonment.**—The sentence to imprisonment should be for a specified number of days under each count upon which conviction was had, and the judgment should require that the imprisonment under each succeeding count should commence where it ends under the preceding count, without fixing the day or hour for each or either to commence or end.²² The court, in fixing the day and hour when imprisonment should commence, under each count on which a conviction was had, erred.²³ It is not for the court to designate any particular jail in which the prisoner shall be confined, but simply to order him to be committed to the county jail. Committing him to a jail of another county is error.²⁴

§ 3338. **Sentence on some counts, acquits on others.**—A judgment and sentence upon one count of an indictment definitely and conclusively disposes of the whole indictment, and operates as an acquittal upon, or discontinuance of, the other count or counts.²⁵ Where a defendant has been found guilty generally upon an indictment containing several counts for distinct offenses, and has been sentenced on some of the counts to imprisonment, and has been imprisoned under such sentence, he can not, at a subsequent term, be brought up and sentenced anew upon another count in the same indictment.²⁶

²¹ Fitzpatrick v. P., 98 Ill. 274; Ex parte Irwin, 88 Cal. 169, 25 Pac. 1118; Johnson v. P., 83 Ill. 431; 1 Bish. New Cr. L., § 1327; Eldridge v. S., 37 Ohio St. 191; Mims v. S., 26 Minn. 498, 5 N. W. 374; In re Walsh, 37 Neb. 454, 55 N. W. 1075, 9 Am. C. R. 653; Ex parte Hibbs, 26 Fed. 421; In re Jackson, 3 McArthur (D. C.) 24, 4 Am. C. R. 569. *Contra*, P. v. Liscomb, 60 N. Y. 559; Prince v. S., 44 Tex. 480, 1 Am. C. R. 545; Lamphere's Case, 61 Mich. 105, 27 N. W. 882; Kennedy v. Howard, 74 Ind. 87. See P. v. Liscomb, 60 N. Y. 559, 19 Am. R. 211.

²² Johnson v. P., 83 Ill. 43; In re Walsh, 37 Neb. 454, 55 N. W. 1075, 9 Am. C. R. 654; S. v. Hood, 51 Me. 363; Eldridge v. S., 37 Ohio St. 191; Com. v. Birdsall, 69 Pac. 482.

²³ Johnson v. P., 83 Ill. 437; S. v. Smith, 10 Nev. 106, 125; Clifford v. S., 30 Md. 575; Ex parte Gibson, 31 Cal. 619, 91 Am. D. 546. Compare Ex parte Gafford (Nev., 1899), 57 Pac. 484.

²⁴ Dyer v. P., 84 Ill. 625; Mullinix v. P., 76 Ill. 211; Keedy v. P., 84 Ill. 569.

²⁵ Com. v. Foster, 122 Mass. 317, 2 Am. C. R. 504; Stoltz v. P., 4 Scam. (Ill.) 168; Guenther v. P., 24 N. Y. 100; S. v. Hill, 30 Wis. 416; Wein-zorffin v. S., 7 Blackf. (Ind.) 186; Girts v. Com., 22 Pa. St. 351; Nabors v. S., 6 Ala. 200.

²⁶ Com. v. Foster, 122 Mass. 317, 2 Am. C. R. 501-5; Com. v. Mayloy, 57 Pa. St. 291; Brown v. Rice, 57 Me. 55.

§ 3339. **Sentence should be separate on each count.**—The defendant having been convicted under several counts, there should be a separate sentence under each count.²⁷

ARTICLE VI. SENTENCE, WHEN CUMULATIVE.

§ 3340. **Sentence cumulative.**—On a conviction upon several distinct counts, and the court sentences the prisoner to ten days' imprisonment upon each count, the imprisonment on each count commenced and ended at the same time.²⁸ Cumulative sentences in most of the states, as well as England, have been sustained without the aid of a statute.²⁹

ARTICLE VII. SENTENCE, VALID IN PART.

§ 3341. **Sentence valid in part.**—A judgment may be erroneous in part and valid as to the residue: as, for example, as provided by the statute, the court ordered that the defendant should remove the nuisance and pay the costs; and the court also adjudged that the defendant should pay a fine of four dollars. The sentence to pay the fine was not warranted by the statute. Reversed as to the fine, but affirmed as to the residue.³⁰

ARTICLE VIII. ALTERNATIVE SENTENCE IMPROPER.

§ 3342. **Alternative sentence.**—An alternative sentence, unless authorized by statute, is defective, as where the defendant is sentenced to pay a fine, and in default thereof he shall be committed to a term of imprisonment.³¹

ARTICLE IX. REVERSAL FOR PROPER SENTENCE.

§ 3343. **Reversal for proper sentence.**—Where the error consists in an unlawful sentence only, and no error appearing prior to the

²⁷ *Fletcher v. P.*, 81 Ill. 117; *P. v. Whitson*, 74 Ill. 26; *Mullinix v. P.*, 76 Ill. 215; *Stack v. P.*, 80 Ill. 34; *Day v. P.*, 76 Ill. 380; *Martin v. P.*, 76 Ill. 500; *S. v. Toole*, 106 N. C. 736, 11 S. E. 168, 8 Am. C. R. 612; *Crowley v. Com.*, 11 Metc. (Mass.) 575; *Eldredge v. S.*, 37 Ohio St. 191.

²⁸ *P. v. Whitson*, 74 Ill. 27; *Miller v. Allen*, 11 Ind. 389; *James v. Ward*, 2 Metc. (Ky.) 271. See *In re Jackson*, 3 McArthur (D. C.) 24, 4 Am.

C. R. 569; *Com. v. Leath*, 1 Va. Cas. 151; *Ex parte Ryan*, 10 Nev. 261; *Martin v. P.*, 76 Ill. 499.

²⁹ *Henderson v. James*, 52 Ohio St. 242, 9 Am. C. R. 713, 39 N. E. 805.

³⁰ *Taff v. S.*, 39 Conn. 82, 1 Green C. R. 629.

³¹ *Donnoly v. P.*, 38 Mich. 756; *In re Deaton*, 105 N. C. 59, 11 S. E. 244; *Miller v. City of Camden*, 63 N. J. L. 501, 43 Atl. 1069. But see *Berkenfield v. P.*, 191 Ill. 272, 276, 61 N. E. 96.

sentence, the cause will be reversed and remanded for proper sentence, and not for a new trial.³² But when a judgment is erroneous, all former proceedings in a case of conviction are defeated by a reversal; it is affirmed or reversed altogether, and can not be affirmed or reversed in part.³³

ARTICLE X. REVERSAL, ON VOID SENTENCE.

§ 3344. **Reversal on void sentence.**—In the absence of a statutory provision, a court of review has no power to impose a proper sentence, nor can it remand the cause to the trial court for that purpose in a case where the trial court had exceeded its authority in sentencing the prisoner, as sentencing him to five years' imprisonment when the statute provided "not more than two years'" imprisonment. The power of the court of review in such case is limited to a simple reversal of the judgment.³⁴

ARTICLE XI. SENTENCE, WHEN SEVERAL DEFENDANTS.

§ 3345. **Sentence, where several defendants.**—If several persons are jointly indicted and convicted, they should be sentenced severally, and the imposition of a joint fine is erroneous.³⁵

ARTICLE XII. VALIDITY OF JUDGMENT.

§ 3346. **Judgment-recitals—Validity.**—The fact that the body of a judgment of conviction fails to show of what crime the defendant was convicted does not render such judgment void if the crime is stated in the caption; as, for example, "*The People v. Hutchinson. Indictment for murder.*"³⁶ It is not necessary to the validity of a judgment of conviction that the mode and manner of the application

³² Wallace v. P., 159 Ill. 452, 42 N. E. 771; Harris v. P., 130 Ill. 457, 22 N. E. 826; S. v. McClain, 156 Mo. 99, 56 S. W. 731; McCue v. Com., 78 Pa. St. 185, 1 Am. C. R. 271; S. v. Johnson, 67 N. C. 59; S. v. Jennings, 24 Kan. 642; Henderson v. P., 165 Ill. 611, 46 N. E. 711; Reynolds v. S., 68 Ala. 502; 1 Bish. New Cr. Proc., § 1293; S. v. Baker, 58 S. C. 111, 36 S. E. 501.

³³ Baxter v. P., 3 Gilm. (Ill.) 387.

³⁴ McDonald v. S., 45 Md. 90, 2 Am. C. R. 493; 4 Bl. Com. 393. But see S. v. Taylor, 124 N. C. 803, 32 S. E. 548.

³⁵ Moody v. P., 20 Ill. 320; Meadowcroft v. P., 163 Ill. 85, 45 N. E. 303; S. v. Gay, 11 Miss. 440.

³⁶ P. v. Murphy, 188 Ill. 144, 58 N. E. 984; Pointer v. U. S., 151 U. S. 419, 14 S. Ct. 410; 1 Bish. Cr. Proc., § 1347.

of the provisions of the act with reference to the parol or discharge of the defendant shall be set forth in the judgment, being mere surplusage.⁸⁷

⁸⁷ P. v. Murphy, 185 Ill. 627, 57 N. E. 820.

CHAPTER XC.

VERDICT.

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	XV.	Verdict, When a Bar,	§ 3380

ARTICLE I. FORM: GENERAL OR SPECIAL.

§ 3347. **General or special verdict.**—By the common law the verdict of the jury may be either general, guilty, or not guilty; or special, setting forth all the circumstances of the case, and praying the judgment of the court, whether, for instance, on the facts stated, if it be murder, manslaughter, or no crime at all. This is where they doubt the matter of law, and, therefore, choose to leave it to the determination of the court, though they have a right to find a general verdict.¹ A special verdict is one in which the jury set out the facts as shown by the evidence and the court determines the conclusions of law and renders judgment.²

¹ 4 Bl. Com. 361.

Moore, 7 Ired. (N. C.) 228; Com. v.

² P. v. Ah Ye, 31 Cal. 451; S. v. Chatham, 50 Pa. St. 181; S. v. Bray,

§ 3348. **Special verdict—Facts essential.**—Before the court is warranted in pronouncing the defendant guilty on a special verdict, such verdict must set forth all the essential facts necessary to constitute the offense charged.³ If a special verdict find facts of an unequivocal character, the court can declare the guilt or innocence of the defendant as a question of law; but if the facts found are equivocal—may be one thing or another—then the court can not determine as a question of law the guilt or innocence of the defendant.⁴

§ 3349. **Form of verdict—Verbal errors—When several counts.**—“We, the jury, find the defendant guilty,” is sufficient, without reference to the indictment or what offense.⁵ “Wee, the jury, agree and find the defendant guilty as charged in the indite, and sess his find at \$100. Isaa Clouse.” This verdict was held sufficient.⁶ It matters not how many counts an indictment may contain, a general verdict of guilty is a finding upon all of them.⁷ On the trial of an indictment charging the defendant with several distinct offenses, in different counts, a verdict of “guilty on the first, second, third and fourth counts” is sufficient, and there need not be a separate verdict for each count.⁸ The verdict of the jury was: “We, the jury, find the de-

89 N. C. 480 (intent). See *S. v. Nies*, 107 N. C. 820, 12 S. E. 443; *Maiden v. Com.*, 82 Ky. 133; *S. v. Spray*, 113 N. C. 686, 18 S. E. 700; *Com. v. Eichelberger*, 119 Pa. St. 254, 13 Atl. 422; *S. v. Morris*, 104 N. C. 837, 10 S. E. 454.

³ *Huffman v. S.*, 89 Ala. 33, 8 So. 28; *S. v. Burdon*, 38 La. 357; *S. v. Finlayson*, 113 N. C. 628, 18 S. E. 200.

⁴ *S. v. Curtis*, 71 N. C. 56, 2 Green C. R. 748; 2 Hawk. P. C. 622; 1 Bish. New Cr. Proc., § 1006.

⁵ *Armstrong v. P.*, 37 Ill. 462; *Bond v. P.*, 39 Ill. 27; *S. v. Nowlan*, 64 Me. 531; *P. v. Perdue*, 49 Cal. 425; *Lovell v. S.*, 45 Ind. 550; *Arnold v. S.*, 51 Ga. 144; *S. v. Hudson*, 74 N. C. 246; *Preuit v. S.*, 5 Neb. 377; *S. v. Lawry*, 4 Nev. 161; *Blount v. S.*, 49 Ala. 381; *S. v. Lee*, 80 Iowa 75, 45 N. W. 545 (“find”); *Shaw v. S.*, 2 Tex. App. 487 (“find”); *Burgess v. S.*, 33 Tex. Cr. 9, 24 S. W. 286; *Moore v. S.*, 36 Tex. Cr. 88, 33 S. W. 971; *Rogers v. Com. (Va.)*, 19 S. E. 162; *S. v. Tolliver*, 47 La. 1099, 17 So. 502; *Wilson v. S.*, 66 Ga. 591; *Colip v. S.*, 153 Ind. 584, 55 N. E. 739; *Ackerman v. S.*, 7 Wyo. 504, 54

Pac. 228; *Gear v. S. (Tex. Cr.)*, 42 S. W. 285. *Contra*, *Robinson v. S.*, 54 Ala. 86.

⁶ *Mitchell v. Com.*, 21 Ky. L. 222, 51 S. W. 17; *Augustine v. S. (Tex. Cr. Ap.)*, 52 S. W. 77; *McGee v. S.*, 39 Tex. Cr. 190, 45 S. W. 709.

⁷ *Armstrong v. P.*, 37 Ill. 463; *S. v. Toole*, 106 N. C. 736, 11 S. E. 168, 8 Am. C. R. 610; *Hughes v. S.*, 65 Ind. 39; *S. v. Berning*, 91 Mo. 82, 3 S. W. 588; *Hronek v. P.*, 134 Ill. 139, 24 N. E. 861; *Brown v. S.*, 111 Ind. 441, 12 N. E. 514; *Curry v. S.*, 7 Tex. App. 91; *S. v. Lee*, 80 Iowa 75, 45 N. W. 545. See 1 *McClain Cr. L.*, § 392; *P. v. Dunn*, 90 N. Y. 104; *S. v. Nicholls*, 37 La. 779; *P. v. Whiteley*, 64 Cal. 211, 27 Pac. 1104; *P. v. McFadden*, 65 Cal. 445, 4 Pac. 421; *P. v. Perez*, 87 Cal. 122, 25 Pac. 262; *Com. v. Nichols*, 134 Mass. 531; *Nelson v. S.*, 52 Wis. 534, 9 N. W. 388; *S. v. Tibbetts*, 86 Me. 189, 29 Atl. 979; *Ballew v. U. S.*, 160 U. S. 187, 16 S. Ct. 263. See *Dean v. S.*, 43 Ga. 218; *S. v. McClung*, 35 W. Va. 280, 13 S. E. 654. *Contra*, *S. v. Karlowski*, 142 Mo. 463, 44 S. W. 244.

⁸ *S. v. Hopkins*, 94 Iowa 86, 62 N. W. 656.

defendants (naming them) guilty of embezzlement in manner and form as charged in the indictment, and we fix the punishment of the said defendants (naming each of them) at a fine in the sum of twenty-eight dollars, and in addition thereto, at imprisonment in the penitentiary for the term of one year." Held sufficient to sustain a judgment fining each twenty-eight dollars, and imprisoning each one year in the penitentiary.⁹

§ 3350. General verdict is finding on greater offense.—Under a statute which provides that when the jury find the defendant guilty of an inferior offense included in the greater charged, the verdict must specify the degree, a general verdict of guilty as charged in the indictment is a finding of the greater offense.¹⁰

§ 3351. General, when several counts.—On an indictment containing six counts, three for misdemeanor and three felony, all relating to the same transaction, where the jury returned a verdict of "guilty in manner and form as charged in the indictment," the logical conclusion is that the defendant was found guilty upon each of the six counts.¹¹ Where an indictment in one count charges the breaking and entering of a car with intent to steal, and in another count with stealing at the same time in the same car, a general verdict will be sustained if the punishment imposed is by law authorized to be inflicted for the offense charged in either count.¹² When the several counts of an indictment relate to a single offense, and a con-

⁹ *Meadowcroft v. P.*, 163 Ill. 85, 45 N. E. 303; *Moody v. P.*, 20 Ill. 320. Compare *Mootry v. S.*, 35 Tex. Cr. 450, 33 S. W. 877, 34 S. W. 126; *Davidson v. S.*, 40 Tex. Cr. 285, 49 S. W. 372, 50 S. W. 365.

¹⁰ *S. v. Elvins*, 101 Mo. 243, 13 S. W. 937; *S. v. Burke*, 151 Mo. 136, 52 S. W. 226; *Ter. v. Yarberry*, 2 N. M. 391; *Craemer v. Washington State*, 168 U. S. 124, 18 S. Ct. 1. See *S. v. Dugan* (N. J. L.), 46 Atl. 566; *S. v. Barnes*, 122 N. C. 1031, 29 S. E. 381. *Contra*, *Allen v. S.*, 85 Wis. 22, 54 N. W. 999; *S. v. Pettys*, 61 Kan. 860, 60 Pac. 735.

¹¹ *Herman v. P.*, 131 Ill. 603, 22 N. E. 471; *Curtis v. P.*, *Breese* (Ill.) 259; *Armstrong v. P.*, 37 Ill. 459; *Lyons v. P.*, 68 Ill. 271; *Tobin v. P.*,

104 Ill. 565; *S. v. Toole*, 106 N. C. 736, 11 S. E. 168, 8 Am. C. R. 611; *Hawker v. P.*, 75 N. Y. 487; *Moody v. S.*, 1 W. Va. 337. See *Estes v. S.*, 55 Ga. 131, 1 Am. C. R. 596; *Timmons v. S.*, 56 Miss. 786; *Anonymous*, 63 Me. 590; *S. v. Hollenscheit*, 61 Mo. 302; *Brown v. S.*, 105 Ind. 385, 5 N. E. 900; *Com. v. Desmar-teau*, 16 Gray (Mass.) 1; *S. v. Scripture*, 42 N. H. 485; *S. v. Hall*, 108 N. C. 776, 13 S. E. 189; *Short v. P.* (Colo., 1900), 60 Pac. 350.

¹² *Langford v. P.*, 134 Ill. 449, 25 N. E. 1009; *Herman v. P.*, 131 Ill. 594, 22 N. E. 471; *Love v. P.*, 160 Ill. 503, 43 N. E. 710; *Sahlinger v. P.*, 102 Ill. 244; *Cook v. Ter.*, 3 Wyo. 110, 4 Pac. 887; *Rose v. S.*, 82 Ind. 344; *Estes v. S.*, 55 Ga. 131.

viction upon each count requires the same judgment and same sentence as a conviction upon all would, a general verdict is all the law requires.¹³ The indictment charging burglary and larceny growing out of the same transaction, a general verdict of guilty, fixing a penalty which, by law, is authorized to be inflicted for either of the two offenses, will be sustained.¹⁴

§ 3352. General verdict, when some counts bad.—A general verdict of guilty will be sustained, although some of the counts of the indictment are defective; there being one good count, it is sufficient.¹⁵ At common law, upon a general verdict of guilty upon an indictment containing several counts, where some are good and others bad, the court will pronounce judgment upon the good counts upon the presumption that it was to the good counts the verdict attached.¹⁶

§ 3353. General verdict, when counts abandoned.—Where some of the counts of an indictment have been abandoned, a general verdict of guilty will be referred to such count or counts which were not abandoned by the prosecution.¹⁷

§ 3354. General verdict—On larceny and burglary.—A general verdict of guilty in manner and form as charged in the indictment was sustained, where the indictment contained counts in larceny, burglary and receiving.¹⁸

¹³ Kilgore v. S., 74 Ala. 1, 9; Hurlburt v. S., 52 Neb. 428, 72 N. W. 471; S. v. Wright, 53 Me. 328; S. v. Baker, 63 N. C. 276. See S. v. Hight, 124 N. C. 845, 32 S. E. 966.

¹⁴ Lyons v. P., 68 Ill. 276, citing Com. v. Hope, 22 Pick. (Mass.) 5; Crowley v. Com., 11 Metc. (Mass.) 575.

¹⁵ Ochs v. P., 124 Ill. 414, 16 N. E. 662; Duffin v. P., 107 Ill. 119; Hiner v. P., 34 Ill. 304; Curtis v. P., Breese (Ill.) 260; Arlen v. S., 18 N. H. 563; Baker v. S., 30 Ala. 521; Mose v. S., 35 Ala. 421; Frain v. S., 40 Ga. 529; Boose v. S., 10 Ohio St. 575; S. v. Stebbins, 29 Conn. 463, 79 Am. D. 223; Looney v. P., 81 Ill. App. 370.

¹⁶ Rice v. S., 3 Heisk. (Tenn.) 215. 1 Green C. R. 369; Isham v. S., 1 Sneed (Tenn.) 113; Handy v. S., 121 Ala. 13, 25 So. 1023. See S. v. Rob-

bins, 123 N. C. 730, 31 S. E. 669; Haynes v. U. S., 101 Fed. 817.

¹⁷ Waver v. S., 108 Ga. 775, 33 S. E. 423.

¹⁸ Sahlinger v. P., 102 Ill. 244; Vancleave v. S., 150 Ind. 273, 49 N. E. 1060. Compare Andrews v. P., 117 Ill. 201, 7 N. E. 265; Tobin v. P., 104 Ill. 567; S. v. Dalton, 101 N. C. 680, 8 S. E. 154; S. v. Stebbins, 29 Conn. 463, 75 Am. D. 223; S. v. Jennings, 18 Mo. 435; S. v. Davidson, 12 Vt. 300; 1 Bish. New Cr. L., § 1015. *Contra*, Com. v. Haskins, 128 Mass. 60; S. v. Rowe, 142 Mo. 439, 44 S. W. 266. Convictions as to part: Foster v. S., 88 Ala. 182, 7 So. 185; Com. v. Lowery, 149 Mass. 67, 20 N. E. 697; Sullivan v. S., 44 Wis. 595; S. v. West, 39 Minn. 321, 40 N. W. 249; Fox v. S., 34 Ohio St. 377; Oxford v. S., 33 Ala. 416; Carter v. S., 20 Wis. 647.

§ 3355. **General verdict, murder case.**—In the absence of a statutory requirement, a general verdict of “guilty” is equivalent to and in fact is a verdict of guilty of murder in the first degree, as alleged in the indictment.¹⁹ The jury shall, if they find the accused guilty, ascertain in their verdict whether it be murder in the first or second degree; the statute so provides. A general verdict of guilty on an indictment for murder is bad, and on such a verdict no judgment can be pronounced.²⁰

§ 3356. **General verdict, where degrees—Arson.**—One count of the indictment charged arson in the second degree, and another the third degree. The jury returned a verdict finding the defendant guilty “in manner and form as charged in the indictment,” fixing his punishment at five years’ imprisonment. Held sufficient, without stating the degree of the crime.²¹

ARTICLE II. VERDICT, FOR INCLUDED OFFENSE.

§ 3357. **Verdict for lesser, included offense.**—If a lesser offense be included in the greater by the pleadings, a conviction may be had of the lesser.²² A verdict finding the defendant guilty of a lower degree included in the greater offense is equivalent to a verdict of not guilty of the greater.²³ All ingredients of the lesser offense must be included in the greater before a verdict on the lesser will stand.²⁴ Under an indictment for the higher crime, the jury may find the defendant guilty of the lower (included in the higher) if they entertain a reasonable doubt as to which of the two offenses he is guilty.²⁵

¹⁹ *P. v. Rugg*, 98 N. Y. 537, 5 Am. C. R. 255; *S. v. Gilchrist*, 113 N. C. 673, 18 S. E. 319; *Curtis v. S.*, 26 Ark. 439. See the following cases in general: *S. v. Treadwell*, 54 Kan. 513, 38 Pac. 813; *S. v. Sivils*, 105 Mo. 530, 16 S. W. 880; *Hays v. S.*, 33 Tex. Cr. 546, 28 S. W. 203; *In re Black*, 52 Kan. 64, 34 Pac. 414; *Kendall v. S.*, 65 Ala. 492.

²⁰ *Williams v. S.*, 60 Md. 402, 4 Am. C. R. 416; *S. v. Huber*, 8 Kan. 447, 1 Green C. R. 751; *Dick v. S.*, 3 Ohio St. 89; *S. v. Reddick*, 7 Kan. 143; *Ford v. S.*, 12 Md. 514. *Contra*, *Bilansky v. S.*, 3 Minn. 427.

²¹ *S. v. Sivils*, 105 Mo. 530, 16 S. W. 880; *Hall v. S.*, 3 Lea (Tenn.) 552; *Davis v. S.*, 52 Ala. 357.

²² *Herman v. P.*, 131 Ill. 594, 22 N.

El. 471; 1 Roscoe Cr. Ev. 83; *Kennedy v. P.*, 122 Ill. 655, 13 N. E. 213; *Whar. Cr. Pl. & Pr.* (8th ed.), 246-7; *Howard v. S.*, 25 Ohio St. 399, 2 Am. C. R. 447; *Clem v. S.*, 42 Ind. 420, 2 Green C. R. 690, 13 Am. R. 369; *Davis v. S.*, 39 Md. 355; *Buckner v. Com.*, 14 Bush (Ky.) 601. See *Ruth v. P.*, 99 Ill. 185; *Earl v. P.*, 73 Ill. 329.

²³ *S. v. Stanley*, 42 La. 978, 8 So. 469; *S. v. Brannon*, 55 Mo. 63, 17 Am. R. 643; *S. v. Lesing*, 16 Minn. 75.

²⁴ *Moore v. P.*, 26 Ill. App. 137; *Carpenter v. P.*, 4 Scam. (Ill.) 197; *Scott v. S.*, 60 Miss. 268. See *Beckwith v. P.*, 26 Ill. 500; 1 Roscoe Cr. Ev. 84.

²⁵ *Haley v. S.*, 49 Ark. 147, 4 S. W.

ARTICLE III. WHEN SEVERAL COUNTS.

§ 3358. **Verdict silent, or disagreement on some counts.**—Where the jury find the defendant guilty on one count of an indictment of several counts, and say nothing as to the other counts, this is equivalent to “not guilty” as to such other counts.²⁸ Where an indictment contains several distinct offenses in separate counts a verdict of guilty on some of the counts may be received, although the verdict states a disagreement as to other counts. The language of the verdict referring to the disagreement will be regarded as surplusage.²⁷

ARTICLE IV. CONDUCT OF JURY.

§ 3359. **Jury drinking intoxicants.**—Where the proof is clear and undisputed that the jury were drinking intoxicating liquors while they were actually deliberating upon their verdict in a capital case, and convicted the accused, such conviction should not be allowed to stand.²⁸ But generally, the mere fact that the jury drank intoxicating liquors is not sufficient to set aside the verdict without a showing that it did or might have affected the result.²⁹

ARTICLE V. IMPEACHING VERDICT.

§ 3360. **Impeaching verdict by jurors.**—Affidavits of the jurors who tried a case will not be received to impeach their verdict.³⁰ Nor

746, 7 Am. C. R. 331; P. v. Jones, 53 Cal. 58; S. v. Painter, 67 Mo. 85; P. v. McGowan, 17 Wend. (N. Y.) 386; S. v. Jenkins, 36 Mo. 372; Hickey v. S., 23 Ind. 21.

²⁸ Thomas v. P., 113 Ill. 531, 5 Am. C. R. 127; P. v. Whitson, 74 Ill. 20; Stoltz v. P., 4 Scam. (Ill.) 169; S. v. Belden, 33 Wis. 120; S. v. Hill, 30 Wis. 416; S. v. Smith, 33 Mo. 139; P. v. Gilmore, 4 Cal. 376. See “Jeopardy.” See S. v. Phinney, 42 Me. 384; Weinzorpfen v. S., 7 Blackf. (Ind.) 186; Hathcock v. S., 88 Ga. 91, 13 S. E. 959, 9 Am. C. R. 708; Bonnell v. S., 64 Ind. 498; P. v. McDonald, 49 Hun 67, 1 N. Y. Supp. 703; S. v. Patterson, 116 Mo. 505, 22 S. W. 696. *Contra*, Dealy v. U. S., 152 U. S. 539, 14 S. Ct. 680, 9 Am. C. R. 161. See 1 Bish. New Cr. Proc., § 1011.

²⁷ S. v. McGee, 55 S. C. 247, 33 S.

E. 353; Silvester v. U. S., 170 U. S. 262, 18 S. Ct. 580. See Com. v. Hackett, 170 Mass. 194, 48 N. E. 1087. See also Davis v. S., 75 Miss. 637, 23 So. 770, 941 (two defendants).

²⁸ P. v. Lee Chuck, 78 Cal. 317, 20 Pac. 719, 8 Am. C. R. 445; Jones v. S., 13 Tex. 168; Bryan v. Harrow, 27 Iowa 494; Weis v. S., 22 Ohio St. 486, 1 Green C. R. 618; Davis v. S., 35 Ind. 496, 9 Am. R. 760; S. v. Bullard, 16 N. H. 139.

²⁹ P. v. Anthony, 56 Cal. 397; Kee v. S., 28 Ark. 155; S. v. Upton, 20 Mo. 398; Roman v. S., 41 Wis. 312; Russell v. S., 53 Miss. 382; Westmoreland v. S., 45 Ga. 225; S. v. Caulfield, 23 La. 148; Davis v. P., 19 Ill. 74; S. v. Corcoran (Idaho), 61 Pac. 1034; 1 Bish. Cr. Proc., § 999.

³⁰ Palmer v. P., 138 Ill. 369, 28 N. E. 130; Marzen v. P., 190 Ill. 87;

will affidavits as to statements made by the jurors to others be received to impeach their verdict.⁸¹

§ 3361. Impeaching by defendant's affidavit.—An affidavit made by the defendant to impeach the verdict of the jury which convicted him, stating the facts on information and belief, is not sufficient to warrant interfering with the verdict.⁸²

ARTICLE VI. AMENDING VERDICT.

§ 3362. Verdict may be amended.—Defects in the form of a verdict should be corrected at the time the verdict is returned and before the discharge of the jury.⁸³ The court may intercede when the jury present their verdict and have them correct any informal or insensible matters contained therein.⁸⁴ And the court may, in the presence of and with assent of the jury, amend their verdict in matters of form.⁸⁵ And the jury may correct their error in announcing a verdict of not guilty, when they meant to say guilty, although the defendant may have been formally discharged.⁸⁶

§ 3363. Verdict not complete.—The verdict of the jury is not complete until it has been received and entered by the court. And the jury have the right to depart from any finding before it is received and entered.⁸⁷

Reed v. Thompson, 88 Ill. 245; Reins v. P., 30 Ill. 274; Welsh v. S. (Neb.), 82 N. W. 368; S. v. Price, 37 La. 215, 6 Am. C. R. 36; S. v. Underwood, 57 Mo. 40, 1 Am. C. R. 261; Read v. Com., 22 Gratt. (Va.) 924; S. v. Horne, 9 Kan. 119, 1 Green C. R. 718.

⁸¹ Allison v. P., 45 Ill. 37; Palmer v. P., 138 Ill. 369, 28 N. E. 130; Bonardo v. P., 182 Ill. 422, 55 N. E. 519; Nicolls v. Foster, 89 Ill. 386.

⁸² Bonardo v. P., 182 Ill. 422, 55 N. E. 519; S. v. Mims, 36 Or. 315, 61 Pac. 888.

⁸³ Hopkins v. S. (Tex. Cr.), 53 S. W. 619.

⁸⁴ Grant v. S., 33 Fla. 291, 14 So. 757, 9 Am. C. R. 750; S. v. Waterman, 1 Nev. 543; Cook v. S., 26 Ga. 593; Gipson v. S., 38 Miss. 295; Reg. v. Mearry, 9 Cox C. C. 231; Mangham v. S., 87 Ga. 549, 13 S. E. 558; Bryant v. S., 34 Fla. 291, 16 So. 177.

⁸⁵ Godfreidson v. P., 88 Ill. 286;

Blair v. Com., 93 Ky. 493, 20 So. 434; S. v. Novak, 109 Iowa 717, 79 N. W. 465; Taggart v. Com., 20 Ky. L. 493, 46 S. W. 674; 1 Bish. New Cr. L., § 1013; P. v. Boggs, 20 Cal. 432; Com. v. Lang, 10 Gray (Mass.) 11; S. v. Davis, 31 W. Va. 390, 7 S. E. 24. See Sims v. S., 87 Ga. 569, 13 S. E. 551.

⁸⁶ Reg. v. Vodden, 6 Cox C. C. 226.

⁸⁷ Grant v. S., 33 Fla. 291, 14 So. 757, 9 Am. C. R. 750; Lord v. S., 16 N. H. 325; Com. v. Nicely, 130 Pa. St. 261, 18 Atl. 737; Com. v. Carrington, 116 Mass. 37; P. v. Bush, 3 Park. Cr. (N. Y.) 552; Pool v. S., 87 Ga. 526, 13 S. E. 556; S. v. Bishop, 73 N. C. 44. See also Com. v. Delehan, 148 Mass. 254, 19 N. E. 221; Sledd v. Com., 19 Gratt. (Va.) 813; S. v. Austin, 6 Wis. 205; Sargent v. S., 11 Ohio 472; Ford v. S., 12 Md. 514; 1 Bish. New Cr. Proc., §§ 1004, 1012.

§ 3364. **Surplusage in verdict.**—The jury in imposing a fine (which was the duty of the judge), in addition to fixing the term of imprisonment in the penitentiary, exceeded its authority. The fine so imposed was surplusage, but the verdict was otherwise in proper form.³⁸

ARTICLE VII. SEALED VERDICT.

§ 3365. **Sealed verdict by agreement.**—Where the parties agree to a sealed verdict, and that the jury may separate and return their verdict into court the next day, it is error for the court to send them out a second time after such separation to find or amend their verdict in substance.³⁹

ARTICLE VIII. WHEN SEVERAL DEFENDANTS.

§ 3366. **Verdict of guilty as to some defendants.**—The general rule seems to be that for all the purposes of a verdict an indictment, in which there is a joinder of offenses or offenders, is to be considered as a several and separate one as to each of such offenses and offenders. The jury may therefore find a verdict of guilty or not guilty as to some and a no verdict as to others, because they can not agree thereon.⁴⁰ Where two or more persons are jointly indicted and tried for the same offense, one or more may be convicted and the others acquitted.⁴¹ A verdict may be sustained as to some of the defendants and set aside as to others.⁴²

³⁸ *Armstrong v. P.*, 37 Ill. 462; *Henderson v. P.*, 165 Ill. 611, 46 N. E. 711; *Traube v. S.*, 56 Miss. 153; *McEntee v. S.*, 24 Wis. 43; *Veatch v. S.*, 60 Ind. 291; *Stephens v. S.*, 51 Ga. 236; *Bittick v. S.*, 40 Tex. 117. See *Walston v. S.*, 54 Ga. 242; *S. v. Jenkins*, 60 Wis. 599, 19 N. W. 406; *Washington v. S.*, 117 Ala. 30, 23 So. 697.

³⁹ *Farley v. P.*, 138 Ill. 100, 27 N. E. 927; *S. v. McCormick*, 84 Me. 566, 24 Atl. 938; *Waller v. S.*, 40 Ala. 325; *P. v. Lee Yune Chong*, 94 Cal. 379, 29 Pac. 776; *Nolan v. P.*, 53 Ga. 137; *Bryant v. S.*, 34 Fla. 291, 16 So. 177; 2 *Thomp. Trials*, § 2633; *Williams v. P.*, 44 Ill. 481; *Mills v. Com.*, 7 Leigh (Va.) 751; *Russell v. P.*, 44 Ill. 509; *Allen v. S.*, 85 Wis. 22, 54 N. W. 999; *Bish. New Cr. Proc.*, § 1003, citing 2 *Hale P. C.* 299, 309;

Sargent v. S., 11 Ohio 472; *S. v. Dawkins*, 32 S. C. 17, 10 S. E. 772; *Mercer v. S.*, 17 Ga. 146; *Stanton v. S.*, 13 Ark. 317. See also *Levells v. S.*, 32 Ark. 585; *Stuart v. Com.*, 28 Gratt. (Va.) 950; *Boyett v. S.*, 26 Tex. App. 689, 9 S. W. 275; *S. v. Fenlason*, 78 Me. 495, 7 Atl. 385. *Contra*, *Pehlman v. S.*, 115 Ind. 131, 17 N. E. 270.

⁴⁰ *U. S. v. Davenport*, Deady 264, 1 *Green C. R.* 429; *Com. v. Fitzwood*, 12 *Mass.* 313.

⁴¹ *Com. v. Gavin*, 148 *Mass.* 449, 18 N. E. 675, 19 N. E. 554; *S. v. Kaiser*, 124 *Mo.* 651, 28 S. W. 182; *S. v. Mooney*, 64 N. C. 54; *Roane v. S.*, 97 *Ga.* 195, 22 S. E. 374.

⁴² *Vandermark v. P.*, 47 Ill. 123; *Fletcher v. P.*, 52 Ill. 396; *Anson v. P.*, 148 Ill. 497, 35 N. E. 145.

ARTICLE IX. RECEIVING VERDICT.

§ 3367. **Receiving verdict after adjournment.**—A verdict may be received after the court adjourns and before it again convenes.⁴³ But when the term of court has ended it is too late to receive a verdict.⁴⁴

§ 3368. **Receiving on Sunday.**—The verdict of a jury may be received and entered on Sunday.⁴⁵ But judgment can not be lawfully entered of record on Sunday.⁴⁶

§ 3369. **Must be received in open court.**—In all capital cases the verdict must be received in open court and in the presence of the prisoner.⁴⁷ If the parties agree that the jury may deliver a sealed verdict, it does not take away the right of either to a public verdict.⁴⁸

§ 3370. **Presence of defendant essential.**—If the prisoner is deprived of the privilege of being present when the verdict is returned the verdict must be set aside and a new trial granted, or the judgment will be reversed.⁴⁹

ARTICLE X. VERDICT UNLAWFUL.

§ 3371. **Verdict unauthorized by law.**—On a charge of assault with intent to commit murder the jury returned a verdict of an assault with intent to commit manslaughter: Held error, there being no such offense in law as that stated in the verdict.⁵⁰

⁴³ *S. v. McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. C. R. 550; *Barrett v. S.*, 1 Wis. 175; *S. v. Barfield*, 36 La. 89. *Contra*, *Longfellow v. S.*, 10 Neb. 105, 4 N. W. 420.

⁴⁴ 1 Bish. New Cr. Proc., § 1001, citing *Kennedy v. Raught*, 6 Minn. 155.

⁴⁵ *Baxter v. P.*, 3 Gilm. (Ill.) 386; *Johnston v. P.*, 31 Ill. 473; *Weaver v. Carter*, 101 Ga. 206, 28 S. E. 869; *Stone v. U. S.*, 167 U. S. 178, 11 S. Ct. 778; *P. v. Lightner*, 49 Cal. 226, 1 Am. C. R. 539; *S. v. McKinney*, 31 Kan. 570, 3 Pac. 356, 5 Am. C. R. 551; *McCorkle v. S.*, 14 Ind. 39.

⁴⁶ *Baxter v. P.*, 3 Gilm. (Ill.) 385; *Ex parte White*, 15 Nev. 146, 37 Am. R. 466; *Shearman v. S.*, 1 Tex. App. 215, 28 Am. R. 402.

⁴⁷ *Holliday v. P.*, 4 Gilm. (Ill.) 111;

S. v. Austin, 108 N. C. 780, 13 S. E. 219; *Cook v. S.*, 60 Ala. 39, 3 Am. C. R. 304; *Sperry v. Com.*, 9 Leigh (Va.) 623; *Stubbs v. S.*, 49 Miss. 716, 1 Am. C. R. 609; *P. v. Perkins*, 1 Wend. (N. Y.) 91; *Waller v. S.*, 40 Ala. 325; *S. v. Mills*, 19 Ark. 476; *Com. v. Tobin*, 125 Mass. 203, 28 Am. R. 220; *Harding v. P.*, 10 Colo. 387, 15 Pac. 727; *Anderson v. S.*, 2 Wash. 183, 26 Pac. 267. See *Jackson v. S.*, 102 Ala. 76, 15 So. 351.

⁴⁸ *Nomaque v. P.*, *Breese* (Ill.) 150.

⁴⁹ *Smith v. P.*, 8 Colo. 457, 5 Am. C. R. 616, 8 Pac. 920; 3 Whar. Cr. L., §§ 2991, 3364; *Summeralls v. S.*, 37 Fla. 162, 20 So. 242; *Temple v. Com.*, 77 Ky. 769, 29 Am. R. 442; *Stubbs v. S.*, 49 Miss. 716, 1 Am. C. R. 608. See "Sentence."

⁵⁰ *Moore v. P.*, 146 Ill. 602, 35 N.

§ 3372. **Illegal verdict—When void.**—If the jury return an illegal verdict the court may refuse to record it and direct the jury to retire again and further consider of their verdict.⁵¹ In a case where the jury came to the bar to deliver their verdict they declared by their foreman that the defendant was guilty of murder in the first degree. On being polled each juror responded "guilty," without specifying the degree of murder. Such a verdict was held a nullity, the statute requiring the jury to find the degree.⁵² A verdict returned by the jury and delivered to the clerk of the court during the recess of the court is null and void.⁵³ A verdict finding "guilty," without referring to the defendant by his name or as defendant, is void.⁵⁴

§ 3373. **Compromise verdict illegal.**—Where some of the jurors believe a defendant guilty of murder as charged, and the others believe him innocent of any offense, it is an outrage for the jury to return a verdict of guilty of manslaughter.⁵⁵ But it has been held that a verdict reached by the jury finding the average of their differences is not of itself sufficient to render the verdict void or voidable, where the term of imprisonment appears to be reasonable in a clear case of guilt.⁵⁶

ARTICLE XI. VERDICT INCONSISTENT OR UNCERTAIN.

§ 3374. **Verdict inconsistent or uncertain.**—Under an indictment against two or more, two can not be convicted jointly for distinct offenses, though of the kind charged in the indictment, committed by them severally and growing out of different transactions.⁵⁷ Two persons of the same name, to wit, Joseph Van Meter and Joseph Van Meter, were convicted and a new trial was granted as to one and overruled as to the other and judgment entered: Held that the record was uncertain without distinguishing which was given the new trial.⁵⁸

E. 166; *Hopkinson v. P.*, 18 Ill. 265; *S. v. White*, 41 Iowa 316; *P. v. Lilley*, 43 Mich. 521, 5 N. W. 982; *Wright v. P.*, 33 Mich. 300, 1 Am. C. R. 245.

⁵¹ *McCoy v. S.*, 52 Ga. 287, 1 Am. C. R. 589; *S. v. Bishop*, 73 N. C. 44, 1 Am. C. R. 594.

⁵² *Williams v. S.*, 60 Md. 402, 4 Am. C. R. 416.

⁵³ *Hayes v. S.*, 107 Ala. 1, 18 So. 172.

⁵⁴ *Williams v. S.*, 6 Neb. 334; *S. v. McCormick*, 84 Me. 566, 24 Atl. 938.

⁵⁵ *S. v. Bybee*, 17 Kan. 462, 2 Am. C. R. 453.

⁵⁶ *Cochlin v. P.*, 93 Ill. 413, citing *Thompson's Case*, 8 Gratt. (Va.) 638.

⁵⁷ *Baker v. P.*, 105 Ill. 454. *Repugnancy*: *Bell v. S.*, 48 Ala. 684; *Speers v. Com.*, 17 Gratt. (Va.) 570.

⁵⁸ *Van Meter v. P.*, 60 Ill. 169.

§ 3375. **Verdict as to defendant's age.**—Under the statute of Illinois, when the accused is over twenty-one years of age it is not necessary to state his age in the verdict, but it is necessary to fix his punishment in the verdict. This was the law prior to the indeterminate sentence statute.⁵⁹

ARTICLE XII. JURY DISCHARGED BEFORE VERDICT.

§ 3376. **Discharge of jury before verdict.**—"When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury can not be discharged (unless in cases of evident necessity) until they have given in their verdict, and they can not give a privy verdict. The judges may adjourn while the jury are withdrawn to confer and return to receive the verdict in open court."⁶⁰ "The discharge of the jury in a criminal cause without the consent of the defendant, after it has been duly impaneled and sworn, but before verdict, is equivalent to a verdict of acquittal, unless the discharge was ordered in consequence of such necessity as the law regards as imperative."⁶¹ In a civil case, if there seems to be no prospect of the jury agreeing, the judge must discharge the jury, even without the consent of the parties; but in a criminal case the jury can not be discharged without the consent of the prisoner merely because the court is of opinion that the jury will not be able to agree as long as the court is in session, and if the jury be discharged it has been held the prisoner is entitled to his discharge.⁶²

ARTICLE XIII. POLLING JURY.

§ 3377. **Right to poll jury.**—The accused has the right to poll the jury and can not be deprived of that right without his consent, as by receiving the verdict on Sunday, in the absence of the accused and his counsel, without notice.⁶³ It was never intended in polling a

⁵⁹ *Sullivan v. P.*, 156 Ill. 97, 40 N. E. 288; *Doss v. P.*, 158 Ill. 662, 41 N. E. 1093; *Porter v. P.*, 158 Ill. 374, 41 N. E. 886.

⁶⁰ 4 Bl. Com. 360. See "Jeopardy."

⁶¹ *Benedict v. S.*, 44 Ohio St. 679, 7 Am. C. R. 14, 11 N. E. 125. See *P. v. Lightner*, 49 Cal. 226; *Hilands v. Com.*, 111 Pa. St. 1, 6 Am. C. R. 342, 2 Atl. 70. See "Jeopardy."

⁶² *S. v. Hurst*, 11 W. Va. 54, 3 Am. C. R. 120; *Williams' Case*, 2 Gratt. (Va.) 568.

⁶³ *S. v. Muir*, 32 Kan. 481, 5 Am. C. R. 599, 4 Pac. 812; *James v. S.*, 55 Miss. 57; *S. v. Hughes*, 2 Ala. 102; *Williams v. S.*, 60 Md. 402, 4 Am. C. R. 416; *Tilton v. S.*, 52 Ga. 478, 1 Am. C. R. 564; *Com. v. Buccieri*, 153 Pa. St. 535, 26 Atl. 228; *Nomaque v. P.*, Breese (Ill.) 145; *S. v. Callahan*, 55 Iowa 364, 7 N. W. 603. *Contra*, *S. v. Hoyt*, 47 Conn. 518, 36 Am. R. 89.

jury to permit the jurors to be interrogated further than to ask each of them the direct question: "Is that your verdict?" If the answer is in the affirmative his answer is conclusive and further inquiry is not permissible.⁶⁴

ARTICLE XIV. DUTY OF JURY.

§ 3378. **Each juror's duty as to verdict.**—It is the duty of jurors to consider carefully every part of the evidence, and, if necessary, reconsider it, and to hear and consider the views and arguments of their fellow jurors, but at last each one of them must act upon his own judgment and not upon that of another.⁶⁵ It is the duty of jurors in making up their verdict to consult with each other, and not to act independently of the others.⁶⁶

§ 3379. **On assault to commit felony.**—On a charge of an assault with intent to commit a felony the verdict of the jury should designate the felony intended to be committed by the accused.⁶⁷

ARTICLE XV. VERDICT, WHEN A BAR.

§ 3380. **Verdict is a bar.**—A verdict either of acquittal or conviction is a bar to a subsequent prosecution for the same offense, although no judgment has been entered upon it.⁶⁸

⁶⁴ Bean v. S., 17 Tex. App. 60, 5 Am. C. R. 479; S. v. Bogain, 12 La. 264. See Biscoe v. S., 68 Md. 294, 12 Atl. 25.

⁶⁵ Clem v. S., 42 Ind. 420, 2 Green C. R. 698, 13 Am. R. 369.

⁶⁶ Little v. P., 157 Ill. 157, 42 N. E. 389.

⁶⁷ S. v. Austin, 109 Iowa 118, 80 N. W. 303.

⁶⁸ Brennan v. P., 15 Ill. 518, citing Mount v. S., 14 Ohio 295; S. v. Norvell, 2 Yerg. (Tenn.) 24; Hurt v. S., 25 Miss. 378. See "Jeopardy."

CHAPTER XCI.

RECORDS.

ART.	I. Amendments, When,	§§ 3381-3386
	II. Errors, Generally,	§§ 3387-3394
	III. Bill of Exceptions, Generally,	§§ 3395-3405
	IV. Writ of Error,	§§ 3406-3411
	V. <i>Remittitur; Certiorari</i> ,	§ 3412

ARTICLE I. AMENDMENTS, WHEN.

§ 3381. **Records may be amended.**—Records can be amended at a subsequent term where the cause is still pending.¹ But when the judgment is perfected and duly entered on the records of the court, and the term closed, and the court adjourned, the court can not have and ought not to have any supervisory power over it at a subsequent term, except as to matters of form, on giving notice to the opposite party.²

§ 3382. **Changes at future term.**—“The court can not make an original order in a case at a term subsequent to that at which final judgment is rendered.” Such order would be void.³ But errors, mistakes, or omissions of the clerk to enter in the record the orders of the court may be corrected or entered at a subsequent term, so as to

¹ Phillips v. P., 88 Ill. 160; May v. P., 92 Ill. 343; Bodkin v. S., 20 Ind. 281; Franklin v. S., 28 Ala. 12; Weighorst v. S., 7 Md. 450; Frances v. S., 6 Fla. 313.

² Cook v. Wood, 24 Ill. 295, 297; Knefel v. P., 187 Ill. 214, 58 N. E. 388.

³ Gebbie v. Mooney, 121 Ill. 255, 258, 12 N. E. 473; P. v. Whitson, 74 Ill. 25; Howell v. Morlan, 78 Ill. 162; Hagler v. Mercer, 6 Fla. 721; Hanra-

han v. P., 95 Ill. 166; Brown v. Rice, 57 Me. 55; Cook v. Wood, 24 Ill. 295, 298; Becker v. Santer, 89 Ill. 596; Lill v. Stookey, 72 Ill. 495; Cameron v. McRoberts, 3 Wheat. (U. S.) 591; Stephens v. Cowan, 6 Watts (Pa.) 511; Jackson v. Ashton, 10 Peters (U. S.) 480; Medford v. Dorsey, 2 Wash. C. C. 433; Ex parte Lange, 18 Wall. (U. S.) 163; S. v. Harrison, 10 Yerg. (Tenn.) 542.

make the record conform to the fact. There must be some memorial paper to amend by.⁴ The entry of a judgment *nunc pro tunc* is always proper when a judgment has been ordered by the court, but which the clerk has failed or neglected to copy into the record.⁵

§ 3383. **Memorial paper to amend by.**—The minute book, journal and docket kept by the clerk of the court may be inspected and evidence of witnesses may be heard explaining how such books were kept and record written in determining a motion to amend the record in a cause.⁶ It has been held that the court is not restricted to some written memorandum among papers in the case to authorize it to amend its records at a subsequent term, but that the actual proceedings of the court may be entered in the record. The court may amend from memory or any legal evidence.⁷

§ 3384. **Notice of intention to amend.**—If substantial amendments of the records, based on extrinsic testimony, are to be made, it can only be done on due notice, after a solemn adjudication of the matters in open court.⁸ An amendment to a judgment in a criminal case at the next term, in the absence of the defendant, is void and does not affect the original judgment.⁹

§ 3385. **Amending indictment or affidavit.**—Where, by statute, the indictment may be amended "with the consent of the defendant," the record should affirmatively show that the consent of the defendant was given to the amendment. Consent will not be inferred or presumed from mere silence.¹⁰ An affidavit on a criminal charge, before a justice of the peace, may be amended.¹¹

⁴ *Dunham v. Park Comrs.*, 87 Ill. 185; *Gebbie v. Mooney*, 121 Ill. 255, 12 N. E. 472; *Frink v. King*, 3 Scam. (Ill.) 144; *Lampsett v. Whitney*, 3 Scam. (Ill.) 170; *Atkins v. Hinman*, 2 Gilm. (Ill.) 437; *O'Conner v. Mullen*, 11 Ill. 57; *Loomis v. Francis*, 17 Ill. 206; *Cook v. Wood*, 24 Ill. 295; *Ives v. Hulce*, 17 Ill. App. 30; *Tucker v. Hamilton*, 108 Ill. 464; *Gore v. P.*, 162 Ill. 260, 44 N. E. 500; *Fielden v. P.*, 128 Ill. 599, 21 N. E. 584; *Church v. English*, 81 Ill. 442; *Chicago Planing Mill Co. v. Merchants' Nat. Bank*, 97 Ill. 294.

⁶ *Freeman Judg.*, § 61; *Benedict v. S.*, 44 Ohio St. 679, 11 N. E. 125, 7 Am. C. R. 16; *Burnett v. S.*, 14 Tex. 455; *Weatherman v. Com.*, 91

Va. 796, 10 Am. C. R. 96, 22 S. E. 349.

⁷ *Knefel v. P.*, 187 Ill. 217, 58 N. E. 388.

⁸ *In re Wright*, 134 U. S. 136, 10 S. Ct. 487; *May v. P.*, 92 Ill. 346; 1 Bish. Cr. Proc. (3d ed.), § 1343. But see *Arnold v. Com.*, 21 Ky. L. 1566, 55 S. W. 894.

⁹ *Devine v. P.*, 100 Ill. 296; *Fielden v. P.*, 128 Ill. 599, 21 N. E. 584.

¹⁰ *Van Fleet Coll. Attack*, 752, citing *Elsner v. Shrigley*, 80 Iowa 30, 45 N. W. 393; *P. v. Whitson*, 74 Ill. 20; *Warren v. McCarthy*, 25 Ill. 88.

¹¹ *Shiff v. S.*, 84 Ala. 454, 4 So. 419, 7 Am. C. R. 242.

¹² *Truitt v. P.*, 88 Ill. 519. See § 2776.

§ 3386. **Contradicting court records by affidavit.**—A record is not commonly suffered to be contradicted by parol evidence, but whenever a fact showing want of jurisdiction in a court of general jurisdiction can be proved without contradicting its recitals it is allowable to do so and thus defeat its effect. The presumption as to the regularity of the record is one of fact and not conclusive. It may be rebutted.¹² The clerk's attestation imports verity, and it can not be impeached by mere *ex parte* affidavits filed in the clerk's office, and no averments can be taken against it.¹³

ARTICLE II. ERRORS, GENERALLY.

§ 3387. **Error must be material.**—A judgment will not be reversed where error has intervened, if it shall appear from the whole record that it could not reasonably have affected the result.¹⁴

§ 3388. **Errors presumed injurious.**—It has been held that if any error intervenes in the proceedings on the trial, it is presumed to be injurious to the prisoner, and entitles him to a reversal of the judgment; but the burden of authority is to the contrary.¹⁵

§ 3389. **Prisoner shackled in court.**—Without some good reason authorizing the court to depart from the general practice in England and in this country, the shackles of the prisoner, when brought before the jury for trial, should be removed.¹⁶

§ 3390. **Evidence prejudicial and irrelevant.**—The admission of evidence irrelevant to the issue, if prejudicial to the defendant, is not cured by striking it out where it is likely to influence the jury.¹⁷

¹² Cooley Const. Lim. (5th ed.), 407; Church Habeas Corpus, § 267; Brown Jurisdiction, 280. See Bimler v. Dawson, 4 Scam. (Ill.) 533, 4 Cr. L. Mag. 812; Ferris v. S. (Ind., 1901), 59 N. E. 475.

¹³ Hughes v. P., 116 Ill. 339, 6 N. E. 55; Welborn v. P., 76 Ill. 518.

¹⁴ Ochs v. P., 124 Ill. 425, 16 N. E. 662; Kirby v. P., 123 Ill. 439, 15 N. E. 33; Zimm v. P., 111 Ill. 49; Wilson v. P., 94 Ill. 327; Epps v. S., 102 Ind. 539, 1 N. E. 491, 5 Am. C. R. 532; Jennings v. P., 189 Ill. 324, 59 N. E. 515; P. v. Maine, 64 N. Y. Supp. 579, 15 N. Y. Cr. 57. See also Morrison v. Com., 21 Ky. L. 1814, 56 S. W. 516; S. v. Mansfield, 52 La.

1355, 27 So. 887; S. v. Cunningham (Iowa), 82 N. W. 775; P. v. Putnam, 129 Cal. 258, 61 Pac. 961; P. v. Sullivan, 129 Cal. 557, 62 Pac. 101; King v. S. (Tex. Cr.), 57 S. W. 840.

¹⁵ P. v. Devine, 44 Cal. 452, 2 Green C. R. 410. *Contra*, S. v. Preston (Idaho), 38 Pac. 694, 9 Am. C. R. 740; P. v. Wheatley, 88 Cal. 114, 26 Pac. 95; Burns v. S., 49 Ala. 370, 1 Am. C. R. 327.

¹⁶ S. v. Kring, 64 Mo. 591, 2 Am. C. R. 314; P. v. Harrington, 42 Cal. 165; 4 Bl. Com. 322; Faire v. S., 58 Ala. 74; Lee v. S., 51 Miss. 566.

¹⁷ P. v. Zimmerman, 4 N. Y. Cr. 272; 1 Roscoe Cr. Ev. 92, note.

§ 3391. **Comment on defendant's failure to testify.**—The statute forbids any reference to the fact that the defendant neglected to testify in his own behalf. If the state's attorney violates the statute, and procures a conviction, such violation will be sufficient to reverse, even though the court interrupts counsel. The evil done by such statements can not be cured by instruction from the court.¹⁸

§ 3392. **Refusing counsel to talk with witnesses.**—In no state of a case should the court refuse the counsel for the prisoner an opportunity to converse with the witness he has subpoenaed and proposes to call on the subject of his or her testimony. To so refuse is error.¹⁹

§ 3393. **Reversal on facts by court of review.**—A case will not be reversed on questions of fact determined by the jury unless the court is clearly satisfied that the verdict is wrong as appears from all the evidence.²⁰

§ 3394. **General assignment of errors.**—In the assignment of errors, to state that the court erred in refusing to grant a new trial, though a general assignment, is sufficient to embrace the giving or refusing of instructions and that the evidence does not sustain the verdict.²¹

¹⁸ Quinn v. P., 123 Ill. 346, 15 N. E. 46; Baker v. P., 105 Ill. 457; Blume v. S., 154 Ind. 343, 56 N. E. 771 (error cured); Austin v. P., 102 Ill. 261; Angelo v. P., 96 Ill. 213; S. v. Banks, 78 Me. 490, 7 Atl. 269, 7 Am. C. R. 526; S. v. Balch, 31 Kan. 465, 2 Pac. 609, 4 Am. C. R. 518; P. v. Tyler, 36 Cal. 522; S. v. Graham, 62 Iowa 108, 17 N. W. 192; Com. v. Scott, 123 Mass. 239. See S. v. Mosley, 31 Kan. 355, 2 Pac. 782; Calkins v. S., 18 Ohio St. 366; Wilson v. U. S., 149 U. S. 60, 13 S. Ct. 765; S. v. Mathews, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135; Staples v. S., 89 Tenn. 231, 14 S. W. 603; S. v. Tennison, 42 Kan. 330, 22 Pac. 429; Showalter v. S., 84 Ind. 562; Com. v. Hanley, 140 Mass. 457, 5 N. E. 468; S. v. Holmes, 65 Minn. 230, 68 N. W. 11; Sanders v. S., 73 Miss. 444, 18 So. 541; Hunt v. S., 28 Tex. App. 149, 12 S. W. 737; S. v. Chisnell, 36 W. Va. 667, 15 S. E. 412; S. v. Moxley,

102 Mo. 374, 393, 14 S. W. 969, 15 S. W. 556. When error cured: Staples v. S., 89 Tenn. 231, 14 S. W. 603; Calkins v. S., 18 Ohio St. 366, 373; P. v. Hess, 85 Mich. 128, 41 N. W. 181; Com. v. Worcester, 141 Mass. 58, 61, 6 N. E. 700; Crandall v. P., 2 Lans. (N. Y.) 309; S. v. Cameron, 40 Vt. 555. See "Trial and Incidents;" "Argument."

¹⁹ White v. S., 52 Miss. 216, 2 Am. C. R. 460, 461.

²⁰ Cronk v. P., 131 Ill. 60, 22 N. E. 862; McMahon v. P., 120 Ill. 581, 11 N. E. 883; Rafferty v. P., 72 Ill. 42; Padgett v. S., 103 Ind. 550, 3 N. E. 377, 6 Am. C. R. 52; P. v. Hamilton, 46 Cal. 540, 2 Green C. R. 433; Bal-
lew v. S., 36 Tex. 98, 1 Green C. R. 607; Gilman v. P., 178 Ill. 19, 52 N. E. 967; S. v. Kaplan, 72 Conn. 635, 45 Atl. 1018; S. v. Coates, 22 Wash. 601, 61 Pac. 726.

²¹ Shaw v. P., 81 Ill. 152.

ARTICLE III. BILL OF EXCEPTIONS, GENERALLY.

§ 3395. **Bill of exceptions at common law.**—At common law a bill of exceptions could not be taken in a felony case, and it is by statute only authorized to be taken on trials at *nisi prius*.²²

§ 3396. **Bill of exceptions, when unnecessary.**—The record properly ordinarily embraces the original writ, the pleadings and the entry of verdict and judgment, and if any error is apparent on the face of these pleadings which constitute the record proper, error may be assigned upon it without the necessity of embodying the same in a bill of exceptions.²³ The indictment is a part of the record proper, and exception need not be taken to the ruling of the court overruling a motion to quash.²⁴

§ 3397. **Proceedings preserved by bill of exceptions.**—A motion for new trial and other proceedings must be preserved in the record by bill of exceptions to be of any avail and to give the court jurisdiction. Affidavits in support of motions come within the rule.²⁵ The mere entry of exception to the rulings of the court by the clerk in the record will not preserve the same. They must be preserved by bill of exceptions.²⁶

§ 3398. **Bill of exceptions by stipulation.**—The parties to a cause may stipulate to file the bill of exceptions at any time either before or after the expiration of the term of the court.²⁷ An unsigned statement purporting to be a stipulation that the original bill of exceptions may be embodied in the transcript of the record as a part of such transcript is not sufficient.²⁸

²² Fielden v. P., 128 Ill. 603, 21 N. E. 584, citing 1 Chitty Cr. L. (5th Am. ed.), 622.

²³ 2 Thomp. Trials, §§ 2771-2773, citing Freshour v. Logansport, etc., Co., 104 Ind. 463, 4 N. E. 157; Bateson v. Clark, 37 Mo. 31, 34. See "Trial and Incidents" generally.

²⁴ Baker v. P., 105 Ill. 454. See Raines v. S. (Fla.), 28 So. 57. See §§ 2847, 3397.

²⁵ Harris v. P., 130 Ill. 457, 22 N. E. 826; Eastman v. P., 93 Ill. 112; Bedee v. P., 73 Ill. 321; S. v. Powers, 52 La. 1254, 27 So. 654; Bernerker v. S., 40 Neb. 810, 59 N. W. 372,

9 Am. C. R. 466; Bradshaw v. S., 17 Neb. 147, 22 N. W. 361, 5 Am. C. R. 500; 2 Thomp. Trials, §§ 2774, 2775; 2 Thomp. Trials, § 2802; Danks v. Rodeheaver, 26 W. Va. 274.

²⁶ Steffy v. P., 130 Ill. 98, 22 N. E. 861; Graham v. P., 115 Ill. 569, 4 N. E. 790; Bedee v. P., 73 Ill. 321; Earl v. P., 73 Ill. 331; 2 Thomp. Trials, § 2779; Dritt v. Dodde, 35 Ind. 63. See §§ 2847, 3396.

²⁷ Swank v. Swank, 85 Mo. 198.

²⁸ Harris v. P., 148 Ill. 97, 35 N. E. 756; Moore v. P., 148 Ill. 50, 35 N. E. 755.

§ 3399. **Bill of exceptions—When to be signed.**—Signing and sealing a bill of exceptions is a judicial as well as a ministerial act, and must be signed by the judge presiding at the trial.²⁹ A bill of exceptions must be taken and signed during the term at which the cause was tried, except where leave is given to file the same in vacation or at some future time, *nunc pro tunc*.³⁰ The court has no jurisdiction to sign a bill of exceptions at a subsequent term from and after the term of the trial of the cause, unless leave was given for that purpose.³¹ The court having fixed a date beyond the expiration of the term within which to file a bill of exceptions, exhausted its power and can not thereafter extend the time except by consent of both the parties.³² Mandamus will lie to compel the judge to sign and seal bills of exceptions in a cause tried before him, but he must at last determine the accuracy of it.³³

§ 3400. **Time for filing fixed by statute.**—Ninety days' time was allowed by the court within which to file a bill of exceptions, the statute providing for only sixty days after the judgment is rendered. But the bill of exceptions having been filed within the statutory limit, it was held sufficient to make the same a part of the record.³⁴

§ 3401. **Certificate showing evidence.**—It is necessary that the bill of exceptions should state that this "was all the evidence given in the cause." It is not sufficient to state that "this was all the evidence offered on the trial of the cause," nor that "this was all the testimony given in the cause," the word testimony not being synonymous with evidence.³⁵ It must appear by certificate that the bill of exceptions contains all the evidence, instructions, motions or other proceedings not part of the record proper.³⁶ But it is not necessary to preserve

²⁹ *P. v. Anthony*, 129 Ill. 218, 21 N. E. 780; *Law v. Jackson*, 8 Cow. (N. Y.) 746; *Hake v. Strubal*, 121 Ill. 321, 12 N. E. 676.

³⁰ *Dougherty v. P.*, 118 Ill. 164, 8 N. E. 673; *Harris v. P.*, 138 Ill. 66, 27 N. E. 706; *Walahan v. P.*, 40 Ill. 104; *Wabash, etc., R. Co. v. P.*, 106 Ill. 652; *Jones v. S.*, 64 Ga. 697, 5 Am. C. R. 552. See *Powell v. S.* (Tex. Cr.), 57 S. W. 668 (filing).

³¹ *Harris v. P.*, 138 Ill. 66, 27 N. E. 706; *Dougherty v. P.*, 118 Ill. 164, 8 N. E. 673.

³² *Robinson v. Johnson*, 61 Ind. 535.

³³ *P. v. Anthony*, 129 Ill. 218, 21 N. E. 780.

³⁴ *S. v. Hunt*, 137 Ind. 537, 9 Am. C. R. 427, 37 N. E. 409.

³⁵ 2 *Thomp. Trials*, § 2784; *Central U. Tel. Co. v. S.*, 110 Ind. 203, 207, 10 N. E. 922, 12 N. E. 136; *Brickley v. Weghorn*, 71 Ind. 497; *Siple v. S.*, 154 Ind. 649, 57 N. E. 544.

³⁶ *James v. Dexter*, 113 Ill. 656; *Bedee v. P.*, 73 Ill. 321; *S. v. Hunt*, 137 Ind. 537, 9 Am. C. R. 436, 37

the evidence in a bill of exceptions if the error complained of consists in the giving of instructions erroneous under any conceivable state of facts.^{36a}

§ 3402. Amendment of bill of exceptions presumed proper.—A bill of exceptions, having once been signed by the judge and filed, becomes a part of the record and can not be amended in vacation. Where the court amends a bill of exceptions at a future term it will be presumed there was something to amend by, unless it appears to the contrary by bill of exceptions.³⁷

§ 3403. Bill of exceptions—Amending.—When it is sought to amend or alter a bill of exceptions at future term there must be some minute or memorandum of the judge or court to amend by.³⁸ But a bill of exceptions may be amended where, through inadvertence or by mistake, it fails to present matters material which transpired at the trial, but notice must be given to the opposite party.³⁹

§ 3404. Defendant presumed in court.—Where the record shows the arraignment and trial were upon one day, and upon the following day the jury returned their verdict and judgment was rendered thereon, and no interval appearing between the trial and the judgment, the presumption is, therefore, the prisoner remained in court the whole time.⁴⁰

§ 3405. Action of court presumed regular.—It will be presumed that the court convened on the day to which it adjourned, nothing to the contrary appearing by bill of exceptions.⁴¹ The action of the trial court will be presumed to be regular until the contrary appears by bill of exceptions taken at the trial, such, for example, as keeping the jury in custody of a sworn officer.⁴²

N. E. 409; Tarble v. P., 111 Ill. 123; Bergdahl v. P. (Colo.), 61 Pac. 228; Barton v. S., 154 Ind. 670, 57 N. E. 515 (instructions); Crawford v. S., 155 Ind. 692, 57 N. E. 931.

^{36a} S. v. Mason (Mont.), 61 Pac. 861.

³⁷ Wallahan v. P., 40 Ill. 103; Devine v. P., 100 Ill. 290.

³⁸ P. v. Anthony, 129 Ill. 218, 21 N. E. 780; Church v. English, 81 Ill. 442; Cook v. Wood, 24 Ill. 295; McCormick v. Wheeler, 36 Ill. 114.

³⁹ P. v. Anthony, 129 Ill. 218, 21 N. E. 780; Heinsen v. Lamb, 117 Ill. 553, 7 N. E. 75; Brooks v. Bruyn, 40 Ill. 64; Wallahan v. P., 40 Ill. 104.

⁴⁰ Schirmer v. P., 33 Ill. 284; Padfield v. P., 146 Ill. 665, 35 N. E. 469; S. v. Craton, 6 Ired. (N. C.) 164; West v. S., 22 N. J. L. 212; S. v. Stieffe, 13 Iowa 603.

⁴¹ White v. P., 81 Ill. 336. See Teerney v. P., 81 Ill. 412.

⁴² McElwee v. P., 77 Ill. 493; Clarke v. S., 78 Ala. 474, 6 Am. C. R. 528;

ARTICLE IV. WRIT OF ERROR.

§ 3406. **Writ of error—At common law.**—A writ of error is a writ of right and can not be denied, except in capital cases.⁴³ Under the constitution of Illinois the appellant has a right to a writ of error, but not an appeal, in a criminal case.⁴⁴ Writ of error at common law may be brought by a party attainted for treason or felony, or after his death by his heirs or executors, to reverse an attainder of treason or felony, but by no other persons, whatever interest they may have in the reversal.⁴⁵

§ 3407. **Escaped prisoner not entitled.**—The defendant is not entitled to prosecute a writ of error if he escapes and fails to surrender himself to give bail.⁴⁶

§ 3408. **Writ of error—From what court.**—In all criminal cases in Illinois, where the validity of a statute is involved, the writ of error must issue out of the supreme court.⁴⁷ A writ of error in cases below the grade of felony, by statutory provision, must issue out of the appellate court, and may be reviewed in the supreme court on writ of error to the appellate court.⁴⁸ Although the validity of a statute was involved in the trial court in a misdemeanor case, yet the cause must be taken to the appellate court by writ of error, if the constitutional question is not raised on error.⁴⁹ In case a party sues out a writ of error in the wrong court, he will, if he desires, be permitted to withdraw the transcript of the record and other documents for the purpose of filing them in the proper court.⁵⁰

McKinney v. P., 2 Gilm. (Ill.) 553; Gardner v. P., 3 Scam. (Ill.) 84. See also S. v. Hunt, 137 Ind. 537, 9 Am. C. R. 428, 37 N. E. 409; Berneker v. S., 40 Neb. 810, 9 Am. C. R. 466, 59 N. W. 372; Patterson v. S., 48 N. J. L. 381, 4 Atl. 449, 7 Am. C. R. 308.

⁴³ Bowers v. Green, 1 Scam. (Ill.) 43; Peak v. P., 76 Ill. 291; Stuart v. P., 3 Scam. (Ill.) 403.

⁴⁴ Anderson v. P., 28 Ill. App. 317, citing Smith v. P., 98 Ill. 407; Bowers v. Green, 1 Scam. (Ill.) 42; French v. P., 77 Ill. 532; Ingraham v. P., 94 Ill. 428.

⁴⁵ 1 Chitty Cr. L. 746; O'Sullivan v. P., 144 Ill. 607, 32 N. E. 192.

⁴⁶ McGowen v. P., 104 Ill. 100; Woodson v. S., 19 Fla. 549, 4 Am. C. R. 478; P. v. Genet, 59 N. Y. 80; Com. v. Andrews, 97 Mass. 543; Smith v. U. S., 94 U. S. 97; P. v. Redinger, 55 Cal. 290.

⁴⁷ Williams v. P., 118 Ill. 444, 8 N. E. 841; Graham v. P., 35 Ill. App. 568; P. v. Miner, 144 Ill. 308, 33 N. E. 40.

⁴⁸ Weiss v. P., 104 Ill. 90; Smith v. P., 98 Ill. 407.

⁴⁹ Skakel v. P., 188 Ill. 291, 58 N. E. 1003.

⁵⁰ Baits v. P., 123 Ill. 428, 16 N. E. 483. See Wright v. P., 92 Ill. 596.

§ 3409. **Writ of error—When will be dismissed.**—Where the transcript of the record filed in the supreme court is imperfect, showing no convening order of the trial court, nor any of the orders or the final judgment of the court, the writ of error will be dismissed.⁵¹

§ 3410. **Death abates writ of error.**—The death of a party after he has sued out a writ of error to reverse a judgment against him abates the writ even before there is a joinder in error, and this result can not be prevented by the entry of judgment *nunc pro tunc*, as of a date prior to his death.⁵²

§ 3411. **Costs in prosecuting writ of error.**—The person who prosecutes a writ of error, and succeeds in reversing the case, will be liable for costs incurred by him.⁵³

ARTICLE V. REMITTITUR; CERTIORARI.

§ 3412. **Writ of remittitur—Certiorari.**—A writ of *remittitur* does not transmit a record back to the lower court, but it is simply a copy of the final order or judgment of the court of review, and its only mission is to inform the lower court of the action of the court of review.⁵⁴ The circuit courts have power to award a writ of *certiorari* at common law to all inferior tribunals and jurisdictions wherever it is shown either they have exceeded the limits of their jurisdiction, or in cases where they have proceeded illegally, and no appeal or other mode of directly reviewing their proceedings is provided.⁵⁵

⁵¹ Harris v. P., 148 Ill. 97, 35 N. E. 756; Moore v. P., 148 Ill. 50, 35 N. E. 755; Lester v. P., 150 Ill. 416, 23 N. E. 387, 37 N. E. 1004. See also Swartzbaugh v. P., 85 Ill. 459; Planing Mill Co. v. Chicago, 56 Ill. 304.

⁵² O'Sullivan v. P., 144 Ill. 606, 32 N. E. 192.

⁵³ Sans v. P., 3 Gilm. (Ill.) 327; Carpenter v. P., 3 Gilm. (Ill.) 148.

⁵⁴ Perteet v. P., 70 Ill. 177.

⁵⁵ P. v. Williamson, 13 Ill. 662, citing Park v. City of Boston, 8 Pick. (Mass.) 218; Glennon v. Britton, 155 Ill. 237, 40 N. E. 594.

CHAPTER XCII.

EXTRADITION.

ART. I.	Constitutional Provisions,	§§ 3413-3417
II.	International Extradition,	§§ 3418-3423
III.	Interstate Extradition,	§§ 3424-3425
IV.	Governor Must Determine Validity,	§§ 3426-3431
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VI.	Matters of Evidence,	§§ 3434-3437
VII.	Habeas Corpus Proceedings,	§ 3438

ARTICLE I. CONSTITUTIONAL PROVISIONS.

§ 3413. **Constitutional provision—Misdemeanors included.**—The constitution of the United States contains the following provision: “A person charged in any state with treason, felony or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.”¹ For the purpose of enforcing this constitutional provision a federal statute was early enacted containing among other things the following: “Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and

¹ U. S. Const., art. iv, § 2. See *Ex parte Morgan* (C. C.), 5 Cr. L. Mag. 698.

to cause the fugitive to be delivered to such agent when he shall appear," etc.^{1a} "Treason, felony or other crimes" are the words of the constitution in reference to extradition proceedings, and are comprehensive enough to include misdemeanors as well as felonies.²

§ 3414. **Fugitive from justice, defined.**—A fugitive from justice is a person who commits a crime within a state and withdraws himself from its jurisdiction without waiting to abide the consequences of his act.³ If a person commits a crime and leaves the state, he may be brought back by extradition proceeding, irrespective of his motives in leaving the state.⁴

§ 3415. **Visiting another state and committing offense.**—Where a person living in one state goes into another and does any act toward the commission of a criminal offense, which results in an actual offense after his return to his own state, he may be extradited as a fugitive from justice: as, where a person goes to another state and by false representation arranges to have goods shipped to him in his state, and then returns and afterwards receives the goods.⁵

§ 3416. **Escaped prisoner, a fugitive.**—Where a person who is serving a term of imprisonment for the commission of a criminal offense escapes and leaves the state where imprisoned, he may be apprehended by extradition proceedings as a fugitive from justice.⁶

§ 3417. **When not a fugitive.**—The prisoners were charged with the crime of murder in the state of Tennessee while they were actually in the state of North Carolina. They having at no time since the homicide gone into the state of Tennessee, can not be surrendered on

^{1a} U. S. Rev. Stat., § 5278; Act of Congress 1793, § 1.

² Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148, 5 Am. C. R. 221; Com. v. Johnston, 12 Pa. Co. Ct. 263; In re Greenough, 31 Vt. 279; Morton v. Skinner, 48 Ind. 123; S. v. Hudson, 2 Ohio N. P. 1. For a history of the constitutional provisions and act of Congress relating to fugitives from justice, see 5 Am. C. R. 221. See Ex parte Morgan (U. S.), 5 Cr. L. Mag. 698.

³ 12 Am. & Eng. Ency. Law (2d ed.) 602; In re White, 55 Fed. 54,

5 C. C. A. 29; Matter of Voorhees, 32 N. J. L. 141; S. v. Hall, 115 N. C. 811, 44 Am. St. 501, 20 S. E. 729, 28 L. R. A. 294; Hibler v. S., 43 Tex. 197.

⁴ In re Bloch, 87 Fed. 981; In re White, 55 Fed. 54, 5 C. C. A. 29; S. v. Richter, 37 Minn. 436, 35 N. W. 9; In re Sultan, 115 N. C. 57, 20 S. E. 375, 44 Am. R. 433; Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291.

⁵ In re Sultan, 115 N. C. 57, 20 S. E. 375, 44 Am. R. 433.

⁶ Drinkall v. Spiegel, 68 Conn. 441, 36 Atl. 830.

the demand of that state as "fugitives from justice."⁷ A state may provide by statute for the surrender, upon requisition, of persons indictable for crimes committed in another state, although they are not "fugitives from justice."⁸

ARTICLE II. INTERNATIONAL EXTRADITION.

§ 3418. Trial on specific offense named.—Where a defendant has been surrendered in pursuance of a treaty, for trial upon a specific charge named therein, he can not be placed upon trial for any other than the particular offense named in the extradition proceedings.* But the principle mentioned, that a person extradited for some particular crime shall be exempt from trial on any other offense, has no application to a case where the fugitive is brought by private individuals, by sheer force, from the country to which he fled.¹⁰

§ 3419. Unlawful arrest immaterial.—The court trying a person charged with a criminal offense will not inquire into the manner of his arrest; whether brought into the jurisdiction of the court by kidnapping, abduction, force or otherwise, from another state or country, the court will have jurisdiction to try him. It is sufficient that the accused is in court.¹¹

§ 3420. Privilege extends to included offense.—Where a person has been surrendered by one country to another on extradition proceedings for some particular crime mentioned, he can not be lawfully tried on a lesser offense, though included in the crime for which he

⁷ *S. v. Hall*, 115 N. C. 811, 20 S. E. 729, 10 Am. C. R. 299, 300, 28 L. R. A. 289, 44 Am. St. 501; *Wilcox v. Nolze*, 34 Ohio St. 520; *Ex parte Reggel*, 114 U. S. 642, 5 S. Ct. 1148; *Hartman v. Aveline*, 63 Ind. 344, 30 Am. R. 217; *In re White*, 55 Fed. 54, 5 C. C. A. 29; *Underhill Cr. Ev.*, § 497; *Ex parte Knowles*, 16 Ky. L. 263; *In re Mohr*, 73 Ala. 503; *P. v. Adams*, 3 Den. (N. Y.) 190. See *In re Maney*, 20 Wash. 509, 55 Pac. 930; *Jones v. Leonard*, 50 Iowa 106, 32 Am. R. 116.

⁸ *S. v. Hall*, 115 N. C. 811, 10 Am. C. R. 302, 20 S. E. 729, 44 Am. St. 501, 28 L. R. A. 294.

⁹ *U. S. v. Rauscher*, 119 U. S. 407,

6 Am. C. R. 222, 7 S. Ct. 234; *U. S. v. Watts*, 8 Sawy. 370, 14 Fed. 130; *S. v. Vanderpool*, 39 Ohio St. 273; *Com. v. Hawes*, 13 Bush (Ky.) 697, 2 Am. C. R. 201; *Foster v. Neilson*, 2 Pet. (U. S.) 254; *Cosgrove v. Winney* (U. S.), 19 S. Ct. 598; *Ex parte Hibbs*, 26 Fed. 421.

¹⁰ *Ker v. P.*, 110 Ill. 627, 51 Am. R. 706; *Ker v. Illinois*, 119 U. S. 436, 7 S. Ct. 225.

¹¹ *Mahon v. Justice*, 127 U. S. 700, 8 S. Ct. 1204; *Ker v. P.*, 110 Ill. 627, 51 Am. R. 706; *S. v. Kealy*, 89 Iowa 94, 56 N. W. 283; *Ex parte Barker*, 87 Ala. 4, 6 So. 7, 13 Am. R. 17; *S. v. Patterson*, 116 Mo. 505, 22 S. W. 696. See § 2574.

was extradited: as, if a man be extradited for assault in the first degree he can not be lawfully convicted of assault in the second degree.¹²

§ 3421. Offense not mentioned in treaty.—The existence of a treaty which provides for extradition for certain crimes does not deprive either nation of the power and right to exercise its discretion in cases not coming within the terms of the treaty. As to crimes not enumerated in the treaty, each contracting party may either grant or deny to the fugitive an asylum within its jurisdiction.¹³

§ 3422. Privilege extends in civil cases.—The privilege exempting an extradited person from being arrested and tried for any other offense than that for which he was extradited extends to freedom from arrest in civil cases until he shall have had reasonable time to return to the country from which extradited.¹⁴

§ 3423. "Forgery" used in treaty.—The word "forgery," as used in a treaty between the United States and a foreign country, should be construed by the common law definition of forgery, which includes the uttering of forged documents.¹⁵

ARTICLE III. INTERSTATE EXTRADITION.

§ 3424. Privilege of returning not extended.—A fugitive from justice who has been surrendered by one state to another state of the Union, upon requisition charging him with the commission of a specific crime, can not claim exemption from indictment and trial in the state to which he is surrendered for any other and different offense from that designated in the requisition without first being tried on the charge for which he was extradited, or having an opportunity to return to the state from which he was extradited.¹⁶ After an ac-

¹² P. v. Stout, 81 Hun 336, 30 N. Y. Supp. 898. See *In re Rowe*, 77 Fed. 161; P. v. Stout, 144 N. Y. 699, 39 N. E. 858.

¹³ *Ex parte Foss*, 102 Cal. 347, 36 Pac. 669, 25 L. R. A. 593, 41 Am. R. 182, 9 Am. C. R. 305; U. S. v. Rauscher, 119 U. S. 407, 7 S. Ct. 234. See *Underhill Cr. Ev.*, § 495.

¹⁴ *In re Reinitz*, 39 Fed. 204; *Mole-*

tor v. Sinnen, 76 Wis. 308, 44 N. W. 1099, 20 Am. St. 71, 7 L. R. A. 817.

¹⁵ *In re Adutt*, 55 Fed. 376.

¹⁶ *Carr v. S.*, 104 Ala. 4, 10 Am. C. R. 82, 16 So. 150; *Com. v. Wright*, 158 Mass. 149, 33 N. E. 82; *Lascelles v. Georgia*, 148 U. S. 537, 13 S. Ct. 687; *Lascelles v. S.*, 90 Ga. 347, 16 S. E. 945, 35 Am. R. 216; *S. v. Stewart*, 60 Wis. 587, 19 N. W. 429, 50

cused person has been returned from one state to another as a fugitive from justice, and tried and acquitted on the charge upon which he was extradited, he may at once be rearrested and subjected to a prosecution in a civil case. He is not entitled to the privilege of an opportunity to return to the state from which he was extradited, as in cases of international extradition.¹⁷

§ 3425. Privilege—When extended.—But if the motive in resorting to extradition proceedings be to bring the alleged fugitive into the jurisdiction of the court for the purpose of instituting a civil action against him, the parties concerned in such proceeding will not be entitled to have him arrested in such action.¹⁸

ARTICLE IV. GOVERNOR MUST DETERMINE VALIDITY.

§ 3426. When governor may act.—The statute of California provides that a person charged in any state of the United States with treason, felony or other crime, who flees from justice and is found in California, must, on demand of the executive authority of the state from which he fled, be delivered up by the governor. The governor is not authorized to act under the statute unless a proper prosecution has first been instituted in the state making such demand.¹⁹

§ 3427. Governor must decide as to fugitive.—The governor of a state upon whom demand for the surrender of an alleged fugitive is made by the executive of another state must determine whether the person demanded is in fact a fugitive from justice; and the fact that the governor issues a warrant for the arrest of the accused is presumptive proof that such person is a fugitive from justice.²⁰

Am. R. 388; P. v. Cross, 135 N. Y. 536, 32 N. E. 246, 31 Am. R. 850; In re Miles, 52 Vt. 609; S. v. Glover, 112 N. C. 896, 17 S. E. 525; In re Noyes, 17 Alb. L. J. 407; S. v. Kealy, 89 Iowa 94, 56 N. W. 283. See S. v. Walker, 119 Mo. 467, 24 S. W. 1011. *Contra*, S. v. Hall, 40 Kan. 338, 19 Pac. 918, 10 Am. R. 200; Ex parte McKnight, 48 Ohio St. 588, 28 N. E. 1034.

¹⁷ Reid v. Ham, 54 Minn. 305, 56 N. W. 35; Browning v. Abrams, 51 How. Pr. (N. Y.) 172. *Contra*, Moleter v. Sinnen, 76 Wis. 308, 44 N. W.

1099, 20 Am. R. 71; Compton v. Wilder, 40 Ohio St. 130.

¹⁸ Ex parte Slanson, 73 Fed. 666; Williams v. Bacon, 10 Wend. (N. Y.) 636; Browning v. Abrams, 51 How. Pr. (N. Y.) 172.

¹⁹ Ex parte White, 49 Cal. 433, 1 Am. C. R. 169.

²⁰ Cook v. Hart, 146 U. S. 183, 13 S. Ct. 40; Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148; In re Hess, 5 Kan. App. 763, 48 Pac. 596; In re Tod, 12 S. D. 386, 81 N. W. 637, 47 L. R. A. 566.

§ 3428. **Proof, whether fugitive—Confined to documents.**—The executive of a state can not be called upon to deliver up a person charged with a criminal offense in another state unless it appears that such person is a fugitive from justice.²¹ The governor of the state upon whom demand is made by the executive of another state for the surrender of a person charged with being a fugitive from justice can not inquire into the guilt or innocence of the person so charged. He can not look outside of the papers accompanying the requisition proceedings to determine his action.²² A person arrested as a fugitive has a right to insist upon proof that he was actually, and not constructively, within the demanding state at the time he is alleged to have committed the crime charged, and consequently withdrew from its jurisdiction so that he could not be reached by its criminal process.²³

§ 3429. **Indictment or affidavit—Sufficiency.**—An affidavit made as a basis for requisition proceedings must charge an offense by positive averments. It is not sufficient to state that the affiant "has reason to believe and does believe" that the accused committed the crime charged.²⁴ As a proper foundation for the demand and surrender of a person charged with being a fugitive from justice, the proceedings must show "a copy of an indictment found or an affidavit made before a magistrate" in the demanding state. It is not sufficient for the extradition warrant to recite that the requisition is accompanied by a copy of a complaint, a complaint not being "an affidavit" within the meaning of the statute.^{24a} If the affidavit or indictment accompanying the requisition substantially charges the accused with the commission of a criminal offense against the laws of the state demanding his return as a fugitive from justice, that is sufficient; mere defects will not render the indictment void.²⁵

²¹ S. v. Hall, 115 N. C. 811, 20 S. E. 729, 10 Am. C. R. 300, 28 L. R. A. 289.

²² P. v. Pinkerton, 17 Hun (N. Y.) 199; P. v. Brady, 56 N. Y. 182.

²³ S. v. Hall, 115 N. C. 811, 20 S. E. 729, 10 Am. C. R. 299; Jones v. Leonard, 50 Iowa 106, 32 Am. R. 116; Ex parte Smith, 3 McLean (U. S.) 121; Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148; Ex parte S., 73 Ala. 503, 49 Am. R. 63; Tennessee v. Jackson, 36 Fed. 258.

²⁴ Ex parte Spears, 88 Cal. 640, 26 Pac. 608, 22 Am. R. 341; S. v. Swope, 72 Mo. 399; Ex parte Rowland, 35

Tex. Cr. 108, 31 S. W. 651. See Smith v. S., 21 Neb. 552, 32 N. W. 594.

^{24a} S. v. Richardson, 34 Minn. 115, 24 N. W. 354; Ex parte Powell, 20 Fla. 806; In re Doo Woon, 18 Fed. 898, 9 Sawy. 417.

²⁵ S. v. Goss, 66 Minn. 291, 68 N. W. 1089; Webb v. York, 79 Fed. 616; Ex parte Reggel, 114 U. S. 642, 5 S. Ct. 1148; Jackson v. Archibald, 12 Ohio C. C. 155; Davis' Case, 122 Mass. 324; Underhill Cr. Ev., § 499; Roberts v. Reilly, 116 U. S. 80, 6 S. Ct. 291.

§ 3430. **Offense committed in demanding state.**—If the extradition proceedings show that the person charged as a fugitive from justice committed a criminal offense as defined by the laws of the state demanding his return, that is sufficient, and it is not material whether the offense charged amounts to criminal offense under the laws of the state upon which demand is made for the fugitive.²⁶

§ 3431. **Documents certified as authentic.**—"The documents accompanying the requisition papers must be certified as authentic by the governor or chief magistrate of the state or territory from whence the person demanded has fled."²⁷

ARTICLE V. EXTRADITION WARRANT.

§ 3432. **Extradition warrant, sufficiency.**—It is not essential to the validity of an extradition warrant that it should set out in full or be accompanied by the indictment or affidavit upon which it is based.²⁸ Where the warrant issued on extradition proceedings recites that the requisition is accompanied by a copy of the indictment certified by the governor of the state making the demand, which is "in due form," that is sufficient, under the law.²⁹

§ 3433. **Warrant may be revoked.**—The chief executive of a state issuing an extradition warrant has power to revoke it at any time before the alleged fugitive from justice has been carried out of the state.³⁰

ARTICLE VI. MATTERS OF EVIDENCE.

§ 3434. **Evidence of extraditable offense.**—The fact that the accused is charged with having committed some extraditable offense may be shown by the production of a warrant for his arrest or an

²⁶ Johnston v. Riley, 13 Ga. 97.

²⁷ Underhill Cr. Ev., § 499, citing Kingsbury's Case, 106 Mass. 223; S. v. Goss, 66 Minn. 291, 68 N. W. 1089; P. v. Donohue, 84 N. Y. 438; Ex parte Powell, 20 Fla. 806. As to authentication of documents and competency of evidence relating to international extradition, see Underhill Cr. Ev., §§ 502, 503.

²⁸ Ex parte Stanley, 25 Tex. App. 372, 8 S. W. 645, 7 Am. C. R. 215; P. v. Donahue, 84 N. Y. 438; Robinson v. Flanders, 29 Ind. 10.

²⁹ Ex parte Dawson, 83 Fed. 306; Ex parte Lewis, 79 Cal. 95, 21 Pac. 553; In re Scrofford, 59 Hun (N. Y.) 320, 12 N. Y. Supp. 943. See Kingsbury's Case, 106 Mass. 223; S. v. Richardson, 34 Minn. 115, 24 N. W. 354; In re Hooper, 52 Wis. 699, 58 N. W. 741; Hackney v. Welsh, 107 Ind. 253, 8 N. E. 141, 57 Am. R. 101.

³⁰ S. v. Toole, 69 Minn. 104, 72 N. W. 53; Work v. Corrington, 34 Ohio St. 64, 32 Am. R. 345.

indictment certified in due form, supported by affidavit, stating the facts necessary to establish the charge and to show jurisdiction.³¹

§ 3435. Weight or degree of evidence.—The weight or degree of evidence necessary to hold and commit an accused person on extradition proceedings, either interstate or international, should generally be the same as would warrant a commitment for an offense committed in the state upon which demand is made for the return of the alleged fugitive.³²

§ 3436. Commissioner, judge of evidence.—On the hearing of an extradition proceeding before a United States commissioner, he is the sole judge of the weight and effect of the evidence introduced, and his action and determination can not be reviewed by any other court or judicial officer.³³

§ 3437. Documentary evidence.—A federal statute providing that in all cases where depositions, warrants or other papers are offered in evidence in extradition proceedings, they shall be received and admitted as evidence, when properly authenticated as prescribed by such statute, has no application to any such papers offered by the accused.³⁴

ARTICLE VII. HABEAS CORPUS PROCEEDINGS.

§ 3438. Habeas corpus—Indictment—Guilt or innocence.—In testing the legality of extradition proceedings by *habeas corpus*, the court will not inquire into the validity of the indictment upon which such proceedings are based by the state demanding the surrender of a person charged as being a fugitive from justice.³⁵ The guilt or innocence of the person charged as being a fugitive from justice can not be inquired into on *habeas corpus* proceedings.³⁶

³¹ *Ex parte Sternaman*, 77 Fed. 595. *In re Van Sciever*, 42 Neb. 772, 60 N. W. 1037, 47 Am. R. 730.

³² *Bryant v. U. S.*, 167 U. S. 104, 17 S. Ct. 744; *Benson v. McMahon*, 127 U. S. 457, 8 S. Ct. 1240; *In re Ezeta*, 62 Fed. 972; *In re McPhun*, 30 Fed. 58; *Underhill Cr. Ev.*, § 496.

³³ *Ornelas v. Ruiz*, 161 U. S. 502, 16 S. Ct. 689; *In re Wadge*, 16 Fed. 332, 21 Blatchf. 300.

³⁴ *Luis Oteiza y Cortes*, *In re*, 136 U. S. 330, 10 S. Ct. 1031.

³⁵ *Pearce v. S.*, 32 Tex. Cr. 301, 23 S. W. 15; *Ex parte Devine*, 74 Miss. 715, 22 So. 3; *P. v. Pinkerton*, 77 N. Y. 245; *In re Voorhees*, 32 N. J. L. 141; *S. v. O'Connor*, 38 Minn. 243, 36 N. W. 462. *Contra*, *Armstrong v. Van De Vanter*, 21 Wash. 682, 59 Pac. 510. See *In re Greenough*, 31 Vt. 279.

³⁶ *In re White*, 55 Fed. 54, 5 C. C. A. 29; *Ex parte Devine*, 74 Miss. 715, 22 So. 3; *Ex parte Sheldon*, 34 Ohio St. 319.

CHAPTER XCIII.

HABEAS CORPUS.

ART. I. Origin of Writ,	§ 3439.
II. Jurisdiction to Issue Writ,	§§ 3440-3443
III. When <i>Habeas Corpus</i> Proper,	§§ 3444-3455
IV. When <i>Habeas Corpus</i> Improper,	§§ 3456-3458
V. Petition for <i>Habeas Corpus</i> ,	§§ 3459-3460
VI. Evidence; Judgment,	§§ 3461-3466

ARTICLE I. ORIGIN OF WRIT.

§ 3439. **Common law origin—Amendable.**—The writ of *habeas corpus* is of common law origin;¹ and it is a civil proceeding.^{1a} The return to a writ of *habeas corpus* may, according to the practice both in England and this country, be amended at any time before the final disposition of the cause, and the return will be liberally construed.²

ARTICLE II. JURISDICTION TO ISSUE WRIT.

§ 3440. **Power of courts to issue writ.**—The circuit courts of Illinois and the criminal court of Cook county possess an original common law jurisdiction to issue the writ of *habeas corpus*.³

§ 3441. **Jurisdiction of state courts.**—Where a person is in the custody of an officer of the United States acting under the laws of the United States, or if in custody under the judgment of a federal court, a state court or judge thereof will not be authorized to release such person by *habeas corpus*.⁴

¹ P. v. Bradley, 60 Ill. 399, citing 2 Institutes 55; 4 Institutes 290; 2 Hale P. C. 144.

^{1a} S. v. Huegin (Wis.), 85 N. W. 1046.

² Patterson v. S., 49 N. J. L. 326, 7 Am. C. R. 234, 8 Atl. 305; P. v.

Cavanaugh, 2 Park. Cr. (N. Y.) 658; Hurd Hab. Corp. 262.

³ P. v. Bradley, 60 Ill. 401.

⁴ Tarble's Case, 13 Wall. (U. S.) 397; Ableman v. Booth, 21 How. (U. S.) 506. But see Robb v. Connolly, 111 U. S. 624, 4 S. Ct. 544. Compare Campbell v. Waite, 88 Fed. 102.

§ 3442. **Jurisdiction of federal courts.**—The federal courts have no jurisdiction to discharge a prisoner held under a state statute upon the ground that such statute is in violation of the constitution of the state. The federal courts will interfere only where the prisoner is held in violation of the United States constitution or laws of congress or a treaty of the United States.⁵ Where a state judge was arrested upon an indictment in the United States district court, which alleged that, it being his duty as such judge to select jurors to serve in certain state courts, he, in violation of the act of congress of March 1, 1875, excluded from the jury, solely because of their color and previous condition, certain colored citizens otherwise qualified, it is proper that such judge should be held to answer the indictment, and is not entitled to discharge on *habeas corpus*, the act of congress being constitutional.⁶

§ 3443. **Jurisdiction of federal court limited.**—It is well settled by a series of decisions that the United States Supreme Court, having no jurisdiction of criminal cases by writ of error or appeal, can not discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence.⁷ Where, upon an indictment by the grand jury, a judge of the United States District Court has issued a bench warrant for the commitment of a judge of a state court, and it is claimed that the federal judge acted in excess of his jurisdiction, the supreme court, in the exercise of its appellate jurisdiction, may award a writ of *habeas corpus*, not to review the whole case, but to examine the authority of the court below to act at all.⁸ Chief Justice Waite, speaking for the supreme court of the United States, said: "We have no general power to review the judgments of the inferior courts of the United States in criminal cases by the use of the writ of *habeas corpus* or otherwise. Our jurisdiction is limited to the single question of the power of the court to commit the prisoner for the act of which he has been convicted."⁹

⁵ In re Brosnahan, 4 McCrary 1, 4 Am. C. R. 23; Ex parte Le Bur, 49 Cal. 159, 1 Am. C. R. 244; Ableman v. Booth, 21 How. (U. S.) 523; Markuson v. Boucher, 175 U. S. 184, 20 S. Ct. 76.

⁶ Ex parte Virginia, 100 U. S. 339, 3 Am. C. R. 547.

⁷ Ex parte Wilson, 114 U. S. 417, 5 S. Ct. 935, 4 Am. C. R. 283; Ex parte Bigelow, 113 U. S. 328, 5 S. Ct. 542; Ex parte Crouch, 112 U. S. 178, 5 S. Ct. 96.

⁸ Ex parte Virginia, 100 U. S. 339, 3 Am. C. R. 547.

⁹ Ex parte Carll, 106 U. S. 521, 1

ARTICLE III. WHEN HABEAS CORPUS PROPER.

§ 3444. **Habeas corpus, remedy on void judgment.**—If a person be imprisoned and held on a void sentence and judgment, he will be released by *habeas corpus* proceedings.¹⁰ The accused entered a plea of guilty at the February term, 1890. Judgment upon his plea was stayed and he was allowed his liberty, without recognizance, to again appear for sentence. The next order in the cause was at the July term, 1893, when, on motion of the state's attorney, it was stricken from the docket. At the September term, 1893, on motion of the state's attorney, the case was reinstated, and the court sentenced him to the penitentiary for three years on his plea of guilty, entered at the February term, 1890. Held void, and the accused was discharged on *habeas corpus*.¹¹

§ 3445. **Amended judgment, void.**—In an Illinois case, the court, on motion of the state's attorney, amended the judgment at a subsequent term, and the prisoner was sentenced and imprisoned on such amended judgment. The judgment as amended was held to be null and void, the court having lost jurisdiction to amend. The prisoner was discharged on *habeas corpus*.¹² Where the court has imposed a fine and imprisonment, the statute providing for a fine or imprisonment, and the fine having been paid, the court can not, even during the same term, modify such judgment to imprisonment, instead of the former sentence. Such judgment so modified is void, the court having lost jurisdiction after the payment of the fine. The prisoner was discharged on *habeas corpus*.¹³

§ 3446. **Indictment made void by amendment.**—Amending the indictment by striking out certain words which the court regarded as mere surplusage, even with the consent of the prisoner, rendered the

S. Ct. 535, 4 Am. C. R. 253, citing *Ex parte Lange*, 18 Wall. (U. S.) 163, 2 Green C. R. 105; *Ex parte Rowland*, 104 U. S. 604.

¹⁰ *P. v. Whitson*, 74 Ill. 23; *Ex parte Clarke*, 126 Cal. 235, 58 Pac. 546, 46 L. R. A. 656; *P. v. Stock*, 157 N. Y. 681, 51 N. E. 1092; *In re Reese*, 98 Fed. 984. See generally the following cases: *Ex parte Chandler*, 114 Ala. 8, 22 So. 285; *S. v. McMahon*, 69 Minn. 265, 72 N. W. 79, 38 L. R. A. 675; *Ex parte Jones*, 96

Fed. 200; *In re Terrill*, 58 Kan. 815, 49 Pac. 158; *Ex parte Tice*, 32 Or. 179, 49 Pac. 1038; *Ex parte Clark*, 110 Cal. 405, 42 Pac. 905; *In re Crandall*, 59 Kan. 671, 54 Pac. 686; *In re Boyle* (Idaho), 57 Pac. 706, 45 L. R. A. 832.

¹¹ *P. v. Allen*, 155 Ill. 62, 39 N. E. 568. See "Jurisdiction;" "Sentence."

¹² *P. v. Whitson*, 74 Ill. 20.

¹³ *Ex parte Lange*, 18 Wall. (U. S.) 163, 2 Green C. R. 103.

indictment void and deprived the court of jurisdiction; and the prisoner, having been convicted and sentenced on such void indictment, was discharged on *habeas corpus*.¹⁴

§ 3447. **Jury unlawfully discharged.**—Where the accused demands a trial and a jury is impaneled and sworn, but no trial is had, the defendant is entitled to his discharge.¹⁵

§ 3448. **Testing validity of statute by habeas corpus.**—The constitutionality of a law under which a conviction was had or judgment entered by a court of competent jurisdiction can not be tested by *habeas corpus* proceedings in Illinois, unless the case falls within some one of the exceptions of the statute relating to *habeas corpus*.¹⁶

§ 3449. **Testing validity of ordinance.**—The validity of an ordinance under which a person has been arrested and imprisoned may be tested by *habeas corpus* without being compelled to submit to trial in the court issuing the warrant. The accused is not bound in such case to seek relief by writ of error or appeal.¹⁷

§ 3450. **Limit of time for trial—Trial delayed.**—“By the common law the jails are cleared twice a year in order to secure the prisoner a speedy trial, and if confined longer than the law contemplates, this would be a denial of a speedy trial.” “By one way or other, the gaols are in general cleared and all offenders tried, punished or delivered twice every year—a constitution of singular use and excellence.”¹⁸ Where a person charged with a crime is willing to proceed at once to trial, no delay on the part of the prosecution is reasonable, except only that which is necessary for the proper prosecution and to secure attendance of witnesses. Further delay would not be allowed without a more specific showing of the causes which prevent the state

¹⁴ *Ex parte Bain*, 121 U. S. 1, 7 S. Ct. 781, 6 Am. C. R. 122. See *Brown Jurisdiction* 276.

¹⁵ *Kerese v. S.*, 10 Ga. 95; *Ex parte McGehan*, 22 Ohio St. 442.

¹⁶ *P. v. Jonas*, 173 Ill. 317, 50 N. E. 1051; *U. S. v. Ames*, 95 Fed. 453; *Ex parte Seibold*, 100 U. S. 376. See *In re Nolan*, 21 Wash. 395, 58 Pac. 222; *Ex parte Yarbrough*, 110 U. S.

654, 4 S. Ct. 152. Compare *Williams v. P.*, 118 Ill. 455, 8 N. E. 841. *Contra*, *Moore v. Wheeler*, 109 Ga. 62, 35 S. E. 116.

¹⁷ *In re Gribben*, 5 Okl. 379, 47 Pac. 1074. Compare *Ex parte Bizzell*, 112 Ala. 210, 21 So. 371.

¹⁸ *U. S. v. Fox*, 3 Mont. 512, 2 Cr. L. Mag. 329; 4 Bl. Com. 270.

proceeding to trial—including the names of witnesses, facts to be proven by them, etc.¹⁹

§ 3451. **Statutory limit for trial.**—A person imprisoned on a criminal charge, and not brought to trial within the time specified by statute, should be discharged on *habeas corpus*, the court having lost jurisdiction.²⁰ Where the prisoner does not apply for a continuance, and in nowise causes the delay, he is entitled to discharge on bail, by *habeas corpus*, under a statute which provides that he may be so discharged at the second term after he is properly triable. In a case where the court prematurely adjourned before the end of the first term without showing cause for such adjournment, and did not try the petitioner, it was held that he was entitled to discharge on bail by *habeas corpus*.²¹

§ 3452. **Limit—Three full terms.**—The object of the statutory provision appears to be to fix an absolute limit of time within which the prosecution must bring the prisoner to trial, and beyond which there shall be no continuance on account of the absence of evidence for the people, and to fix this limit at three terms of the court; not two terms and a fraction, but three full terms.²² The term at which the prisoner was committed, or admitted to bail, is not to be counted as the first term.²³

§ 3453. **Defendant delaying trial—Delayed by law.**—Where a defendant creates the necessity for the delay beyond the statutory limit within which he must be tried, or be discharged, as by moving for and obtaining a separate trial, he is not entitled to his discharge on writ of *habeas corpus*.²⁴ The accused is not entitled to discharge by reason of any delay made necessary by the law itself.²⁵

¹⁹ Cooley Const. Lim. (5th ed.), 311.

²⁰ In re McMicken, 39 Kan. 406, 18 Pac. 473. See In re Garvey, 7 Colo. 394-5, 3 Pac. 903; Com. v. Prophet, 1 Brown (Pa.) 135; Green v. Com., 1 Rob. (Va.) 731; Johnson v. S., 42 Ohio St. 207.

²¹ Ex parte Croom, 19 Ala. 561. For a digest of cases on *habeas corpus* see note at the foot of the case of Ex parte Friday, 8 Am. C. R. 351, 5 Am. C. R. 277.

²² Ochs v. P., 124 Ill. 399, 408, 16

N. E. 662; Brooks v. P., 88 Ill. 328. See S. v. Kuhn, 154 Ind. 450, 57 N. E. 106.

²³ Ochs v. P., 124 Ill. 399, 408, 16 N. E. 662; Grady v. P., 125 Ill. 124, 16 N. E. 654; Gillespie v. P., 176 Ill. 241, 52 N. E. 250.

²⁴ P. v. Matson, 129 Ill. 598, 22 N. E. 456; Nixon v. S., 2 S. & M. (Miss.) 497, 41 Am. D. 601. See Wadley v. Com., 97 Va. 803, 35 S. E. 452.

²⁵ Ex parte S., 76 Ala. 482; Clark v. Com., 29 Pa. St. 129.

§ 3454. **Demand for trial, when essential.**—Where the prisoner is on bail he must appear in court in person and make demand for trial to avail himself of the discharge statute.²⁶ Defendants were indicted at the April term, 1894, and gave bail at the May term; the June, July, August, September and October terms were held, and at the November term, 1894, the defendants moved for their discharge. Held not entitled to discharge, they being on bail.²⁷ No demand for trial by the defendant is required where he is not admitted to bail.²⁸ The demand for trial may be by words or acts, or both.²⁹

§ 3455. **Cause stricken with leave.**—At the May term, 1883, on motion of the state's attorney, a case was stricken from the docket with leave to reinstate. At the December term, 1886, the case was reinstated, and on December 22, 1886, the defendant entered a motion to vacate the order of reinstatement, which was overruled. On December 23, 1886, the defendant moved the court for his discharge, which motion was continued to the next term, and at that term the motion was overruled. Held that these proceedings were regular.³⁰

ARTICLE IV. WHEN HABEAS CORPUS IMPROPER.

§ 3456. **Judgment merely voidable.**—If the judgment upon which a prisoner is held in custody is merely erroneous, and subject to reversal on writ of error, he will not be discharged upon *habeas corpus*. But if the court had no power or jurisdiction to render judgment, it is void, and the prisoner should be discharged on *habeas corpus*.³¹ If the court, in the trial of a criminal case, had jurisdiction of the person and subject-matter, and the judgment is not void, the only relief is by writ of error.³² If the judge has jurisdiction,

²⁶ *Gallegher v. P.*, 88 Ill. 335; *Meadowcroft v. P.*, 163 Ill. 75, 45 N. E. 303.

²⁷ *Meadowcroft v. P.*, 163 Ill. 75, 45 N. E. 303.

²⁸ *Gallegher v. P.*, 88 Ill. 335; *Watson v. P.*, 27 Ill. App. 493.

²⁹ *P. v. Frost*, 5 Park. Cr. (N. Y.) 52; *Couch v. S.*, 28 Ga. 64.

³⁰ *Dougherty v. P.*, 124 Ill. 557, 568, 16 N. E. 852.

³¹ *P. v. Whitson*, 74 Ill. 20; *P. v. Pirfenbrink*, 96 Ill. 68, 70; *In re Lewis (Mich.)*, 82 N. W. 816; *Lowery v. Howard*, 103 Ind. 440, 5 Am. C. R. 275, 3 N. E. 124; *In re*

S., 52 La. 4, 26 So. 773; *S. v. Garlington*, 56 S. C. 413, 34 S. E. 689; *Garvey's Case*, 7 Colo. 384, 3 Pac. 903, 4 Am. C. R. 263-4; *In re Rolfs*, 30 Kan. 758, 1 Pac. 523, 4 Am. C. R. 447; *Petition of Semler*, 41 Wis. 517, 2 Am. C. R. 247; *Ex parte Beeler (Tex. Cr.)*, 53 S. W. 857; *P. v. District Court*, 26 Colo. 380, 58 Pac. 608, 46 L. R. A. 855; *Pritchett v. Cox*, 154 Ind. 108, 56 N. E. 20; *Ex parte Roberson*, 123 Ala. 103, 26 So. 645; *In re Fanton*, 55 Neb. 703, 76 N. W. 447; *In re Eckart*, 166 U. S. 481, 17 S. Ct. 638.

³² *P. v. Allen*, 160 Ill. 400, 43 N. E.

his judgment, in discharging a prisoner, may be erroneous, but it can not be void. If he decides that the process is illegal, he may err, and so may all courts err, but erroneous judgments are not void, but voidable.³³

§ 3457. **Judge de facto only.**—The fact that the judge before whom the accused was convicted and sentenced was a judge *de facto* only, having no valid title to the office, will not authorize the discharge of the prisoner by *habeas corpus*.³⁴

§ 3458. **Case not considered by grand jury.**—A prisoner will not be discharged on *habeas corpus* after the adjournment of the grand jury unless it affirmatively appears that his case was acted upon by that body and ignored.³⁵

ARTICLE V. PETITION FOR HABEAS CORPUS.

§ 3459. **Facts should be stated—Court proceedings.**—A petition for *habeas corpus* charging unlawful detention should set out the facts constituting the grounds of complaint. It is not sufficient to allege generally that a warrant or commitment document was “illegally issued without process of law.” The illegal detention must appear on the face of the petition.³⁶ Where *habeas corpus* proceedings are instituted for the release of a person, charging unlawful detention, in violation of his constitutional rights, the petition for the writ should set out the proceedings of the court in which trial and conviction were had.³⁷ In order to test the validity of a judgment under which a person is imprisoned, the petition for *habeas corpus* should set out or have attached to it the indictment, verdict, judgment and other proceed-

332; In re Smith, 117 Ill. 63, 7 N. E. 683; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411; S. v. Matter, 78 Minn. 377, 81 N. W. 9; In re Corcoran (Idaho, 1899), 59 Pac. 18; Ex parte Gafford (Nev., 1899), 57 Pac. 484; In re Bishop, 172 Mass. 35, 51 N. E. 191; In re Marshall (Idaho, 1899), 56 Pac. 470; Petition of Semler, 41 Wis. 517, 2 Am. C. R. 247.

³³ Ex parte Jilz, 64 Mo. 205, 2 Am. C. R. 221; In re Meggett, 105 Wis. 291, 81 N. W. 419.

³⁴ Ex parte Ward, 173 U. S. 452, 19 S. Ct. 459.

³⁵ P. v. Hessing, 28 Ill. 411. *Contra*, Bennett v. S., 27 Tex. 701.

³⁶ S. v. Goss, 73 Minn. 126, 75 N. W. 1132; Ex parte Bizzell, 112 Ala. 210, 21 So. 371. See Howard v. U. S., 75 Fed. 986, 34 L. R. A. 509.

³⁷ Anderson v. Treat, 172 U. S. 24, 19 S. Ct. 67. See In re Count De Toulouse Lantrec, 102 Fed. 878 (evidence).

ings of the court which rendered the judgment; otherwise the petition will be defective.³⁸

§ 3460. **Evidence in homicide case.**—Where a person who has been committed without bail on a charge of murder seeks by *habeas corpus* to be admitted to bail, the petition for the writ should set out the evidence adduced before the examining officer; otherwise the petition is defective and the writ will be denied.³⁹

ARTICLE VI. EVIDENCE; JUDGMENT.

§ 3461. **Evidence on habeas corpus.**—"What evidence extrinsic of the record may be used upon the hearing of a writ of *habeas corpus* has always been a doubtful question. We are not aware that any rule upon the subject, of universal application, has been formulated."⁴⁰

§ 3462. **Weight of evidence—No evidence.**—A court will not interfere in a case where a person has been committed by a police magistrate on extradition proceedings, except where there is no jurisdiction, or no evidence before the magistrate. It is for him to decide whether the evidence is sufficient to warrant commitment.⁴¹ The fact that the evidence was not sufficient to warrant a conviction and judgment of imprisonment for a violation of a city ordinance can not be raised by *habeas corpus* where the proceedings of the court in which conviction was had appear to be otherwise regular.⁴²

§ 3463. **Impeaching record.**—The record of the court in which the accused was indicted, tried and convicted imports verity and can not be attacked or impeached by parol evidence on *habeas corpus* proceedings.⁴³

§ 3464. **Judgment on habeas corpus.**—"The judgment subsisting, but being illegal and void, it is no warrant for holding the defendant

³⁸ Craemer v. Washington State, 168 U. S. 124, 18 S. Ct. 1; In re Greenwald, 77 Fed. 590.

³⁹ Ex parte Klepper, 26 Ill. 532.

⁴⁰ In re Hardigan, 57 Vt. 100, 5 Am. C. R. 272.

⁴¹ Queen v. Maurer, 10 Q. B. D. 513, 4 Am. C. R. 588; In re Gilmore, 61 Kan. 857, 58 Pac. 961; In re Mac-

donnell, 11 Blatchf. 79, 2 Green C. R. 178; In re Chamberlin (Kan.), 61 Pac. 805; S. v. Huegin (Wis.), 85 N. W. 1046. See "Extradition."

⁴² Ex parte Long, 114 Cal. 159, 45 Pac. 1057.

⁴³ Whitten v. Spiegel, 67 Conn. 551, 35 Atl. 508.

in custody, and it seems clear that no new judgment can be entered in this court or in the court below. The judgment of the trial court is simply to be reversed and the prisoner discharged."⁴⁴ Where a prisoner has been discharged on *habeas corpus*, such discharge is final and conclusive on the same cause.⁴⁵

§ 3465. Judgment, when conclusive and when not.—A decision under one writ of *habeas corpus* refusing to discharge the prisoner does not bar the issuing of another or any number of successive writs by any court or officer having jurisdiction.⁴⁶ But a former adjudication on the question of the right to the custody of an infant child, brought upon *habeas corpus*, may be pleaded as *res adjudicata*, and is conclusive upon the same state of facts.⁴⁷

§ 3466. Writ of error not allowed.—Under the common law and the English statutes a writ of error can not be maintained on a judgment of a court or the order of a judge on a trial of a *habeas corpus*.⁴⁸

⁴⁴ *S. v. Gray*, 37 N. J. L. 368, 1 Am. C. R. 557; *P. v. Liscomb*, 60 N. Y. 559; *Shepherd v. P.*, 25 N. Y. 406; *Daniels v. Com.*, 7 Barr (Pa.) 375; *Shepherd v. Com.*, 2 Metc. (Mass.) 419.

⁴⁵ *In re Crow*, 60 Wis. 349, 19 N. W. 713; *Com. v. McBride*, 2 Brewst. (Pa.) 545; *Ex parte Jilz*, 64 Mo. 205, 2 Am. C. R. 220, 221. See *Cook v. Wyatt*, 60 Kan. 535, 57 Pac. 130.

⁴⁶ *P. v. Brady*, 56 N. Y. 192; *In re Crow*, 60 Wis. 349, 19 N. W. 713; *Miskimmins v. Shaver*, 8 Wyo. 392, 58 Pac. 411; *Ex parte Kaine*, 3 Blatchf. (C. C.) 1; *Hammond v. P.*, 32 Ill. 455; *S. v. Bechdel*, 37 Minn. 360, 7 Am. C. R. 227, 34 N.

W. 334; *Luetzler v. Perry*, 18 Ohio C. C. 826.

⁴⁷ *S. v. Bechdel*, 37 Minn. 360, 34 N. W. 334, 7 Am. C. R. 228; *Mercein v. P.*, 25 Wend. (N. Y.) 64; *P. v. Brady*, 56 N. Y. 182; *Green. Judg.*, § 324; *Church Hab. Corp.*, § 387. See *McKercher v. Green*, 13 Colo. App. 270, 58 Pac. 406.

⁴⁸ *Hammond v. P.*, 32 Ill. 446, 452, citing *Russell v. Com.*, 1 Penr. & Watts (Pa.) 82; *Wade v. Judge*, 5 Ala. 130; *Howe v. S.*, 9 Mo. 690; *Ex parte Mitchell*, 1 La. An. 413; *Ex parte Perkins*, 2 Cal. 424; *Bell v. S.*, 4 Gill (Md.) 301; *P. v. Skinner*, 19 Ill. App. 332.

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